In the matter of the nomination of the Spread Eagle, Walmgate, York (the Property) for listing as an Asset of Community Value (ACV)

Response submitted on behalf of the freehold owner, SWL Property Ltd

Introduction

SWL Property Limited is the owner of the freehold title to the Property.

These representations are submitted on behalf of SWL Property Ltd in response to the nomination of the Property for listing as an ACV under the Localism Act 2011 ("the 2011 Act"); and the Assets of Community Value (England) Regulations 2012 ("the 2012 Regulations").

Preliminary Issue – The consideration of the listing is out of time

1. The nomination is dated 16th March 2021 ("the Nomination"). It states in the Nomination that it is submitted on behalf of Campaign for Real Ale – York Branch ("the Nominators").

2. Regulation 7 of the 2012 Regulations states:

"The responsible authority must decide whether land nominated by a community nomination should be included in the list within eight weeks of receiving the nomination."

3. The relevant local authority is under a statutory duty to determine any nominations in accordance with this regulation. There is no statutory or regulatory provision for this timescale to be extended or amended (either unilaterally or by agreement).

4. If the Nomination was received on the date which is included therein, the deadline for determination of the Nomination was 11th May 2021.

5. Even if the Nomination was only received on the date on which SWL Property was notified of the Nomination (being 15th June 2021), the determination deadline would be the 10th August 2021.

6. In the circumstances, pursuant to the 2011 Act and 2012 Regulations, the Nomination is timed out and is therefore legally incapable of being determined.

The status of CAMRA (the Nominators)

7. In the section requiring the Nominator to identify the Organisation Type, the Nominators have selected 'Company Limited by Guarantee'.

8. If the Nomination is made by York branch of Campaign for Real Ale then, unless they can provide a registration number exclusive to them; together with copies of their branch exclusive accounts and articles of association; the Nomination is void. They are not a company limited by guarantee.

9. If the Nomination is made by the registered company that is Campaign for Real Ale Limited ("CAMRA"), then they do not qualify as a nominating body. In order to qualify, any company limited by a guarantee must, pursuant to Regulation 4(1)(b) of the 2012 Regulations, either wholly or partly apply any surplus it makes for the benefit of the local authority's area or for the benefit of the neighbouring authority's area.

10. According to CAMRA's latest unaudited statutory accounts, which were lodged in respect of the period ending 30th November 2020, CAMRA made a deficit. We would note however that, as is quoted in the accounts, in the 11 months to 30 November 2019 CAMRA made a surplus of £76,685.00. A copy of these accounts are held and can be provided for consideration should the council wish to see these. None of this surplus was used for the benefit of the local authority's area nor for the benefit of a neighbouring authority's area.

11. CAMRA's latest unaudited statutory accounts, which were lodged in respect of the period ending 30th November 2020, also show that CAMRA hold total net assets of £3,070,354.00. An examination of the last set of full accounts lodged by CAMRA, for the year ending 31 December 2018, state that *"reserves not immediately required for operating expenses are held in mixed equity and property fund investments."* This is further evidence that not only do CAMRA not distribute any surplus within the council's local area, they do not distribute *any* surplus in *any* area.

12. In light of the above, CAMRA cannot qualify as having a "local connection" under Regulation 4(1)(B) of the 2012 Regulations. Previous cases which have discussed CAMRA's standing to make nominations have failed to examine this point which, it is our submission, is central to any consideration as to the standing of CAMRA as a nominating body.

13. The Regulations only talk of a distribution of the company surplus. We have already demonstrated that CAMRA (the national body, which is the body which is a company limited by guarantee) retains any surplus which it makes after tax. This means that no surplus was

applied for the benefit of either the local authority's area or the benefit of the neighbouring authority's area. Either:-

a) The York District Branch is a part of the National Body that is CAMRA, in which case the accounts referred to above prove conclusively that no surplus was applied for the benefit of either the local authority's area or the benefit of the neighbouring authority's area, or for the benefit of any other area (as no surplus was distributed at all); or

b) The York District Branch is not part of the National Body that is CAMRA, in which case the Nomination is invalid as the nomination does not properly identify and/or provide satisfactory evidence of the organisation type (see above).

14. It is also noted that despite making numerous nominations to list public houses as ACVs, CAMRA are yet, to the best of our knowledge, to attempt to bid for any of these properties. They have no interest in making such a bid and are merely trying to hamper the ability of companies to freely deal with their properties.

15. It is abundantly clear that the overarching principle of the 2011 Act (and the 2012 Regulations which flow therefrom) is to allow bona fide community groups sufficient time to investigate the possibility of raising sufficient funds to place a bid in respect of the subject property.

