FREETHS

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Your Ref: ACV/2023/00013

Dear Sirs

ASSET OF COMMUNITY VALUE NOMINATION OF LAND TO THE NORTH OF PARK STREET, HEYTESBURY, WARMINSTER BA12 0HQ ("THE PROPERTY")

We act for Heytesland Limited ("the **Owner**"), the freehold owner of the land comprised in title number WT280388, described above as the Property and more particularly shown on the enclosed title plan (which also demarcates land included within the Nomination Form dated 29 June 2023 ("the **Nomination**") which either falls within other registered titles, or is not registered at all).

We refer now to the nomination of the Property as an Asset of Community Value ("**ACV**") by Heytesbury Imber and Knook Parish Council ("the **Nominator**"). We are instructed to make the following representations to Wiltshire Council ("the **Council**") on behalf of the Owner in response to the Nomination, in particular in relation to the Owner's position that:

A. The main use of the Property is as agricultural land, and as such the Property cannot be said to either have been or be in use in a way satisfying the community value criteria, since the main use of that land for agricultural purposes was/is not an actual non-ancillary use that furthered / furthers the social wellbeing or social interests of the local community.

B. It is not realistic to think that there is a time in the next five years when there could be non-ancillary use of the building or other land that would further (whether or not in the same way as before) the social well-being or social interests of the local community.

We will first set the Nomination in its correct context, by explaining the various impacts of any ACV listing of the Property, before detailing the objections mentioned above under headings A. and B.

ACV Listing

1. ACV listing of a property can have severe and far-reaching consequences for the owners of listed properties in terms of the owner's otherwise unrestricted ability to dispose of its property as it sees fit and the potential impact on future development of the property. Largely because

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of this, ACV listing may also diminish a property's value. The consequences of ACV listing include:

1.1. 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.

1.2. The potential imposition of a moratorium against dealing with the property for either six weeks (the interim moratorium) or, if the local authority receives notice of an intention to bid from a community interest group (as defined in the Assets of Community Value (England) Regulations 2012/2421 (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.

1.3. The potential for an ACV listing to be a material consideration in a planning context, with its weight being considered by the relevant decision maker (albeit the relevant decision maker may, as occurred in the East Meon Forge case, recorded in *R (East Meon Forge and Cricket Ground Protection Association –v- East Hampshire DC* [2014] EWHC 3543 (Admin), consider that the ACV listing should be given negligible or no weight because of the inherent limitation in a community interest group only being able to bid for the property in question).

2. Largely because of these consequences, a listed property's value may be substantially reduced by reason of:

2.1. an owner's otherwise unrestricted ability to dispose of its property as it sees fit, rendering the owner's asset more illiquid and therefore less valuable; and

2.2. the potential detrimental impact on future development of the property. This consequence can also render the property in question substantially more illiquid for either the current or future owner, causing a proposed sale of the property in question to fail, particularly where the sale envisages development.

3. It flows from the above, and the recent binding case law set out below, that councils are now placed at very significant risk of the requirement to compensate affected owners, and the Owner notes, and relies upon, the following in this regard:

3.1. 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.

3.2. 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".

3.3. The First-tier Tribunal ("**FTT**") decision in *St John Ambulance –v- Teignbridge District Council* CR/2018/0003, in which the learned Judge Simon Bird QC held that:

"The wording of Regulation 14(2) is, in my view, wide enough to include loss or expense which arises as a result of an asset acquiring the status of an ACV, as well as loss or expense arising from compliance with the procedural requirements of the statutory regime. The only two pre-conditions for entitlement to compensation are (a) the loss or expense must arise at a time when the asset is listed and (b) be one which would not be likely to have been incurred but for the listing. I do not see that the requirement that the loss or expense must arise when the asset is listed excludes any loss of value at the point it is first added to the list.

This interpretation of the scope of the regulation is consistent with its statutory object which is to mitigate the effect of the imposition of the ACV regime on the rights of landowners. It is also consistent with Regulation 14(3) which identifies an especial potential loss of value claim but "without prejudice to other types of claim" which may be made.

Where a landowner is able to demonstrate that the value of a relevant property has been diminished by its inclusion on the list, I see no logical reason why a claim for compensation should not lie. It would be a surprising result of the statutory scheme if a loss of value attributable to the operation of the moratorium periods were to be compensatable (such a claim falls squarely within Regulation 14(3)(a)) but a demonstrable loss of value due to the inclusion on the LACV fell entirely outside the scope of the compensation provision."

