First-tier Tribunal
(General Regulatory Chamber)

Tribunal Reference: CR/2017/0017

Before

TRIBUNAL JUDGE SIMON BIRD QC

Between

JOHN HICKINBOTTOM
SUSAN KING

Appellants

and

TELFORD & WREKIN COUNCIL

First Respondent

and

ERCALL MAGNA PARISH COUNCIL

Second Respondent

and

THE CLEVELAND PHOENIX CHARITY

Third Respondent

Representation:

For the Appellant:	Mr John Hickinbottom
	Ms Susan King
For the First Respondent:	Mr James Corbet Burcher by instructed by the Solicitor, Telford & Wrekin Council
For the Second Respondent:	Mr Raymond Wickson
For the Third Respondent	Mr David Haston

DECISION AND REASONS

A Introduction

1. The Localism Act 2011 ("the 2011 Act") requires local authorities to keep a list of assets (meaning buildings or other land) which are of community value. The effect of listing is that, generally speaking, an owner intending to sell the asset must give notice to the local authority. A community interest group then has six weeks in which to ask to be treated as a potential bidder. If it does so, a sale cannot take place for six months. The intention is that this period, known as "the moratorium", will allow the community group to come up with an alternative proposal. However, at the end of the moratorium it remains up to the owner whether the asset is sold, to whom and at what price. There are arrangements for the local authority to pay compensation to an owner who loses money in consequence of the asset being listed.

B Legislation

2. Section 88 of the 2011 Act provides so far as is material to this appeal:

> "(1) For the purposes of this Chapter but subject to regulations under subsection (3), a building or other land in a local authority's area is land of community value if in the opinion of the authority –

(a) an actual current use of the building or other land that is not an ancillary use furthers the social wellbeing or social interests of the local community, and

(b) it is realistic to think that 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.

(2) For the purposes of this Chapter but subject to regulations under subsection (3), a building or other land in a local authority's area that is not land of community value as a result of subsection (1) is land of community value if in the opinion of the local authority –

(a) there is a time in the recent past when an actual use of the building or other land that was not an ancillary use furthered the social wellbeing or interests of the local community, and

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

C The Listed Asset

3. This appeal concerns the Cleveland Arms , Cotwall Road, High Ercall ("the CA") and the adjoining bowling green ("the Bowling Green") and car park.

4. On 16 My 2017 Ercall Magna Parish Council nominated the CA and the Bowling Green for inclusion on Telford & Wrekin Council's List of Assets of Community Value ("LACV"). There is no suggestion in this appeal that the nomination was other than a valid nomination.

5. On 10 July 2017 the Council determined that it should be included on the LACV and this decision was affirmed following a review on 20 October 2017.

6. The Appellants appealed to the Tribunal by notice dated 17 November 2017.

7. I conducted an accompanied site visit on the afternoon of 21 July 2018 and a hearing on 22 July 2018. In accordance with decision of the Upper Tribunal in Admiral Taverns v Cheshire [2018] UKUT 15 (AAC) the appeal has taken the

form of complete reconsideration of whether the CA and the Bowling Green should be included on the LACV. In reaching a decision on this appeal, I have had regard to all the written evidence and submissions comprised in the appeal bundle running to in excess of 1200 pages, the skeleton arguments filed on behalf of the Appellant and the First Respondent and the submissions made at the hearing on behalf of all of the parties. The fact that I do not make specific reference to a particular document or submission does not mean that I have not taken it into account.

D Background

8. High Ercall is the largest settlement within the civil parish of Ercall Magna and has a population of approximately 800 people. For planning purposes it is a rural service centre and benefits from a good range of community services and facilities. Outline planning permission exists for a development of 45 dwellings at the village, just to the north of Walton Avenue and therefore the population of the village is likely to grow. Until 2016, the village had a pub, the CA, one of two within the civil parish. The other pub, which remains open, is The Royal Oak which is situated 1km to the west of Ellerdine Heath, 7.7km from High Ercall using the most direct route.

9. Whilst there are some differences between the parties as to the detail of the CA's history, those are not material to the issues raised by this appeal.

10. For over 100 years the CA operated as a public house, but closed in January 2016. Up until 2013, a large car park for the CA was sited to the east of the pub building, with the garden area for the pub lying to its north.

11. The CA was previously owned by national tied estate pub company, Punch Taverns who in 2011, determined that it was surplus to their requirements. From October 2011 the property was marketed as a whole but in March 2013 Punch Taverns secured planning permission for the erection of 6 dwellings on what was then the large car park of the pub. It was a condition of this planning permission that a 30 space replacement car park would be provided on what had previously been the garden area of the pub.

12. Marketing of the CA with the Bowling Green, but excluding the residential development land, continued at an asking price of £225,000, although in 2013 the decision was taken to auction the property.

13. Immediately prior to the auction, the property was acquired by John Charles Homes Limited a company of which the Appellants are the sole directors. The Proprietorship Register under Land Registry title number SL223018 shows

that the price stated to have been paid was £185,000 plus £33,300 VAT. The CA and Bowling Green are in the same registered title.

14. The Appellants occupy the CA, living in the first floor accommodation which has been used for residential use ancillary to the pub use certainly for some years.

15. After John Charles Homes Limited acquired the CA in July 2013, it was re-opened for trade at the beginning of September 2013, trading through The Cleveland Arms High Ercall Limited. The Appellants were the sole directors also of this company.

16. Work on the new car park for the CA secured by the condition attached to the planning permission secured by Punch Taverns commenced in November 2013 and was completed in May 2014.

17. The CA benefits from a premises licence which licences the sale of alcohol on and off the premises and the playing of live and recorded music indoors. The current licence was granted on 20 June 2005 under the provisions of the Licensing Act 2003, following consultation with the Shropshire Fire Service. The licence is presently suspended because of non payment of the annual fee.