16. It is submitted that there is no evidence whatsoever to suggest that CAMRA, despite numerous nominations being submitted nationwide, have any intention at all of investigating the possibility of raising any such funds or indeed submitting any such bid in respect of this or any other public house.

Reasons given by CAMRA to support the nomination

17. Notwithstanding the fact that the Nomination is invalid for the reasons outlined above, and the fact that the Property is not currently open to provide any facilities, the reasons given by the Nominators for why they believe the Property should be listed as an ACV, as recorded within the document produced to the Council alongside the Nomination, titled '*Why the Spread Eagle is an Asset of Community Value'* have been considered.

18. A brief note of their reasons and responses are set out below:-

a. "*The Spread Eagle is not what you would call a trendy upmarket craft beer bar, but rather a good old fashioned 'down to earth' establishment that sells real ale and has an open and inclusive admission policy that appeals to difference demographic social groups."* This is a

statement which records nothing more than the business of a public house. The Property has been serving anybody since it opened and throughout all periods during which is has been open for trading. This is in no way attributable to the Property's community value but rather simply because the Property is a commercial public house. A property is not an ACV simply by virtue of the business carried on thereat. If this was the intention of the legislature then a distinct category or sub-category of properties would have been established for that very purpose. This was not the case. In addition to this, as explored at length below, there is an enormous number of other alternative and very similar venues in the immediate vicinity of the Property which provide the same services, products, and admissions policy as the Property. We would note that, in respect of this statement, the Nominators do not provide any demonstrable evidence of any such use by any appropriate community group, nor do they provide anything which differentiates the Property from the huge number of alternative venues very nearby. In assessing the Nomination, we have looked into the provision of services which are the same, or substantially the same as those offered at the Property. We note CAMRA's own '*WhatPub*' website covering the local area (and this is not an exhaustive list of sites within the local area which may provide the same or substantially the same facilities as those which are referred to within the Nomination, these are simply sites which CAMRA are willing to acknowledge).

This evidence shows clearly that there are at least **69 other public house sites within 0.5 miles** of the Property which are open and trading (notwithstanding the ongoing public health emergency). It is absolutely clear from the number of local competitors that the Property is not the hub nor focal point of the community, nor does the Property offer anything in particular which is not readily available in many other local establishments. Any of the functions which the Property may perform can be more than adequately replicated by its competitors.

We refer you to the case of *Hawthorn Leisure Limited v Bracknell Forest Council* [2016].

The *Hawthorn* case concerned a nomination of a pub which was the last remaining pub in that village. When reaching his decisions in this case Judge Lane attached particular significance to there being no other pubs in the village, both when considering whether the nomination met the requirements of Regulation 6 of the 2012 Regulations and when considering whether the pub served the function of a meeting place for residents to socialise. Furthermore, in the *Hawthorn* case no evidence was adduced by the landowner to challenge the nominator's claims about the pub being a community public house.

Unlike the pub in the *Hawthorn* case, there are at least 69 pubs which are currently open and trading within just half a mile of the Property. It is therefore not reasonable to assume that the Property serves the function of a community hub or meeting place for residents to socialise just because it is a pub, as Judge Lane (reasonably) could in the *Hawthorn* case. The local community already have many other pubs nearby in which they can meet and socialise. In circumstances such as this it is reasonable to expect a nominating group to adduce evidence of regular, non-ancillary community use of a property they believe should be listed as an ACV. The nominating group have failed to adduce any evidence whatsoever of regular, non-ancillary, community use of the Property by anyone. They have provided

no actual evidence of any community events/functions/meetings having been held regularly at the Property and they have not provided any testimonials from anyone who truly frequents the Property.

The abundance of community facilities and competing public houses (all offering the same, or substantially the same, facilities as the Property) within walking distance of the Property makes it clear that neither the local community's social wellbeing nor their cultural, recreational or sporting interests would not be affected at all were the Property to close and cease trading. The Property, in the execution of its primary function, offers nothing in particular which makes it special or which distinguishes it from the many rival businesses in the locality. As a result, it cannot be credibly argued that the Property does anything in particular to further the social wellbeing or cultural, recreational or sporting interests of the local community.

b. *"it is arguably the last traditional pub left on this stretch of Walmgate…"* Neither the 2011 Act nor the 2012 Regulations provide for properties to be listed as ACVs due to their being the last traditional pub, for example. The 2011 Act and 2012 Regulations were intended to provide protection for communities which stood to suffer actual detriment to their social wellbeing or their cultural, recreational or sporting interests were a site to cease to continue in its present guise. As shown above, there are a huge number of alternative sites which offer almost identical facilities to the Property, and all of which can be used by the local community to serve and enhance their social wellbeing and/or their cultural, recreational or sporting interests without any detriment whatsoever being suffered.