3.4. The recent Upper Tribunal case of *Fielder –v- Harrogate Borough Council* [2020] UKUT 288 (AAC), which is binding upon all Councils, and in which Judge Poynter confirmed the ability of owners to recover the diminution in the value of property:

"In those circumstances, it is only necessary for me to say that, as was accepted by counsel for both parties, such a diminution in value is in principle a valid head of compensation. There may be difficult issues as to quantum, and possibly also as to causation, but the law permits an owner or former owner of listed land to seek to establish that the requirements of regulation 14 are met in relation to any such diminution: it does not require a claim for diminution in value to be rejected at the threshold as being outside the scope of the regulation.

As to why that is so, I respectfully agree with the reasoning of Tribunal Judge Simon Bird QC at paragraphs 87-102 of his decision in the First-tier Tribunal in St John Ambulance v Teignbridge District Council [2018] UKFTT CR-2018-0003 (GRC), [2019] CLY 1764 and do not wish to add to what was said there."

4. Decisions of the Upper Tribunal are binding in law and therefore, with the above in mind and in light of the potentially severe consequences of an ACV listing on property owners and councils, it is important that the relevant local authority, including the Council, considers all of the circumstances in coming to the correct decision on any given nomination. If it fails to do so, the Council is placed at risk of a two-fold compensation claim: (i) a possible diminution in value claim and (ii) a claim for the Owner's costs in reviewing the local authority's decision if the owner is successful in reviewing any listing, either at review or Appeal stage.

5. Therefore, it is now the case that all councils are exposed to considerable risk should land be ACV listed as a consequence of the acceptance of an invalid or inappropriate ACV nomination, whether this arises as a result of a nominator's ineligibility, the inadequate reasons for the nomination for the property in question, or the lack of realism in a nominator's assessment of the likelihood of the property in question being used in a way engaging the community value in the future. 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 the context of development land in high value locations these claims can be very substantial.

6. The Owner is currently in the process of taking steps to promote the Property for development, via its planning and strategic land planning consultant. As per the above, the listing of the Property as an ACV may adversely influence the value of the Property. If the Property is listed and, as a result, the intended development adversely affected, then it is highly likely that the Owner will make a claim for compensation for any diminution in value suffered.

7. Against the backdrop of the above we are obliged to draw the inadequate nature of the Nomination to the attention of the Council.

A. <u>THE MAIN USE OF THE PROPERTY IS AS AGRICULTURAL LAND, AND AS SUCH THE PROPERTY CANNOT BE SAID TO EITHER HAVE BEEN OR BE IN USE IN A WAY SATISFYING THE COMMUNITY VALUE CRITERIA, SINCE THE MAIN USE OF THAT LAND FOR AGRICULTURAL PURPOSES WAS/IS NOT AN ACTUAL NON-ANCILLARY USE THAT FURTHERED / FURTHERS THE SOCIAL WELLBEING OR SOCIAL INTERESTS OF THE LOCAL COMMUNITY.</u>

8. The relevant provisions of the Act and of the Regulations are as follows:

   8.1. For the Property to be land of community value, the Council must be satisfied that either:

      8.1.1. an actual current <u>non-ancillary</u> use of the Property furthers the social wellbeing or social interests of the local community <u>and</u> it is realistic to think that there can continue to be <u>non-ancillary</u> use of the Property which will further (whether or not in the same way) the social wellbeing or social interests of the local community (s.88(1) of the Act); or

      8.1.2. there is a time in the recent past when an actual <u>non-ancillary</u> use of the Property furthered the social wellbeing or social interests of the local community <u>and</u> it is realistic to think that there is a time in the next five years when there could be <u>non-ancillary</u> use of the Property that would

further (whether or not in the same way as before) the social wellbeing or social interests of the local community (s.88(2) of the Act).

(Our underlining.)

8.2. "*Social interests*" are expressly stated to include cultural, recreational and/or 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.

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

Comments as to "Non-ancillary" Use

9. As mentioned, both sections 88(1) and (2) require there to be "*an actual… use of the building or other land that [is/was] not an ancillary use*" (our emphasis). No definition of "*ancillary use*" is provided by the Act or the Regulations. However consideration of the following assists.