18. The CA was initially operated by the Appellants as a drinks led establishment, but a simple snack and buffet food offer was available for pre-booked and regularly scheduled events, including bowls matches, football team home matches, christenings and other events. In April 2014 a Sunday lunch offer was introduced, with the Appellants working in cooperation with an experienced pub chef and this continued until 26 October 2014. In May 2015, a more expansive food offer was introduced, working in cooperation with a new chef as catering partner, but this arrangement was terminated without notice by the chef and a limited menu was then offered until late August 2015.

19. After operating the CA for a period of 2 years and four months, the Appellants reached the conclusion that it could not trade at an acceptable level so as to provide a satisfactory remuneration for the time spent in its operation or return for the capital invested in the property. The decision was made to close the pub business in January 2016.

20. The Appellants have continued to occupy the first floor accommodation within the CA and, subsequent to its closure, various works of stripping out, exposing the structure and excavation have been carried our principally in the bar and snug areas of the pub.

21. On 2 March 2018, the Council served an enforcement notice contending that there had been a material change in use of the CA from public house use to use as a residential dwellinghouse. The requirement of the notice is to cease residential dwellinghouse use within a six month compliance period except for use ancillary to the public house. The Appellants have appealed against this notice, arguing that there has been no material change of use. The effect of the making of the appeal is that the notice has not taken effect. The appeal remains outstanding.

22. The Bowling Green was occupied by the Ercall Magna Bowling Club ("the Bowling Club") apparently under licence from the various landlords of the CA over time. This was a members club comprising principally of people from the village and, although exact membership numbers were not available to me, at the time of the Appellants taking up occupation of the CA, it was believed to have about two dozen playing members. Players used the lavatories at the pub as there were none provided with the Bowling Green itself and also made use of the pub for refreshments. The electricity supply to the Bowling Club also came from the CA and access was from or across the CA's grounds.

23. The initial arrangement reached between the Appellants and the Bowling Club was that no rent would be payable for its occupation of the Bowling Green but in lieu, payment for its use would come in the form of bar custom from club members.

24. However, the extent of this custom did not meet the Appellants' expectations and, in 2015, the renegotiation of terms led ultimately, to the Bowling Club giving notice and vacating the Bowling Green and its ancillary buildings. Whilst the Appellants sought initially to maintain the bowling surface following the departure of the Club, this proved to be too labour intensive and the facility fell into disuse. It is now heavily overgrown and the condition of its ancillary buildings is in decline.

E The CA's condition, the cost of repairs/refurbishment and viability

25. In October 2015 the need for strengthening of a number of structural brick piers within bar area of the CA was indentified in a report provided by Online Structural Design Limited. No specific recommendations were made within the report with it simply concluding:

> *"Methods of strengthening the walls should be discussed with the owner on site as several options are available, each*

with their own complication with regard to costs and intrusiveness."

26. In 2016, the Appellants then adopted what they described as a "Risk Management Strategy," part of which included the installation of six Acrow props to provide additional support to the first floor above the bar area. This required the removal of the false ceiling in that area following which, Mr Hickinbottom prepared his own *"Structural Survey"* which identified a number of structural and other defects requiring remedy/repair and which recommended that they all be addressed. No assessment was made as part of the survey of the cost of carrying out the recommendations in the report.

27. In July 2016 Mr Anthony Barnes BSc(Hons) MRICS employed by Fleurets, a national practice which provides advice on the sale and valuation of hotels, restaurants, public houses and other forms of licensed and leisure property, provided a report to the Appellant ("the Fleurets Report"). Amongst other matters, he had been asked to provide a viability appraisal of the most credible option for the continuation of a public house use within the CA and to provide conclusions on the credible potential options for its future.

28. Mr Barnes concluded that the size of the local population would not give an operator confidence in the viability of public house use and that any prospective operator would, out of necessity, have to target custom from a considerably wider catchment than Ercall Magna and its surrounding villages. However, he advised there was already a very material level of competition in the catchment from pubs serving food.

29. Mr Barnes also concluded that whilst, the building was of satisfactory size for public house trading purposes, its layout was inefficient and inconvenient, particularly if contemplating the service of food.

30. Mr Barnes noted the need for structural repairs, fire protection improvements and refurbishment and, for the purposes of his viability assessment summarised his approach as follows:

"For the purposes of arriving at my assessment of viability, I have accounted for a repairs investment requirement of £75000. Such a cost I have treated as the absolute minimum necessary expenditure before any operator could safely contemplate reopening the property for public house trading purposes. In practice however such a sum is quite possibly insufficient in order satisfactorily complete all the required works to remedy the above two issues and to cover the require reinstatement of the customer accommodation following the undertaking of the required building works. I

am not currently aware of any professionally produced cost estimate of the works or commercial builder quotations. Any additional repair costs which are found to be necessary in order to complete the required works, will of course add to the required initial capital a prospective future operator would be obliged to fund in order to be able to re-open the property for public house trading".

31. The viability assessment undertaken by Mr Barnes identified a Fair Maintainable Trade for the CA, taking account of its weaknesses, to be in the region of £150,000. Allowing for a notional acquisition price of £185,000 for the building repair costs of £75,000 and licensee remuneration of £28,500, he concluded that this would not be viable (producing a loss of £23,652). This was due to the capital outlay and assumed repayments at commercial rates and the risk that these presented to a future operator. Mr Barnes was not asked to comment on and did not comment on the possible use of enabling development to facilitate the re-opening of the pub.

