

ANNEX D

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Dear Sirs

THE SUFFOLK PUNCH, 1 LANGCLIFFE DRIVE, HEELANDS, MILTON KEYNES MK13 7PL -
ACV NOMINATION

We refer to the Delegated Decision meeting held on 4 October 2016 when Councillor Gifford deferred the Council's decision on the Nomination to 15 November 2016 and permitted the Nominator a further opportunity to submit evidence as to the future use of the Property, namely whether it is realistic to think that there is a time in the next five years that there could be use satisfying the community value criteria.

The Nominator has now submitted additional representations on 14 October 2016 ("the **Additional Representations**") and we take this opportunity to respond on behalf of MKPT. For the avoidance of doubt:

- (a) we are instructed to make these additional representations in response to the facts and matters set out in the Additional Representations only;
- (b) the additional representations set out below are supplemental to, and should be considered in conjunction with, MKPT's representations set out in our letter of 13 September 2016; and
- (c) the additional representations set out below are made entirely without prejudice to the Council's failure to comply with the statutory timetable and procedural impropriety.

For ease reference, we will adopt the definitions used in our letter of 13 September 2016.

A. Procedural impropriety – the statutory timetable

1. The timetable procedure involved in the ACV listing process is prescribed by statute, and specifically by various provisions of the Act and the Regulations.

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2. The purpose of the statutory timetable for determining ACV nominations and the requirement to notify property owners at specific points is clear, as it allows property owners (and nominators) a degree of certainty as to the timeframes involved in the ACV nomination process and the progress of a nomination.
3. This certainty is clearly important, as it is not uncommon for an ACV nomination to impact upon a property owner's plans to sell and/or develop a nominated asset and for an owner's intended action in relation to its property to be delayed or otherwise prejudiced by a nomination of that asset as an ACV.
4. By way of example, paragraph A.1. of Part 3 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015/596 (**"the GPDO 2015"**) precludes otherwise permitted development for public houses that are the subject of ACV nominations for a *"specified period"*. The *"specified period"*, where a public house has been nominated as an ACV but no decision has yet been made, continues until the pub is either listed as an ACV or placed on the relevant local authority's list of unsuccessful nominations. If the pub is placed on the local authority's list of ACVs, the *"specified period"* continues for 5 years or until the pub is removed from the list, if earlier (paragraph A.3. of Part 3 of Schedule 2 of the GPDO 2015).
5. Were local authorities to breach their statutory duties under the Act and the Regulations by failing to make a decision within the prescribed time limit, or by failing to notify property owners either of the nomination of an asset, the local authority's decision to list, or the property owner's right to request a review, the *"specified period"* under the GPDO 2015 could stretch on interminably, with obvious adverse effects for the property owner. Hence the statutory timescale within which local authorities must make their decisions. These provisions were obviously drafted with the statutory timescale and notification procedure for ACV decision-making prescribed by the Regulations and the Act in mind. These provisions therefore clearly underline the importance of the statutory timescales and notification procedures imposed by the Act and the Regulations and the implications of a local authority's failure to comply with their statutory duties in this respect.

Regulation 7

6. More specifically, Regulation 7 of the Regulations clearly states that the relevant local authority *"must decide whether land nominated by a community nomination should be included in the list within eight weeks of receiving the nomination"* (our emphasis).
 7. The language of Regulation 7 is quite clear - it imposes a duty on local authorities to make a decision on whether to list a nominated property within 8 weeks of receiving the nomination. The language is also mandatory. Neither the Act nor the Regulations afford a local authority any discretion to extend this period.
 8. Under Regulation 7, the Council had until 27 September 2016 to make a decision on the Nomination. However, and despite the clear language of Regulation 7 and the obvious implications for MKPT, namely in circumstances where it has conditionally sold the Property and the purchaser, Riverside (Clapham) Limited (**"the Purchaser"**), has made an application for planning permission to develop the Property, the Council has failed to make a decision on
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whether to list the Property and does not propose to do so until 15 November 2016, some 6 weeks or so after the mandatory statutory deadline.