10. Most notably, when considering the ACV regime, the Upper Tribunal held in *Admiral Taverns Limited -v- Cheshire West and Chester Council and Farndon Parish Council* [2018] UKUT 15 (AAC) "*…that "ancillary" is an ordinary word to be understood in the context of the relevant legislation and in light of the facts of any particular case, and any further comments by the Upper Tribunal on its meaning would lead to more confusion rather than less*".

11. It is a trite principle of statutory interpretation that, where a term is not expressly defined in legislation, the starting point for its interpretation is its ordinary, literal meaning in context. The shorter and little Oxford English Dictionaries define ancillary as meaning "*subservient", "subordinate", "auxiliary"* or "*providing essential or necessary support to the primary activities or operation of an organization or system*".

12. In various items of guidance on the ACV regime, the term has been clarified:

12.1. Baroness Hanham in the House of Lords during the passage of the bill through Parliament (Report Stage, 5th sitting, 10 October 2011 col 1459) stated that where "*farmland is used for the annual village bonfire*" this would be an ancillary use, demonstrating the importance of frequency and/or intensity of use when considering whether a use is "*ancillary*"; and

12.2. the Local Government Association has stated that: *"…[The ACV listing regime] also provides for the exclusion of assets whose community value is clearly ancillary, such as an agricultural field which is used once or twice a year for a village carnival*". This again clarifies how frequency and/or intensity of use is a key factor when considering whether a use is "*non-ancillary*".

13. While not a case concerning ACVs, in *Williams v IRC [2005]* UKSPC SPC00500, the issue was whether the occupation of a building was "*ancillary*" to that of agricultural land. It was held:

> *"The primary meaning of "ancillary" to my mind involves the provision of a service or support and carries the implication that the ancillary matter is less important or subsidiary to the matter to which it is ancillary…*
>
> *Whether occupation is ancillary or not is in the circumstance of this case best determined by reference to the purposes of use of the woodland, buildings and other land, and is satisfied where, even if the purpose or the use of the woodland or buildings includes a free-standing purpose, that purpose, or an element of it, is either a small part of the larger purpose of the occupation of the other land, or specifically helps or serves the purposes to which the other land is put."*

14. In the case of *General Conference of the New Church v Bristol City Council* (Localism Act 2011) [2015] UKFTT CR_2014_0013 (GRC) (16 February 2015), a church was used for religious services until it closed as a result of severely declining numbers in its congregation. A number of other groups also used the building: it was used as a polling station, by a Brownie pack, for dance classes, for meditation groups and by a mother and baby group.

15. The Tribunal held that the primary use of the church was for religious purposes. The church was still a church and not a community or social centre, and therefore the other uses were ancillary. As such, the appeal against the listing of the Church as an ACV was successful.

16. These cases clarify that ancillary uses are those which are supportive of and less important/subsidiary to the main uses of a property. When read with the authority as to the frequency of uses, it is clear that uses are "*ancillary*" when they are less important than the main uses, less frequent, or both.

17. The Property's primary use has been for agricultural purposes. The Owner submits that, in much the same way as the church was still a church and not a community centre in *General Conference of the New Church*, this land is unequivocally grazing and meadow land. Equally, the Property does not consist of fields which are parkland.

18. To the extent it is argued that this land is used in ways which could engage the community value criteria (which is denied, in any event), then such uses can only be ancillary to the Property's main use as agricultural land, being both less important than the main use identified (more on this, below) and far less frequent than the said main use. The test in both limbs of ss.88(1) and (2) of the Act requires the Nominator to identify actual non-ancillary uses of the Property. Use of the Property for the purposes alleged to occur by the Nominator is ancillary to the Property's main use as agricultural land. As such these assertions do not engage the limbs of ss.88 (1) and (2) at all.

19. Indeed, the agricultural use of the Property was for cattle up until 1986 when the A36 bypass obliged George Sassoon to buy out the then tenant farmer (Roger Osborne). The Property has been in continuous use since then for equine pasture with associated fencing and facilities. Prior to 1986 the land was used to farm cattle and sheep (by Robert Pulvertaft for George Sassoon).

20. The sports pitches were both provided by Siegfried and latterly by his son, George Sassoon, as a gesture of goodwill and this was recognised as such by both clubs in George Sassoon and latterly Robert Pulvertaft's mother being President of both clubs. This recognition has ceased since around 2006.