32. In March 2017, Mr Hickinbottom applied for planning permission for the reconfiguration and reorientation of the CA from a public house with living accommodation into a public house with staff accommodation, an attached separate dwelling and a separate pair of houses. The application site did not include the Bowling Green despite the fact that it was contended by the Appellants that the development would need to be cross-subsidised by residential development taking place on it. The Council did not determine the application within the prescribed period and an appeal was made against the Council's deemed refusal of planning permission.

33. The putative reasons for refusal were the effect of the proposal on the character and appearance of the area, with particular regard to the Conservation Area (which the pub building lies within), the effect of the proposal on the provision of community facilities in the area, the effect on the living conditions of existing and future occupants and the effect of the proposal on protected species.

34. The appeal was dealt with under the written representations procedure and was dismissed by Inspector's decision letter dated 12 February 2018. On the various issues the Inspector concluded in summary that:

    (a) With the proposed extension to the building it would appear much grander in overall form than the existing building, detracting from its simple well-proportioned scale and its rural character, thus harming the Conservation Area;

(b) The proposal to replace the present pub accommodation with a large room shown to be used as a restaurant, with only a small bar, would reduce its community function and the Appellant had not justified this loss of function by demonstrating through recent marketing, building survey and cost reports prepared by appropriately qualified professionals and realistic viability assessments, that there was a lack of need for retention of the community function served by the public house;

(c) The proposal would not provide acceptable living conditions for the future occupants of the proposed residential units and would be harmful to those of neighbouring residents; and

(d) In the absence of a bat survey of the roof voids, it had to be concluded that the proposal would be harmful to protected species.

35. The Inspector's decision letter describes the condition of the CA as at the date of her site visit on 12 February 2018:

> *"During the site visit I was able to observe that the interior of the building at ground floor level has been stripped down to bare brick walls in the main front room and there are props in place holding up the ceiling".*

36. The building was in a similar condition on my site visit carried out on 21 June 2018. I also saw that works had been undertaken in the area of the lavatories, to remove the floors and some wall partitions.

F The Issues

37. Two issues are raised by the Appellant's grounds of appeal:

(a) Whether there was a time in the recent past when either or both the CA (and its Car Park) and the Bowling Green was used for an actual use which furthered the social wellbeing or interests of the local community and which was not an ancillary use ("the First Issue"); and

(b) Whether it is realistic to think that there is a time in the next five years when there could be non-ancillary use of either or both the CA and the Bowling Green that would further (whether in the same way as the past use or not) the social wellbeing or social interests of the local community ("the Second Issue).

38. There was a dispute between the Appellants and the Council as to whether, for the purposes of these issues, the CA (and its Car Park) and the Bowling Green should be considered together as a single asset or separately as two assets.

39. The Appellant's argued that the functional connection between the Bowling Green use and the CA in terms of access and the provision of services required the Tribunal to consider the two as a single unit. The Council contended that the Bowling Green, when in use, had been separately occupied and there was insufficient physical and functional connection to justify treating the two as a single unit for the purposes of the issues raised by these appeals.

40. On this issue, my conclusion is that the Bowling Green is properly treated as an asset in its own right. It was in separate occupation and the functional connections between its use and that of the CA were purely ancillary. It is therefore appropriate to consider separately, in respect of each asset, whether the statutory tests are satisfied.

41. However, I do not see that this issue has any material bearing on the ultimate conclusion of the Tribunal. Applying either approach, the Tribunal would need to consider whether in respect of each part of the buildings and land to which the appeal relates, the statutory tests were met. It would not be appropriate to include on the LACV any part of any buildings or land which do not meet the tests. This approach ensures that land which does not qualify for listing is not listed simply by association.

G The Appellants' Submissions on the First Issue

42. The Appellants had no knowledge of how the CA and Bowling Green were used prior to their purchase of it in 2013. After they took the CA over it was used by the local Sunday League football team for lunch/hot food snacks after matches played at the village hall, by the bowls club principally on Mondays, Wednesdays and Thursdays when the pub provided tea and biscuits and access to it lavatories and, when the food offer was available, some food on Monday nights. However, they received little income from the Bowling Club. The Club struggled for members and had an elderly membership with approximately 24 members playing members, all but one or two being local.

43. The Appellants also held other events in the CA including two pub quizzes; the first well attended, the second poorly attended.

44. The British Legion used the "snug" room for meetings and coffee and wraps. Members of the Tennis Club (usually 3-4 people, but sometimes more) used to come in once or twice a week after they had played and sometimes had food. The Scout Leaders (4-6 people) used the pub once every other month. A Ukele Club was held monthly and was well attended, but this was mostly attended by people from outside the village. There was also a Vinyl Club, which held 3 to 4 meetings and to which people brought their vinyl records to play on equipment specially purchased by the Appellants. Tennis Club members used the CA once or twice a week (usually 3 to 4 of them).

45. The CA had also hosted a number of wakes and christening over the years.

46. The Appellants accepted that the CA served a local community use during their ownership and occupation but, because of the alterations which had been made to the building and the width of the door openings, it was inaccessible to those in wheelchairs and therefore could not be said to have served all of the local community. Further, the Survey of Parish residents undertaken in 2015, as part of the preparation of a Neighbourhood Plan, also showed that the CA was used "*rarely*" or "*not at all*" and, given the structural issues with the building and consequential health and safety implications, it could not be said that any local community use furthered its social wellbeing or interests.

47. The Appellants argued that the listing contravened the Council's own *"ACV Nomination Guide"* which required that, over and above the past or proposed use being for cultural, recreational or sport, it should be either a broad inclusive use across the whole community or a use by a section of the community which would not otherwise be provided for or is underprovided for in the locality e.g. elderly people, children.

F The Council's Submissions on the First Issue

48. The evidence shows that there was recent use of the CA by a wide cross section of the community and extensive use of the Bowls Green; 24 playing Bowls Club members is still a substantial community use. The evidence shows that the CA and Bowling Green were extremely popular and a focal point for the local community.