9. Therefore in this case the Council's failure to make a decision on the Nomination within the timescale allotted by the Act and the Regulations is a clear breach of its statutory duties which are prejudicing MKPT by the Council's delay in determining the Purchaser's application for planning permission. It is clear that the Nomination is clearly and materially impacting on the application for planning permission as the determination of it is being delayed pending the determination of the Nomination, despite the application for planning permission being submitted in June 2016.

B. Procedural impropriety – abuse of the Council's quasi-judicial role

10. The Council's role in determining whether a nominated asset should be listed as an ACV is quasi-judicial. That is to say that the Council is required to act in a manner that is both procedurally fair and completely unbiased in order to determine whether a nominated property should be listed as an ACV or otherwise.
 11. However, and contrary to the duty it owed to MKPT by virtue of its quasi-judicial role in these proceedings, the Council's conduct of this process to date could be perceived to be biased and manifestly procedurally improper.
 12. In particular, on 4 October 2016 the Council permitted the Nominator further time to make the Additional Representations, even though at that point the Council was outside of the statutory timescale for making a decision on the Nomination. There was no need whatsoever to permit the Nominator an additional opportunity to submit the Additional Representations; the Nomination should not be a moving target and the Act or Regulations do not permit this flexibility.
 13. The Council officer who authored the Delegated Decision paper dated 4 October 2016 took the view at paragraph 3.7 that:

"The Friends of the Suffolk Punch have provided no evidence in support of their contention that the public house could reopen as a viable business...They have not suggested or provided any evidence in support of any alternative use...No evidence has been submitted that there is interest from the business community, or that fund raising is being pursued by community members which would indicate that there is any commitment to pursue the venture".
 14. It is MKPT's submission that the Council was in a position to make a decision on 4 October 2016 and that decision should have been to place the Property in the list of unsuccessful community nominations, as recommended by the Council officers. That the Nomination was defective and devoid of sufficient detail properly to satisfy the future community use criteria is a problem for the Nominator; it should not result in MKPT being prejudiced. Indeed, at the meeting on 4 October Councillor Gifford remarked herself that sufficient reasons for the future community use had not been provided by the Nominator.
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15. MKPT further submits that the assistance on the part of the Council could be regarded as evidence of perceived bias that will render any decision to list the Property unsafe and open to Judicial Review, especially against the backdrop of the prejudice that has already been caused to MKPT by virtue of the Council's disregard of the relevant statutory timescales.
16. It is also clear from these facts that the Council considered the Nomination entirely deficient as it was made on 2 August 2016. It follows that, had the Council observed its quasi-judicial role and maintained its impartiality when the Nomination was made, the Nomination must necessarily have been rejected, even without the benefit of MKPT's representations.
17. The Council's role is categorically *not* to provide assistance to a nominator to succeed in its nomination of a given property at the expense of its impartiality, nor to ignore the clear statutory rules that govern the ACV nomination process in order to allow a nominator sufficient time and support to improve upon its nomination until such a time as the Council deems it likely to be successful, as appears to be the case here. For the reasons above we submit that the Nomination should be rejected as unsuccessful.

C. Insufficient evidence that it is realistic to think that there is a time in the next five years that there could be use satisfying the community value criteria