21. Further, these temporary arrangements for cricket and football use are now ceasing, with the Football Club's licence to use the football pitch having been terminated with immediate effect as of 24 July 2023 as a consequence of breach thereof, and the Cricket Club's licence to use the cricket pitch being terminated as of 31 October 2023.

22. To evidence the main use of the Property as agricultural land, we enclose a plan identifying the various uses of the Property included within the Nomination, from which it will be noted that:-

    22.1. The total area of the Property nominated for ACV listing is 12.36 acres, or 5 hectares.

    22.2. Of the total area of the Property nominated, only 4.27 acres, or 1.72 hectares, has been temporarily used during periods of the year for the football ground and pavilion, and cricket ground and pavilion. This equates to approximately only a third of the area of the Property nominated.

    22.3. Excluding the remaining land within the Property used as accessways, 7.97 acres, or 3.23 hectares, has been and is being used as agricultural land, as either grazing land (the majority of which is grazed under licence) or farm buildings and general storage. This equates to approximately two thirds of the area of the Property nominated.

23. Plainly, when viewed from the perspective of geographic area, the dominant and main use of the Property is agricultural, **all year round**. Historically, and before any of the Property became dedicated for use for sports pitches (whether football or cricket), this was even more so, to the exclusion of all other uses. Looking forward, this will again be the case given the termination of the Clubs' respective licences.

22. Despite all this clear main use of the Property for agricultural purposes, the entirety of the Property (together with other land not within the title of the Owner, in respect of which please see the enclosed ownership plan which identifies both unregistered land and land falling within title WT116836, which is not the Owner's title) has been nominated to be listed as an ACV, based upon the purported use of the land as "*of important general recreational and social value*". Pausing here, and with regard to this assertion, we have the following points to make.

Lack of supporting evidence

23. Evidence of community use is not an expressly mandatory requirement under the Act, but it is clearly the case that well-evidenced instances of actual community use give a local authority *more* reason to believe that such use actually occurs (and a better idea of what such use actually entails) than unevidenced bare assertions. It follows that the more corroborating evidence that is provided to substantiate a nominator's assertions, the more reason the local

authority may have to believe that an asset furthers (or furthered) the social wellbeing or social interests of the local community and so the more likely a nomination will be to succeed.

24. In addition, where assets are genuinely of community value, evidence of that community value is not difficult to come by. It does not place too heavy a burden on nominators seeking to have others' land listed as an ACV to require them to make a small effort to substantiate their assertions, especially when one considers that the effect of ACV listing is to interfere with the asset owner's property rights. It is only reasonable for a local authority, confronted with a lack of evidence to substantiate a nominator's assertions, to draw adverse inferences from the fact that no evidence was provided.

25. In this case, the Nomination itself was entirely unsupported by evidence or detail (discussed further below). To the extent that the Nominator makes entirely unsubstantiated comments in support of the Nomination, these are not evidence in and of themselves, but rather bare assertions that should have been supported with evidence provided by the Nominator.

26. We respectfully submit that no decision-maker could reasonably conclude that the Property satisfies s.88 of the Act on the basis of the Nomination's bare assertions alone and instead invite the Council to draw adverse inferences from the complete lack of substantive evidence provided in support of the Nomination.

Lack of detail

27. The Nominator's unsubstantiated "reasons" for nominating the Property also lack the detail necessary to allow the Council to safely conclude, in relation to each alleged use of the Property, *when* the use alluded to allegedly occurred, *how frequently* it is supposed to have occurred, *how intense* any such use of the Property has been and what its consequent impact on the social interests and/or social wellbeing of the community has been.

28. It is not sufficient for the Nominator to invite the Council to "fill in the gaps" here, as this information is vital if the Council is to establish:

    28.1. whether the alleged uses actually occur/occurred at all (i.e. whether it is an *"actual"* use);

    28.2. if so, when any such use has been made of the Property (i.e. whether it is a *"current"* use or one within the *"recent past"*);

    28.3. if so, whether the use occurs with sufficient frequency and/or intensity (i.e. whether it is a *"non-ancillary"* use); and

    28.4. if so, whether such use furthers the social wellbeing or social interests of the local community in any event.