c. *"The local presence of a pub within a community is important, as expert national research confirms…"* If expert national research has been undertaken, and is to be referred to within the Nomination, we would note that this ought to be provided. Notwithstanding the fact that this 'research' cannot be tested, due to its absence, we would note that, as irrefutably demonstrated above, the Property is not the only pub serving the local community.

d. The fourth paragraph adds nothing to the first paragraph, in that it too is an unsubstantiated attempt to create the impression of community use/value, where no such use and/or value exists. The Property is not the only public house in the area, nor does it have a 'local community' that it serves which goes beyond or is any different to the local community which is served by the 69 sites referred to in detail above. To suggest that the proximity of social housing is somehow indicative of a community use is incorrect and does not alter the requirements of the 2011 Act with regards to what is required to secure a listing. The comments provided are vague and untestable, and the Nominators are attempting to create the impression that the Property is used by community groups, which the Nominators believe may assist them in securing a listing, when this is not necessarily the case.

e. The Nominators state in the next two paragraphs, that live music and other events have taken place at the Property and the general value of live music. The 2011 Act is clear, and the bases upon which determinations must be made under the 2011 Act are clear. Ancillary uses of any

property are not relevant for the purposes of determination of a nomination. The primary use of the Property is a commercial public house. The Property is not a music venue, and there are numerous music venues within the City of York. General comments by the Nominators that York needs as many live music venues as possible are both insufficiently specific with regards to the non-ancillary uses of the Property; and simply not relevant for the purposes of the 2011 Act. Further to this, with specific regards to occasional uses (such as the quoted uses for 'X Factor' and 'Britain's Got Talent' auditions) we would note that, as was made clear during the passage of the 2011 Act through Parliament, with regards to "*…the extent to which it will be appropriate for the local authority to consider occasional or periodic use of a particular site as meeting the definition of an asset of community value…"* it was stated, by Baroness Hanham, that *"there is a large difference between the use of a field once a year as a car park for the annual village fete and the licensing or leasing of a barn to a local group to run a playgroup"*. The principle here is clear, and has been reiterated by the decision of the Tribunal in the case of *Idsall School V Shropshire Council [2015] UKFTT CR/2014/0016 (GRC)*, in which the tribunal rejected the assertion that the quantum of use cannot be determinative. Highly occasional (indeed annual or even less frequent than that) events cannot be adduced as evidence of a property providing a vital community benefit sufficient to secure an ACV listing.

f. In the next paragraph, the Nominators state that *"if this much regarded pub shuts, then a safe gathering space disappears and leaves a hole in the community for regulars that can't be duplicated by any other establishment such as a restaurant or shop."* As we have referred to above, there is no demonstrable community which is served by the Property and which is not also served by the other 69 sites which are within 0.5 miles of the Property. Furthermore, given that the inference of this statement is that such a 'hole' could be filled with another pub, were the Property to close, the community would have their choice of no less than 69 alternative sites within half a mile of the Property. It is without question that the community's needs could and would be met, as they currently are, by these properties. The same issues apply to the next paragraph of the Nomination, in which the Nominators again refer to 'research' without having submitted any testable or demonstrable evidence. To be clear, the requirements of the 2011 Act and 2012 Regulations are for any nomination to show why the property (or land) in question is an area which provides qualifying benefits to the relevant local community. General commentary about the relative merits of public houses is not something which is linked to the Property, nor does it apply to the Nomination. We would submit that this approach is indicative of a lack of strong, relevant, and property specific evidence and/or reasons to list the Property; and this is because, the Property does not meet the requirements for listing as an ACV under the 2011 Act.

g. The Nominators point out that the Property is Grade II listed, and the current building was erected in the early 19th Century. While the Property may be interesting with regards to local history, the age of the Property and its architectural merits are irrelevant to the nomination of the Property for listing as an ACV. As the Nominators rightly point out, the Property already benefits from being a Grade II listed building under the Planning (Listed Buildings and Conservation Areas) Act 1990. The protection of any building for reasons of architectural merit are not the role of the 2011 Act, and to seek to do so is further evidence of the attempted misapplication of the 2011 Act by the Nominators. The age and appearance of the building

does not provide an applicable or relevant benefit to the local community, and therefore is irrelevant for the purposes of the determination of the Nomination.

h. The final submissions relating to the pub's traditions and atmosphere are irrelevant. These amount to the thoughts of a group whose stated aim is to steadfastly preserve public houses, notwithstanding the actual standing of those establishments within the relevant communities within which they sit. The use of this style of writing, which is held out to be 'evidence' is, we must assume, intended to create an emotive connection to 'the locals'. This is neither appropriate nor relevant to the Nomination. We would also note that we are unaware as to any questions as to the safety of any of the 69 sites which stand within 0.5 miles of the Property, notwithstanding which the Nominators seem to keen to imply that somehow the other establishments within this locale are in some way unsafe.