18. Without prejudice to the above, it is MKPT's submission that the Nominator has still not provided sufficient evidence to show that it is realistic to think that there is a time in the next five years that there could be use of the Property that satisfies the community value criteria.
 19. We respond to the Additional Representations below.
 20. Firstly, contrary to the Nominator's assertion, the Campaign for Real Ale (CAMRA) does not have a legal team. CAMRA is a body that is represented by members at branch level, who are brought together for their appreciation of real ale. CAMRA does have experience in nominating pubs as ACVs across England and Wales, but it is not qualified to give legal advice in respect of the Act or Regulations.
 21. The Nominator correctly sets out the test to be considered by the Council, but asserting an allegedly fundamental point that "*the site is a public house with grounds which include a car park*" takes the Nominator no further forward. That the Property is a pub now does not mean that it will necessarily satisfy the community value in the next five years. The Nominator has to adduce evidence that it will do so, but has again failed in this regard.
 22. It is also correct to say that no planning permission for alternative use has been granted. However, there is an extant application submitted by the Purchaser to demolish the pub building and erect new dwellings and a children's nursery (which will be a new community facility), the determination of which appears to be subject to the determination of the Nomination. Provided that the Purchaser obtains planning permission, it has a clear and settled intent to carry out the development, which is also realistic and achievable.
 23. MKPT disagrees that "*it is reasonable to think that given a period of time a community group could run a community facility on the site*". It is not realistic at all. In particular:
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- 23.1. The Property is not for sale. It was sold to the Purchaser on 1 June 2016 for £960,000 and the transfer will complete if planning permission is granted.
 - 23.2. The local community have already had the opportunity to purchase the Property but the bids made were not realistic and did not reflect the market value of the Property. Following service by MKPT in December 2014 of a notice of intention to enter into a 'relevant disposal', Bradwell Parish Council advised MKPT in January 2015 of its interest in the Property. MKPT and Bradwell Parish Council met in March 2015 and bids were subsequently invited for the Property in April 2015. On 2 June 2015 MKPT received a bid from SIEVEMK Gateway Limited, which was backed by Bradwell Parish Council, comprising (i) an unconditional offer of £100,000, which would have involved taken the Property as is, and (ii) a conditional bid of £225,000 (subject to planning), which would have involved demolishing the pub building and erecting 6 detached dwellings, a 2 storey office building and a meeting room with bar. However, neither of the bids was accepted.
 - 23.3. Mr Foster, Chief Executive Office of MKPT, has already submitted evidence that it would not be MKPT's intention to re-open the Property as a pub. If the Property reverts back to MKPT as a consequence of the refusal of planning permission, the Property will continue to be mothballed until such time as MKPT receives a bid for the market value of the Property. It is MKPT's intention to sell the site for alternative use and it will seek to do so for the next 5 years if necessary.
 - 23.4. Given that the community bids for the Property were made by SIEVEMK Gateway Limited, a corporate entity with assets of £74,695 (according to the last set of filed accounts), it is wholly unrealistic to think that the individual members of the Nominator will be able to make a bid for the Property that reflects its market value.
 24. It is correct that the nominator does not have to submit a business plan when it makes an ACV nomination, but there has to be more than mere speculation for the Council to support a finding that it is realistic to think there will be community use of the Property satisfying the relevant criteria in the future.
 25. MKPT has already made the point that the Property, in use as a pub, is not commercially viable. The Property was unable to trade profitably as a pub and made heavy losses for a number of years, even when the Property was operated by a substantial pub company like Greene King. The Nominator makes unsubstantiated comments, such as that it "*traded well*" in the "*not too distant past*", which are patently false. The fact is that the previous operator, Enlighters Limited, took a lease of the Property under a concessionary rent (some 50% of the market rent) and could not make a financial success of the pub. We also refer to the extensive marketing campaigns for the Property carried out by both AG&G and Fleurets.
 26. However, commercial viability is not the end of the matter. Insofar as the Nominator intends to run a community facility from the Property, rather than a fully licensed public house, which appears to be the case, then that intention requires positive evidence, not only that the Nominator has some kind of plan or proposal to run the pub, or community facility, but also that the Nominator is prepared collectively to bear the relevant financial losses.
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27. There is no evidence that has been put forward in this regard by the Nominator. Judge Lane's comments in STO Capital v London Borough of Hackney CR/2015/0010 at paragraph 15 apply equally to this case:

"15. 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."