29. Without this information in relation to each (or sufficient) of the uses alleged by the Nominator, no reasonable decision-maker ought to conclude that the Property satisfies s.88 of the Act - the Council simply does not have enough information at its disposal to come to that conclusion by any reasonable logic.

30. On this basis, and by reference to the Nominator's specific allegations as to uses of the Property, we respectfully submit that the Nomination should be rejected.

The allegation that the Property has been used for limited other recreational activities taking place on it

31. Beyond past use of two distinct parts of the Property for cricket and football as identified in the enclosed plan, there are two identified activities alleged to have taken / be taking place on the surrounding land despite public use of any of the Property being prohibited:

    31.1. Dog-walking; and

    31.2. A picnic in the park.

32. These are such broad and unparticularised allegations that it is almost impossible to address them beyond saying the following.

33. The use of walking routes across the fields and land contained in the Property, to pass and re-pass across it, cannot qualify land as an ACV. Indeed even were such use able to qualify the extent of any footpath or any other established tracks across the Property for listing, that would not qualify the whole of the Property for listing. We will explain why, now.

34. The case of *Banner Homes Ltd v St Albans City and District Council* [2015] UKFTT CR/2014/0018 (GRC) concerned the use of footpaths across the nominated land. It was found that it did not matter if the use was trespassory, so long as it satisfied the s.88 criteria. The First-tier Tribunal determined that:

    34.1. Trespassory use did not preclude the use from engaging the s.88 criteria per se.

    34.2. Without more, the question of whether such use was permitted was simply irrelevant.

35. As per *Banner Homes*, it is the use of the Property that must be assessed when considering if the criteria are engaged. It is irrelevant as to whether such use is permitted. Such permission is, for the avoidance of doubt, denied and refuted by Owner.

36. In *Banner Homes*, two public footpaths crossed a field. The question arose as to whether the use of these footpaths could qualify as use of the 4.83 hectare field as a whole. The First-tier Tribunal agreed that the "common sense" approach adopted for village greens should be applied to the Act and ACVs. Applying that approach, the then President of the First-tier Tribunal, Judge Peter Lane, stated that:

> *"I agree that the same "common sense" approach falls to be applied in the case of section 88 of the 2011 Act. Assuming for the moment that the requirement imposed by section 88 is for there to be a physical use of the land to be listed, it cannot sensibly be contended that the narrow strips forming the public footpaths are such as to entitle the council to list the entire 4.83ha Field."*

37. What is noteworthy is that such use of the footpaths in ***Banner Homes*** was not sufficient to qualify a field measuring 4.83 hectares as an ACV. In this case, if the Council were to take the Nominator's bare assertions as to walking across the Property along either paths or any other defined tracks across the Property, and listed an area of agricultural land estimated at 5 hectares in total, then that would plainly be an irrational and wrong decision.

38. To elaborate, and as confirmed by Judge Lane in ***Banner Homes***, the use of land as a footpath is a main use which does not engage the community value criteria:

> *"It was not suggested that the actual public footpaths have any significant flora or fauna of interest to the local community, since they are merely trodden grass paths. Any suggestion that the footpaths themselves might separately be listed is refuted by that fact… Such a suggestion in any event founders on the basis that the clear primary use of the footpath is, like any other right of way, for passing and repassing and that any enjoyment of views from the footpath is, on the facts, merely an ancillary use, incidental to the main use of passing and repassing."*

39. The main use of a path or track is the passing and repassing by the public along the path or track. All other uses are ancillary and paths or defined tracks (including those tracks identified in the enclosed plan) cannot, without more, become assets of community value.

Grazing Land

40. Without prejudice to the above, some of the land nominated has been and is in continuous current use as agricultural grazing land, and as such that land cannot be said to either have been or be in use in a way satisfying the community value criteria, since the main use of that land for agricultural purposes was/is not an actual non-ancillary use that furthered / furthers the social wellbeing or social interests of the local community. That land is identified in the enclosed plan, being both the land used as grazing land under licence and the land coloured green.

41. That land cannot be listed as an ACV because its main use is, and always has been, for agricultural purposes. In this regard, and without prejudice to the fact that the main use of all the land has been for agricultural purposes, the part of the land subject to the grazing licence cannot be listed, for the same reasons as set out in relation to all the land.