49. There is no statutory definition or limitation on what constitutes *"the local community"*; the words refer to the locality and do not require use by every single member of a defined population.

50. The Appellants' primary argument that exclusion of a particular section of the community, in this case those with disabilities requiring wheelchair access, amounted to a disqualification from listing, was not a correct reading of section 88(2).

51. Further, the Parish Survey should be afforded little weight, given that it recorded a state of affairs as at 2015, when the pub was being managed by the Appellants and the survey was drawn from a sample of just 225 people or 34.4%.

52. As to the Bowling Green, the Appellants' core submission was that this was a private members club with an historic membership limited to 25 members. However, the status of the occupier as a private members' club does not preclude its listing. A private members club is capable of satisfying the statutory requirement – see Astim Limited v Bury Council CR/2015/0022, which involved use of a bowling green by a members club of 40, albeit one which was not fenced and where use of the bowling green was not restricted to members.

H The Parish Council's Submissions on the First Issue

53. The Royal British Legion used the CA initially monthly under the Appellants' ownership but this subsequently changed to quarterly, because of restrictions on its activities. The Bowls Club attracted spectators because it was a County Ground and even those who did not play bowls could leave the pub and watch bowls matches. The Ukele Club meetings had 4/5 playing village members, the rest were from the wider county, but the events were supported by locals and they brought the villagers into the pub. There was also a ladies darts group of 3-4 people who played on Thursday evenings but alternated the pubs they played at.

54. In relation to the Parish Survey, the results in terms of usage for both the public houses in the parish were similar, but the other pub is trading well because it promotes itself.

I The Cleveland Phoenix Charity's ("CPC") Submissions on the First Issue

55. In terms of the approximately 164 years of pub use before closure, the last community use of the nominated assets was recent for the purposes of section 88(2).

56. The Tennis Club currently has a membership of 50 and over the years its membership has lain in the 40-60 range. The Club fields 3 mens' and 3

ladies' teams, 3 teams in the autumn league and 2 teams in the Winter Woollies. It is a league requirement that for home matches, food and drink are provided, whether at the club or a local venue such as a pub. Prior to the Appellant's occupation all the teams used the CA after matches but, largely due to the quality of the food, this declined and now all teams bring their own food and drink and use the clubhouse for after match refreshment.

J The Tribunal's Conclusions on the First Issue

The CA

57. I am satisfied that the evidence before me establishes that the use of the CA with its Car Park furthered the social wellbeing and interests of the local community. It provided a venue for members of that community to meet and socialise, whether in groups or individually. The use by a variety of clubs, for christenings and wakes, all demonstrate that the CA served as a hub for the local community. I am also satisfied that this use was a use of the CA made in the recent past. The evidence is that a wide range of social and local community use was made of the public house (served by a different and larger car park) during Punch Tavern's period of ownership in the period to 2013, which can fairly be said to be in the recent past.

58. Further, I am satisfied that the nature and extent of local community use of the CA, whilst it was trading during the Appellant's occupation furthered the social well-being of the local community. There was sufficient use during this period by way of use by clubs and other members of the local community for me to conclude that the statutory requirement contained in section 88(2)(a) is satisfied, albeit usage declined in 2015,.

59. Whilst the Appellant's contend that the CA was not accessible to all and the Parish Survey showed little use in 2015, it is not a requirement of the Act that, to be listed, an Asset of Community Value must be used or capable of being used by all members of a given community. Such a test would impose a far higher threshold for listing than Parliament can have intended given the wording of section 88(2)(a). If adopted, that approach would prevent many buildings and other assets whose use clearly furthers the social wellbeing of a local community from being listed.

60. Clearly, to satisfy the statutory test there must be evidence of use by a sufficient number of people to support a finding that the interests of the local community have benefitted, but the evidence of use by the Bowling Club, Tennis Club and Scout Leaders coupled with the evidence of wakes and christenings is more than sufficient to support a conclusion that the social wellbeing of this relatively small village, was furthered by use of the CA.

61. That conclusion is not lessened by the structural condition of the building during the relevant period or the results of the Parish Survey. The focus of the section 88(2)(a) requirement is on the use actually made of the asset in the recent past. The fact that such use might have posed some, then unknown, risk to the users does not in any sense lessen the actual social wellbeing benefit obtained from that use.

62. In terms of the Parish Survey, I attach little weight to that survey, given that it was a single survey undertaken in 2015, at a point when the use of the CA was, on the Appellants' own evidence, in significant decline. The evidence shows that in the early period of the Appellants' operation of the CA, the pub (supported by its new car park from May 2014), did function as a local community hub and furthered its social wellbeing.

The Bowling Green

63. The Bowling Green was occupied under licence by a members club, but that club comprised principally members of the local community. Whilst there is no exact figure before the Tribunal as to the size of the membership, on the evidence before me, I am satisfied that during the period 2013 to 2015, it is more likely than not to have had 24 playing members, with the vast majority of these members being local people.

64. Whilst the Club was therefore a small club, its use of the bowling green furthered the social wellbeing of that section of the local community which used it and, in the context of a village of the size of High Ercall, bringing together in the region of 20 local, elderly people to engage in a recreational activity can fairly be said to further the social wellbeing of the local community.

65. The fact that the Bowling Club was a private club is, of itself, not determinative of whether the test contained in section 88(2)(a) is met. It is not unusual for social, sporting and other community facilities which further social wellbeing of a local community to be operated by clubs which, as a condition of usage, require membership of the club whether on a temporary or an annual basis.