28. 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, let alone set out in substance what an alternative, realistic model for the Property would look like. The Nominator proposes to put in place a Steering Group and Fund Raising Committee if the Property is listed. However, were the Council to list the Property, and MKPT fails to overturn the listing on review or on appeal to the First Tier Tribunal (and it would seek to challenge the decision), such that the Nominator can make a bid for the Property, then each member of the Nominator would have to fund at least £46,080 (including VAT, which would not be recoverable) just to purchase the Property for the same amount as the Purchaser. This is obviously before professional fees, Stamp Duty Land Tax, disbursements, and costs of redeveloping the Property are factored in. That the Nominator can allege that it is therefore realistic that a community group could run the Property as a community facility is simply not the case: it is fanciful. The Nominator does not even have the financial support of Bradwell Parish Council.
29. The Nominator states that it would wish to operate a "*Community Centre with a Residents Club including a bar and food facilities*" and asserts that the development of a new business park in Linford Wood presents new potential for good food trade at lunchtime and after work relaxation if opened again. This seems to be a contradiction in terms: we do not follow why employees of surrounding businesses would wish to use a 'Community Centre with a Residents Club' for lunch, still less why they would do so after work. The Nominator appears confused as to whether such a facility would be for local residents or a destination leisure facility.
30. The Nominator also makes reference to the fact that the Property is adjacent to the "*well attended Roman Catholic Church which regularly has several hundred worshipping there at three Masses on Sundays*". Insofar as it is being implied, that the parishioners will start to use the Property as a community facility is speculative and made without evidence. The church has been located in Heelands for some considerable time and the parishioners previously had the chance to use the Property. Unfortunately, the Property was closed because it was not used by sufficient local residents, or parishioners, to make the business financially sustainable. In any event, the Purchaser's proposed development will entail the provision of car parking spaces for the church (at a cost of £150,000) in an effort to alleviate a significant and ongoing problem relating to parking.
31. We note that "*members of the Community will attend to give evidence of the wish to retain the site for the whole community*". It is not clear from this whether these people are members of the Nominator or not. Either way, this statement, and the Nomination in general, is

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comparable to the facts in Fenwick Limited v Mid Suffolk District Council CR/2015/0024. Whilst there may be support for the continued protection of the use of the Property, that support has to be seen in context. In Fenwick Limited Judge Simon Bird QC said at paragraph 27 "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 to attempt to run it as a going concern".

32. Accordingly, it is MKPT's position that the Property does not satisfy the test at s.88(2)(b) of the Act, still less has the Nominator even provided evidence that the Property satisfied the community value criteria in the past. In this respect MKPT relies on its written representations dated 13 September 2016.
33. Lastly, it seems to us that this whole process will become circular and that this is being used by the Nominator to prevent the development of the Property. Assuming that the Property is listed as an ACV and MKPT is unsuccessful in challenging the listing (both on review and appeal), then:
 - 33.1. the Property will be marketed for sale again;
 - 33.2. the Nominator would make a bid for the Property, which would have to be evaluated against a new bid from the Purchaser (who has confirmed to MKPT that it remains committed to acquiring the Property) and any other bidders;
 - 33.3. in the likely event that the Nominator's bid does not compete with the Purchaser's bid, MKPT would be duty bound to accept the Purchaser's bid;
 - 33.4. MKPT would then enter into a conditional agreement with the Purchaser, with the Property being removed from the list of community assets in consequence; and
 - 33.5. the Nominator could apply to nominate the Property again.
34. On any view, this result would be absurd and the Council is therefore respectfully invited to add the Property to its list of unsuccessful nominations. Should the Council decide otherwise, then MKPT will challenge the decision and it will also lodge a claim for all its losses, including diminution in value of the Property as a consequence of listing the Property as an ACV, which is likely to be very significant if the ACV listing materially impacts on the Purchaser's outstanding planning application.

Yours faithfully



Freeths LLP