B. FUTURE COMMUNITY USE

42. In order to satisfy the second limb of s.88(1) and s.88(2), the Nominator must be able to show that it is realistic to think that:

    42.1. there can continue to be non-ancillary use of the building or other land which will further (whether or not in the same way) the social wellbeing or social interests of the local community" (s.88(1)(b)); or

    42.2. there is a time in the next five years when there could be non-ancillary use of the building or other land that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community (s.88(2)(b)).

43. Accordingly, the second part of the community value criteria requires the Council to make an assessment as to whether or not the Property satisfies either of these sub-sections, i.e. whether it is realistic to think that there can continue to be non-ancillary use of the Property which will further (whether or not in the same way) the social wellbeing or social interests of the local community or (if no such use currently occurs but has occurred in the past), whether it is realistic to think that such use could occur again in the next 5 years (the "**Future Condition**").

44. Not having shown the first limbs of ss.88 (1) or (2) to have been satisfied, the Owner's primary position is that the Future Condition does not fall to be considered by the Council at all.

45. Without prejudice to the contention of the Owner that the Nomination falls at the first hurdle, i.e. in relation to non-ancillary use of the Property satisfying the community value criteria either at the moment or in the recent past, the Owner makes the following points in relation to the Future Condition.

The "Realistic to Think" Test contained in the Future Condition

46. The Council must consider what the legislature meant by the use of the word "*realistic*" in ss. 88(1) and 88(2) of the Act. The only appropriate way to consider this is by reference to the Oxford Dictionary (the approach adopted and endorsed by the FTT in the recent case of *Carsberg and M & A Knightsbridge Properties Limited –v- East Northamptonshire Council* CR.2020.0004 and CR.2020.0005), which defines the word "*realistic*" to mean:

    46.1. "*having or showing a sensible and practical idea of what can be achieved or expected*"; or

    46.2. "*representing things in a way that is accurate and true to life*".

47. The term "*realistic"* should therefore be given its ordinary, natural, meaning. Determining whether it is realistic to think that a certain state of affairs may come to pass requires an assessor to take a sensible and practical view of what can be achieved or expected in the circumstances and requires an accurate grasp of the facts as they actually exist.

Complete absence of Nominator's Plans for the Property

48. Neither the Nominator, nor any unincorporated body, nor any community interest group, have disclosed any plans for the Property. In the absence of any other authorised use for the Property under planning law, it must be assumed that agricultural use of the land will resume and continue unless and until planning consent is granted for development of the Property for an alternative use, in accordance with the Owner's eventual purchaser's wishes. In this regard:

    48.1. Agricultural use is not a use that can be said to further the social wellbeing or social interests, being sporting, recreational or cultural, as defined in the Act.

48.2. The use of the land for any "*general and social value*", cannot be considered to be "*non-ancillary*" and so does not fall to be considered, if any such use has or does occur.

49. As such, and given the permanent termination of the licences to use part of the Property for the purpose of a cricket and football pitch, if it is alleged by the Nominator that the Property will continue to be used in some sort of general recreational way as it currently is, then the envisaged future use would not engage the s.88 criteria any more than the current use does.

50. Without prejudice to the complete lack of any substantive comments as to future use in the Nomination, if the Nominator considers that use of the Property for general recreational purposes can be achieved in a way engaging the community value criteria through "*altruism and community effort*" (as Judge Warren put it in *Worthy Developments Ltd v Forest of Dean DC* CR/2014/0005), then that allegation does require positive evidence on the part of the Nominator - not only that the Nominator has some kind of plan or proposal in relation to the Property, but also that the Nominator is prepared to bear any relevant financial losses associated with acquisition and maintenance of the Property – see paragraph 21 of *Worthy*.

51. However, there is no such evidence in the Nomination and, as such, the future use criteria cannot be said to be satisfied. 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 nominator 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 nominator 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".*

52. 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. This is particularly pertinent, because Savills have valued the Property at £280,000.

53. Even in communities where there is a "*volunteering spirit*" like in the *Crostone v Amber Valley Borough Council* CR/2014/0010 case, the Nominator still had to show "*alternative, realistic models*" as to how the site could be acquired and used. Of course, the Nominator does not have to present a full business plan or provide in-depth reports on exactly how its purchase of the Property would be realised – it does, however, have to provide something realistic, as the Future Condition requires. However in this case the Nominator has done nothing to show how it would acquire the Property for its value of £280,000.