66. It is not the structure or arrangements through which the facility is provided which are principally relevant in terms of the statutory test, but rather the use actually made of the asset and by whom that use is made. Here the evidence is that the Bowling Green was well used by its 24, principally local members and by providing access to a local recreational opportunity needed this section of the local community, it furthered its social wellbeing.

K The Appellant's Submissions on the Second Issue

67. The CA was originally designed and built as a three bedroom farmhouse between 1841 and 1851. Up until 1972 it was operated with at least five separate trade areas, but in that year major alterations were undertaken. These involved the introduction of many steel beams and false ceilings, making the CA more open plan.

68. The CA has been in the control and ownership of several breweries and pub companies for much of the 20th and 21st centuries and in the period 1998 to July 2013 it had had at least eight different licensees/landlords.

69. During the Appellants' occupation the CA was operated through an operating company, the Cleveland Arms High Ercall Limited. This was only possible after significant investment in repairs/improvements to the pub including the kitchen and replacement/overhaul of equipment.

70. The Appellant's initial business plan was to extend the CA with letting rooms above and at the rear, but following the voluntary departure of the Bowling Club in June 2015 and the chef leaving the pub without notice in July 2015 due to lack of support from the local community, the business plan changed and pre-planning negotiations started in August 2015.

71. Online Structural Design Limited, a local structural engineering practice was consulted in October 2015 to check the loading on two beams that have a point loading imposed by posts which support the main roof structure. The structural engineer identified serious deficiencies with the brick piers supporting the beams in the bar area, concluding that some of the loadings potentially exceeded 100% capacity. The works to correct these deficiencies alone would take 6 weeks.

72. The CA permanently closed in early January 2016 and the trading position was not recoverable following the structural deficiencies found in late 2015, the inability to comply with the Regulatory Reform (Fire Safety) Order 2005 and a consistent trading loss over two and a half years.

73. Planning permission was then sought for the conversion of part of the existing pub into a dwelling with the erection of a two storey side/rear extension which led to the subsequent planning appeal made in November 2017 .

74. Due to significant damp problems being apparent along the rear north wall of both the cellar and the pub, it has been necessary to remove the concrete sub-floor on the floor area above the old scullery and dairy. Work on this

commenced in June 2017. The floor finish in the bar also required removal due to considerable expansion of timbers due to poor installation and lack of heating.

75. To prevent the collapse of a significant section of the building, it is currently supported on 34 temporary Acrow props, primarily the western half. It cannot comply with the Regulatory Reform (Fire Safety) Order 2005, as it requires full compliant compartmentalisation throughout the structure and a configuration which separates the living accommodation from the trade areas and affords the minimum fire protection. The current layout does not comply with Parts A, B, K & M of the Building Regulations.

76. The costs of structural repair, fire safety compliance and changing the layout to comply with the Building Regulations have been fully and independently costed in 2016 and 2016/7. These appraisals were based on sketch schemes showing compliant options. One appraisal was carried out by John Charles Homes Limited and another, a full quantity survey, by Metrics Ltd.

77. These appraisals were undertaken in November 2016 prior to the removal of the false ceiling, decorative fabric and finishes and prior to the Structural Survey undertaken in early 2017 by Mr Hickinbottom. They also did not take account of the Floor Structures & Condition, Joinery Restoration Proposal prepared by the Appellants. A further £66,480 also needs to be added to the Metrics Ltd costings to fund the repair/replacement to the roof, re-pointing the brickwork and replacing 14 large period windows. The total of all these additional costs would be a minimum of £148,000.

78. Metric Ltd's costings for the repairs/work to provide a compliant building fall in the range £816,000-1,008,000, depending on the option. These figures are repairs costs only. The costs of acquisition, furnishing and further fixtures and fittings is likely to add a further £475,000. The likely costs of being able to re-open the CA would be between £1.439M and £1.631M.

79. The costs of restoration of the Bowling Green are estimated to be £128,799.74. Had planning permission been granted on the planning appeal, the likely outcome would have been an application for planning permission seeking residential development on the Bowling Green site.

80. Mr Hickinbottom is qualified provide evidence on structural matters, build/repair costs and land values. He was registered with the NHBC in 1984 and built several house on sites with difficult ground conditions. In 1986 he commenced his parallel career as an airline pilot undertaking regular fire safety courses. The last house he built was in 1998 although he had built an extension for a friend in 2008 and although he had no land valuation

qualifications, he knows how businesses are valued. The value of £400,000 attributed to the Bowling Green with planning permission for residential development was supported by a surveyor and the Appellants had received an unsolicited oral offer from a developer for the CA of £275,000 and looking at sales particulars for pubs, few have asking prices less than £300,000 as evidenced by the particulars for the Bucks Head, Long Lane, Telford. Weight should therefore be given to the various figures he has presented.

81. Spirit Pub Co. Ltd v Rushmoor Borough Council CR/2013/0003 is authority for the proposition that significant costs are determinative of whether section 88(2)(b) can be met. Where significant costs are identified, community groups need to demonstrate a firm indication that the community group can raise the money necessary to deliver the qualifying use and have a financially robust business plan. The lack 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 in such circumstances is determinative; see STO Capital v Haringey LBC CR/2015/0010.

82. A notice of intention to dispose of the property was made on 31 October 2017 and the CA has been locally advertised for sale in a number of prominent locations in the village. CPC and the Parish Council expressed an interest on 6 and 12 December 2017. CPC say they intend to bid but that, as a charity it needs to commission its own RICS Red Book Valuation before it can formulate proposals. However, it has not even started to raise funds or to progress registration with the Charity Commission. No realistic or credible bid has been made and there is no robust business plan. Further, the information available to CPC about the condition of the building is more than sufficient to enable the preparation of a business plan and bid without the need for a further survey.

83. The owner has the ability to block future community use simply by denying the CPC access to the building. It also has the ability to apply an overage clause to any sale which would remove the ability to reduce the cost of works via enabling development.