19. The above further reinforces the assertion made above, that the Nomination was made by CAMRA in bad faith, with the intention of halting the owner's ability to deal with the Property. CAMRA have illustrated, through the conduct of their business over the preceding 10 years, that they have no intention of purchasing a property which they nominate and that the nominations they are currently making serve no other purpose than to halt the disposition of assets by their owners. This is further supported by CAMRA's own press releases which have stated a company desire to see 1000 properties listed as ACVs. How can such a target be compatible with the 2011 Act and the desire of government, manifested in the 2011 Act, to protect local communities in actual danger of losing amenities upon which they rely?

20. For the avoidance of doubt the only non-ancillary use of the Property is as a commercial public house. The requirements of section 88 of the 2011 act are clear – only non-ancillary uses of a nominated property are relevant when considering whether the section 88 test is met.

21. It is not the role of the 2011 Act to be used, either by nominators or local authorities, as a planning act by proxy. Any historical or architectural significance should be protected using a building listing or similar and the fact that any village/town/etc has had a certain type of building for a long time does not, in of itself, make this indicative of that building being a genuine ACV (as defined under the 2011 Act). This is a misapplication of the 2011 Act.

22. SWL Property Ltd should not have its property rights eroded (which is the effect of an ACV listing) by virtue of the fact that the Nominators feel that they ought to be able to decide what properties may, or may not, be used for. This is a perversion of the purpose of the ACV regime and is not in accordance with the intentions of the legislature.

23. Simply being a pub is not enough to demonstrate that the Property furthers the social interests or social wellbeing of the local community. Were it the legislature's intention to do so then both the 2011 Act and the 2012 Regulations would simply have designated all pubs ACVs. The legislation is not drafted in this manner. As a result, when nominating pubs for listing, like any other nominated property, the burden is on nominators to show evidence of a non-ancillary use which furthers the social interests/social wellbeing of the local community. Simply being a pub is not enough to show that the section 88 test is met. This position has been reinforced by the decision in *Admiral Taverns Ltd. V Cheshire West and Chester Council and another* ([2018] UKUT 15 (AAC)) in which the Upper Tribunal confirmed that *"There was no presumption that a pub came within the listing provisions of the 2011 Act…*". Simply stating that the property is a pub and thus must be listed is not an accurate or equitable use of the 2011 Act, which was enacted to protect communities who were (or are) at risk of losing an asset without which community social wellbeing would be damaged. This is clearly not the case in this instance.

Conclusion

The Nomination is invalid, as the strict timescales within which any nomination under the 2011 Act must be determined has passed. To determine the Nomination would be ultra vires and can lead to nothing other than an immediate appeal.

In addition, as explained above, the Nominators lack the standing, under the requirements of the 2011 Act, to make a valid nomination. The Nominators are not a company limited by guarantee, and the company known as CAMRA which is a company limited by guarantee does not distribute any surplus withing the local community nor any neighbouring community. This means that the requirement for 'local connection; is absent, and the Nomination is rendered invalid.

As for the contents of the Nomination itself, the Nomination fails to identify a single cogent reason to show how/why the Property meets the requirements of section 88 of the 2011 Act. The Nomination employs various methods from the use of emotive language, to referring to location and historic merit. Submission of volume is not a substitute for accurate, valid and (most importantly) relevant content.

It has been shown that the Nomination provides no evidence of a non-ancillary use of the Property in the recent past which meets the requirements of section 88(2)(a) of the Act nor is it possible for there to be any use which meets the requirements of section 88(1) of the 2011 Act. The wording of Section 88 of the 2011 Act makes it clear that the alleged uses of the Property discussed in the Nomination are irrelevant and should be disregarded.

When a property is listed as an ACV, this severely hampers the ability of the owner to deal freely with the property and can cause financial loss/hardship to the owner. Any decision to list should therefore not be taken lightly.

The Council is entrusted with a quasi-judicial function under the 2011 Act and the 2012 Regulations and must decide both the validity of the Nomination and, if the Nomination is valid, whether or not to list the Property based on the evidence presented. The Nominators have failed to adduce satisfactory evidence that they are eligible to nominate; the Nomination has not been determined within the strict statutory timescales; and the Nominators have failed to show that the requirements of Section 88 of the 2011 Act are met.

Gosschalks

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