54. We refer to the judgment of Judge Simon Bird QC in *Fernwick Limited v Mid Suffolk District Council* CR/2015/0024. 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 nominator 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".

55. As the Council can see, it is essentially being asked to consider a case that has already been rejected by Judge Bird QC. Neither the Nominator, nor any unincorporated body, nor any community interest group, has even begun to think about acquiring the Property. It is the Owner's respectful submission to the Council that, in addition to everything else set out above, the above factors mean that the Property does not and cannot meet the Future Condition.

Future use - the Owner's intentions for the Property

56. When considering the question of whether it is realistic to think that the Property could continue to be used for non-ancillary community uses engaging the community value criteria, the Owner's intentions are relevant to whether future operation of land in a way engaging the community value criteria is realistic.

57. The Owner's intentions are relevant to whether future operation of land in a way engaging the community value criteria is realistic (*Patel v London Borough of Hackney* CR/2013/0005 at paragraph 11). While an owner's intentions may not always be determinative in any given case, the Owner submits that in this case they are. There is no mechanism under the Act or Regulations to compel an owner to dispose of an asset to a particular party and an owner will, ultimately, have control over when and how it deals with it.

58. The Owner has resolved to sell the Property to a residential developer, for residential use. Indeed, its resolve is such that any alternative scenarios are so unlikely as to be unrealistic. The steps the Owner has taken, and will take, will stand as evidence of their future intentions in relation to the Property. Any purchaser's intent will be to pursue planning permission for

residential use and, if it is refused, pursue an appeal and alternative planning application/s addressing any issues, repeating the process until the Property can be developed for residential use. Pending that development gain, no purchaser will permit the Property to be used in a way which engages the community value criteria (just as is the case on the part of the Owner, now).

59. 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:

    59.1. The Property's main use is agricultural. It is now all pasture / meadow / grazing land.

    59.2. The only worthwhile development of the land is for residential use.

    59.3. Not a single potential purchaser, with any real prospect of acquiring the Property for its market value of £280,000, has expressed any other intention for use of the Property.

    59.4. In the light of the Nomination and the allegations contained therein, the Owner has resolved to take further steps to prevent any potential use of the Property for a use engaging the community value criteria.

60. Accordingly, there is no other alternative scenario, in relation to the Future Condition, to compete with the owner's intentions. Were it true that the Property or any part of it was being used in a way engaging the community value criteria, then the act of the Nominator in making the Nomination has been counter-productive in strengthening the owner's resolve to ensure that its private property, now all to be used for agricultural purposes but in the future to be used for residential purposes, is not trespassed upon.

61. It is worthwhile testing this, by reference to what the Nominator would ask the Council to do in the light of all the above. In order to test whether the Owner's intentions now operate to exclude all other possibilities from being realistic, the Nominator would have to ask the Council to suspend reality and hypothesize a situation in which the Owner would sell the Property to a community interest group. The need for that very suspension of reality, it is respectfully submitted, militates strongly against the Council being able to take the Nomination seriously, at all. The question is not "what is possible" might occur in the future to the Property, or parts of it, but rather what is realistic might happen to it. The latter requires a fact sensitive investigation, and the following is relevant in this regard:

    61.1. The Nominator has, historically, supported residential development of part of the Property and this was also supported by the local community, subject to a village hall being financed for construction on part of the Property. These plans were explored in the period from 2003 to 2009.

    61.2. However the Nominator's support for the above was capricious with the effect that it later abandoned its support in around 2009.

61.3. The respective Clubs were then approached with alternative proposals which would have secured their continuance on part of the Property alongside residential development of the remainder of it. However they refused the proposals.

61.4. Further development proposals were pursued in 2018/2019 but despite local community support the Nominator again refused to support the proposals in 2017.

61.5. Notwithstanding the various negative effects of ACV listing as set out at paragraphs 1 to 7 above, the Parish Council, under encouragement from the Council itself, made this ACV nomination without engaging with the Owner, at all.

62. Given the above hostility towards any mutually beneficial development of the Property over a period of 20 years, in circumstances where the Owner / Trust has since 2006 been under an obligation to maximise the value of the Property for the benefit of the ultimate beneficiaries of the GT Sassoon Trust, it is now near impossible (and certainly unrealistic) to imagine a scenario in which the Owner or any purchaser will try and cooperate with either the Nominator or any community interest group in a sale and development of either the whole or any part of the Property. That ship has now sailed, and is not returning to port.