84. As Judge Peter Lane said in Evenden Estates v Brighton and Hove City Council CR/2015/0015:

> *"it should not be assumed that the requirement of section 88(2)(b) will necessarily be met, merely by a Micawber-like hope that something will turn up. A fact-sensitive analysis is called for".*

85. In relation to the Bowling Club, the only service available to it is a mains water supply. It has no electricity, no lavatory facilities and no communications services. Following Haddon Property Development Ltd v Cheshire East Council CR/2015/2017, it is not realistic to consider that former members who had joined other clubs would return to a bowling club lacking essential facilities and with a dilapidated clubhouse.

86. The dismissal of the planning appeals is a very relevant change of circumstance since the Council's decisions to list the nominated assets. There is no option to operate the CA without the premises being structurally sound and legally compliant. The unviability of operating a pub from the premises is confirmed by Matthew Philips, who previously marketed the property, in an e-mail dated 11 January 2018.

87. None of the land can have a community use until the CA is repaired and made legally compliant. The planning appeal decision seemed to turn on an interpretation of a proposed ground floor layout as showing a change from pub to restaurant use. However, that was contrary to all the evidence and had the plans been treated correctly and the viability considerations properly analysed, there would have been no conflict with planning policy.

88. The Appellants do not agree with the conclusions of the Inspector, but the decision has not been challenged and her comments are therefore very significant for the future community use of the CA. The three nearest pubs to the CA which comprise its local competition have all had major refurbishments costing over £1million. They are A3/A4 pub/restaurants. Given the investment required in the CA it is wholly unrealistic to expect a low key public house use of the kind described by the Inspector to resume, given the low proven actual past trade, the scale of investment required and the competition. This is supported by the Fleurets' Report.

89. Some weight should be attached to this report , Mr Barnes' subsequent letter dated 18 January 2018, Mr Philip's e-mail and to independent evidence on the costs of repairs. If the cost of repair works following a relevant appraisal would exceed the value of the restored building in pub use, then it would reduce the prospect of anyone other than a benevolent investor acting purely altruistically being interested in the building.

90. There has to be a realistic prospect that the necessary funds will be available to enable the structural and refurbishment work to make the building and site safe, compliant and usable (see Neem Genie Ltd v Telford & Wrekin Council CR/2016/0010 and Registered Proprietors of Uptin House v Newcastle CC CR/2017/0006). The costs of the works required to the CA would exceed its value by a factor of at least three (the CA has previously been marketed at

£475,000 and £335,000). There is no realistic prospect of the funding being forthcoming.

91. The only business model put forward by the Parish Council, CPC and the Council is a not for profit community run model. The Parish Council and CPC attempt to paint the picture of a vibrant, cohesive community that is bursting at the seams in the Village Hall bar, but that is in stark contrast to the findings of the Parish Survey and the actual operational success of the bar at the Village Hall for which there is demonstrably limited demand. It is unrealistic to consider that this level of support could support viable re-use of the CA and the works required to it are well beyond the skills base identified as available to CPC.

92. The CPC suggestion that the section 106 Agreement relating to residential development of 45 dwellings at High Ercall might be varied to allow contributions to be deployed on restoring the CA rather than other social infrastructure is an unrealistic one. The contributions presently required under the Agreement are £3723.73 per dwelling making a total contribution of £167,702.85. To enable the re-opening of the public house this would have to increase to £39,971.00, which would be unviable.

L The Council's Submissions on the Second Issue

93. The Appellants' core case is founded on a submission that the full costs of bringing the CA back into use would be in excess of £1.6M. These costs include an outlay on acquisition and fitting out of £475,000, the main component being the property value which has been set by the Appellant and which is not supported by an independent or external valuation. The repair and renovation costs are said to exceed between £800,000 and £1M.

94. The main document setting out the structural repair costs, is the Appellants' own Costs Analysis drawn up in the name of John Charles Homes Ltd. This is not independently produced and the section 78 Inspector was doubtful of the weight which could be afforded to it.

95. The Metrics Ltd document is a Quantity Survey only and an assessment of the Appellant's own proposed layouts. The Appellants' repair costs are therefore premised on their own options including the appeal scheme which was dismissed at appeal. The Appellant accepted in answer to the Tribunal that there were any number of computations in relation to addressing the issues with the building and the costings do not assess the range of proposals which could realistically be put forward by the community after acquiring it.

96. Whilst the Appellants refer to a Notice of Intention to make a relevant disposal of the property given on 31 October 2017, no actual or prospective purchaser has been named nor the type of disposal envisaged explained and their submission refer to continued marketing and other options.

97. The Parish Council and CPC notified the Council of their intention to be treated as potential bidders but were not able to issue a qualifying bid for purchase of the freehold within the full moratorium period. CPC did send letters to the Appellants seeking to get access to the property to inform a valuation and to carry out a structural survey but this was refused. On 10 February 2018 the Appellants issued a "Bid document" which set out 13 requirements which a prospective purchaser would be expected to meet. This has no statutory status and the Appellants' conduct is considered to have acted as an obstacle to a bid being made.

98. The statutory test of *"realistic to think"* has consistently been interpreted by the First Tie Tribunal s a low threshold, to be distinguished from higher thresholds, notably *"balance of probabilities". "Realistic"* does not mean *"most likely";* it permits of a number of possibilities; see Evenden Estates v Brighton and Hove City Council CR/2015/0015). Evenden is also authority for the proposition that evidence of public action/support for a bid combined with the refusal of planning permission are relevant factors in identifying what is realistic.