Summary

63. The Nomination is abusive of the ACV regime, as it is plainly made to try and frustrate development of the Property for residential use, without any intent of any person to bid to acquire the Property and despite the need for new homes to be built in Heytesbury, providing much needed housing and economic activity through the construction of new homes.

64. Planning and development concerns fall outside of the remit of the ACV listing regime. Such matters will fall to be considered by the relevant planning officers and are not a relevant consideration for the Council in making its Decision.

65. The Nomination does not provide the Council with sufficient reasons to believe that the s.88 criteria are satisfied. The Nomination is completely unsupported by evidence and makes bare allegations. The Property should not therefore be listed as an ACV.

66. The licences to use part of the Property for cricket and football have been terminated and will not be renewed, leaving the Property in its main use for agricultural purposes, as grazing and meadow land.

67. The use of any paths or routes to pass and re-pass over any of the Property, is not a use that engages the s.88 criteria and is therefore not a relevant consideration for the Council, as per *Banner Homes*. In any event, to consider the use of any paths as sufficient to list the entirety of the Property would be, as has been stated by the First-tier Tribunal, incorrect.

68. Once the reasons stated for nominating the Property to be an asset of community value have been considered, it can be said that the Nominator is seeking to have the Property listed on an entirely incorrect basis: the main use of the Property is agricultural and cannot therefore engage the community value criteria. Ancillary uses of the Property for one off events do not

fall to be considered and are therefore not relevant considerations for the Council when making its decision on the Nomination.

69. Further, it is not "*realistic to think*" that there can be non-ancillary use of the Property which will further the social wellbeing or social interests of the local community because no use which meets the statutory criteria takes place at the Property will continue. In any event, the Owner, through its agents, is promoting the land for development and sale as residential land and will the process to obtain planning permission for the same will soon be instigated, and so were there to be any use of the Property engaging the community value criteria (which is denied), then that would clearly not continue.

70. If the Property were to be listed as an ACV, which is respectfully submitted would be wrong, then the Owner would be left in the regrettable and unfortunate position of considering a claim for compensation for diminution in value of the Property from the Council.

For all the reasons set out above, we submit that none of the Property either can, or should be listed as an ACV, and the Council is respectfully invited to add the Property to its list of unsuccessful nominations.

Yours faithfully

Freeths LLP
Please respond by e-mail where possible

Land use within ACV application

Heytesbury Land Limited

Formerly cricket ground
ACV application
Ancillary agricultural grazing land
Formerly football ground
Access
Farm & general storage building
Grazing Licence

A36
Heytesbury Park
Track
0.08 ac
Pavilion
Football Ground
1.55 ac
2.63 ac
Cricket Ground
3.74 ac
0.06 ac
4.17 ac
Pavilion
0.09 ac
0.04 ac
93.0m
95.0m
Eastholme
Westholme
28
23
12
13 to 22
29
32 to 35
10
Chapel
36 to 38
1 to 9
Heidi
7
6
5
3
2
1
OLD FORGE CLOSE
101
102
103
Box Cottage
106
PARK STREET
109
113
LB
Park Lodge
Stockbridge House
Pembroke Cottage
The Old Estate Yard
Old Estate House
South View
MANTLES LANE
Beech Barn
Three

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BCM

50 m
Scale 1:1250 (at A3)

N

Land ownership within ACV application

Heytesbury Land Limited

KEY

- WT280388 (HLL)
- WT116836 (Highways Agency)
- Unregistered
- ACV application

Heytesbury Park
A36
Track
Pavilion
Football Ground
Cricket Ground
WT280388
12.19 ac
WT116836
0.18 ac
Unregistered
0.11 ac
Pavilion
Eastholme
Westholme
28
23
12
13 to 22
29
32 to 35
10
Chapel
36 to 38
1 to 9
95.0m
93.0m
Park Lodge
PARK STREET
PARK STREET
Heidi
7
6
5
3
2
1
OLD FORGE CLOSE
101
103102
Box Cottage
106
109
113
LB
Stockbridge
House
Pembroke
Cottage
South View
The Old Estate Yard
Old Estate
House
Beech Barn
MANTLES LANE
Three

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BCM

50 m
Scale 1:1250 (at A3)

N