99. In the context of the Bowling Green, other open space uses may qualify and the statutory scheme does not impose a requirement that specific sources of funding are secured (see Astim v Bury Council CR/2015/022. The Haddon Property Ltd case relied upon by the Appellant is distinguishable on its facts, given the different nature of the community activities to be enjoyed at the Bowling Green and the particular role of the golf clubhouse in that case.

100. The Appellant relies on Sprit Pub Co but in that case, there was a specific purchaser of the building and an agreement to purchase which predated the coming into force of the Localism Act 2011 and this could be used as a concrete basis to identify a purchase price. Equally, STO Capital is a highly fact sensitive case where planning permission for a change of use had been granted, significantly altering its value. Neem Genie also turned on its specific facts, notably the scale of the fire damage and the repair works required. The case of Registered Proprietors of Uptin House is also distinguishable as the Appellant's case there was supported by appropriately qualified professionals.

101. The Tribunal has long rejected the position that an Appellant can defeat a nomination simply by stating that they will refuse to sell the asset save a given

price (see Patel v Hackney CR/2013/0005). The Appellants have set an acquisition figure of £475,000. The breakdown of that figure is not provided and is unclear. It appears to comprise mostly of a property value in excess of £350,000 and a number of additional items. At this level. the purchase price for the property alone would be considerably higher than the value for which the site was purchased. It is also at odds with the Appellants' most recent accounts which show fixed assets at £210,881.

102. Whilst the Appellants have provided sales particulars from the Bucks Head, Telford, it is not explained how that property is comparable. The CPC observe in their evidence that the poor state of the property here could likely have reduced its value since the 2013 purchase. The difficulties in gaining access to the property have prevented them obtaining a valuation.

103. The Appellants have not demonstrated their elevated valuation of £475,000 prevents acquisition at a lower price and the realistic outcomes in the case must reflect the absence of planning permission for the Appellants' proposal, the ongoing enforcement proceedings and the prospect of the Appellants selling the land for a lower price to a community interest group.

104. The £800,000-1,000,000 repair/refurbishment costs is derived from the planning appeal documents which looked at a different configuration of the property, for a specific type of venture. The Metrics Ltd Report expressly addressed the construction costs of that proposal. It is not a structural report produced on an independent basis to identify the minimum costs of renovation to bring it back into pub use.

105. The Tribunal has repeatedly made it clear that a nominating group need not provide a detailed business case for acquisition or to show viability. By the same token, there is no expectation that they should be required to set out in specific terms what the appropriate scale of renovation costs would be, particularly where they are not able to visit the property. Were CPC permitted to access the site, they would be able to undertake a structural survey. They also have access to a wide range of local professionals and trades people who would be prepared to contribute their services to a renovation project.

106. There is no dispute that a level of renovation will be required, however the CA is not in the position of the pub in the Neem Genie case which was fire damaged.

107. At the present time, it is plainly one realistic outcome that the CPC or a community interest group could secure funding and voluntary assistance from the community to carry out the works to the building.

108. The Appellants' case on viability is largely based on use of the CA in the period 2013 to 2016 during which they managed it. That is not however a direct template or precedent for how the pub could be managed if taken over by the community. The evidence of CPC is that there is very strong community support for the pub as a focal point for social events. It is therefore entirely realistic that the community pub operation could be viable and thus operate successfully.

109. The Appellants have not explained the detail of their proposed overage clause beyond recitation of certain principles. It is entirely realistic that in considering the sale of the property, there would be no overage clause imposed.

110. Whilst no bid has been submitted for the freehold, given the context, including the refusal to permit access to CPC, that is not determinative of the realistic options within the five year period. A sale or other relevant disposal to the CPC is plainly one realistic option within the five year period, even if this is not within the specific time limits under section 95.

111. As to the Bowling Green, the figure of £128,000 for renovation is the Appellants' own figure. However, there are a wide number of uses to which the site could be put, including but not limited to bowling. There is also a high level of community interest. It is therefore entirely realistic that the Bowling Green could be acquired and returned to community use within the five year period.

M Submissions on behalf of CPC

112. CPC was established on 1 December 2017 by a group of residents of Ercall Magna, the civil parish within which the CA is located. The main aims of CPC are to secure the restoration and operation of the CA as a public house together with its associated ancillary residential accommodation, Bowling Green, car park and access in order to serve the social wellbeing of Ercall Magna.

113. The CPC has registered an interest in acquiring the CA which, if successful, would be operated by CPC or a successor local community organisation on a not-for-profit or similar basis.

114. CPC has an ongoing programme of public meetings which are held at the Village Hall to help inform and update members of the local community on progress with the ACV nomination process. During the course of one of those meetings, a survey was undertaken of attendees' views of the uses to which the CA should be put in the event that it became available to the community.

The survey indicated strong support for the CA to be restored and operated as a public house and for the Bowling Green to be restored and reinstated. Wider community sentiment has been demonstrated in the form of a petition signed by 306 people expressing a wish for the CA to be retained as an operational pub.

115. Whilst the Appellants may argue that the CA was not supported by the local community, the feeling of many in the community is that the way the public house was managed under the Appellants' occupation and the level of service provided did not encourage custom. These included a lack of any food, a limited beer offer and poor ambiance. The fact that there are several public houses with a similar offer located slightly further afield within more remote locations and/or with fewer people residing within reasonable walking distance but which are viable and, in some case thriving, supports this view. The CPC sees no reason why the relatively simple elements of a food business model shown by these other pubs could not be replicated at CA.

116. With a population of 800 people already living within a reasonable walking distance and well over 100 additional new residents coming to live in the village in the next couple of years, the CA would have a local customer base exceeding that of much of the competition and it has the added advantage of being located in a prominent position for passing trade.

117. In order to progress the preparation of its bid for the CA, the CPC wrote to the Appellants on three occasions in early 2018 requesting access to the property by Chartered Surveyors /Valuers for the purposes of undertaking a structural survey and a valuation for the charity. The response took the form of queries as to the CPC's intentions and ability to raise sufficient capital to purchase the CA and the provision of a Bid Document setting pre-conditions for any bidder. Without access to the property, CPC's advisers are unable to provide independent advice on the works needed to rectify any damage caused to the interior of the property, the estimated cost of those remedial works or the current open market value of the property. It could not therefore satisfy the Appellants' bidding requirements and cannot produce a business plan for the reinstatement and operation of the CA.

118. The price stated on the Land Registry Title to have been paid for the land within the CA's title is shown as £185,000 and £33,000 VAT. The price paid at that time would ordinarily have taken account of the goodwill value based on previous years trading accounts as well as the property itself.

119. At this stage, CPC has no idea what the open market value of the CA is. If the internal condition is so bad and works required as extensive as the Appellants contend, then one would expect its value to be much lower than

the £210,881 book value shown in the accounts of John Charles Homes Limited.

120. The absence of a business plan cannot be considered fatal in the context of a public house where the proposal is that it be operated by a community based group on a not-for –profit basis or similar and may have potential to generate capital sums from other sources. Financial support has already been sought from the Community Pub Business Support Programme jointly funded by the DCLG and Power to Change which is administered by the Plunkett Foundation. This would provide up-front funding for surveys and valuations.

121. The five trustees of CPC are willing to provide funding to the charity on a loan basis but well below commercial rates. Whilst there are no formal commitments in place, this could realistically produce funding of £400,000.

122. There is also scope to vary the section 106 Agreement relating to the permitted housing scheme to reduce its affordable housing provision rather than the other contributions referred to by the Appellants and to apply the released extra value from the scheme to the restoration of the public house. This has been raised with the developer and with the Council. The developer is amenable to considering a variation but the Council has not yet expressed a view, although given the support shown by them for retention of the CA in the recent appeal and the absence of a local need for the scale of affordable housing secured through the section 106 Agreement, there is reason to believe they would not object. There is potential by this means to secure funding of £400,000 towards the CA's restoration.

123. The acquiring community would also be able to draw on the skills and expertise of a range of professionals and trades peoples, including a chartered accountant, a member of the Royal Institution of Chartered Surveyors, a Member of the Institute of Bankers, general builders, a plumber and a painter and decorator.

124. The Town and Country Planning regime would not in principle pose any particular obstacle for the re-establishment of the pub use. Internal alterations which do not materially affect the external appearance of the building would not require permission and any external works that might be required, perhaps to the rear of the building which were well designed and did not harm the Conservation Area, would be likely to secure consent.

N The Tribunal's Conclusion on the Second Issue

125. There is no material difference between the parties as to the law in this case. I have to decide whether it is realistic to think that there is a time in the next

five years when there could be a non-ancillary use of the CA (and its Car Park) and/or the Bowling Green that would further (whether or not in the same was as before) the social wellbeing or social interests of the local community. I do not have to be satisfied that such a use is the most likely, the more likely or the only use which could occur in the five year period. The test is one which, as the Tribunal has consistently held, may be satisfied notwithstanding that there may be several realistic uses of which a qualifying use is but one.

126. A number of previous decisions were cited to me as establishing principles, particularly in relation to (a) whether or not it is a pre-requisite of listing that a nominating body should produce a detailed proposal or worked up business plan demonstrating that the qualifying use is viable and sustainable (see Evenden Estates, Astim, Spirit Pub, Neem Genie); and (b) the relevance of the grant or refusal of planning permission (STO Capital, Sprit Pub).

127. I do not see those cases as establishing general principles other than that the planning status of the land and the degree of consideration given to the viability and sustainability of a qualifying use of the nominated asset by the proponents of listing, will be material to the decision on whether or not to list that asset.

128. How relevant and therefore the extent to which the absence or presence of a business plan and/or planning permission is to any particular decision, will be highly fact sensitive. For example, in the context of a recently closed public house in reasonable condition with accounts going back over a period of time showing good levels of profitability, there is (all other things being equal), less likely to be a need for a nominating body to produce a detailed business plan to support its nomination.

129. At the other end of the spectrum, there will be cases in which the nominated asset may have failed commercially over some years, been extensively marketed without success, fallen into disuse and disrepair and benefit from a recently granted planning permission for a new non-qualifying use. In such a case a nominating body may struggle to demonstrate that it is realistic to think that a qualifying use could be made nominated asset without a clear demonstration of how, financially, a qualifying use could be delivered in the five year period. These examples represent the two ends of a broad spectrum. Where on that spectrum any given case falls, will inevitably turn on its specific facts.

The CA

(i) Previous Trading History

130. Whilst there is some anecdotal evidence of the trading performance of the CA prior to the Appellants' occupation of it, there are no accounts dating to this period. However, I do note from the evidence that, although the Appellants stress the high turnover of licensees in the period 1988 to July 2013, the previous permanent licensees, Mr and Mrs Smith had run the pub from 2006 to 2011 up until the installation of a caretaker manager by Punch Taverns, following its decision to sell the CA in 2011. An apparently settled period of tenancy of five years is not indicative of a pub which lacks all profitability or has an inherent commercial weakness by reason of its location or catchment.

131. However, the evidence also shows that Punch Taverns did market the CA as a pub and failed to secure a purchaser, leading ultimately to the decision to sell it by auction. The absence of a purchaser may have reflected the asking price (the Smiths were apparently deterred from making an offer because of the high asking price), or other factors beyond viability, but the marketing history is not indicative of a particularly strong past trading performance. In this context, I also note that the Fleurets' report comments that the low rateable value of the CA does not indicate a pub with strong trade.

132. In the absence of any trading accounts for the pre-2013 period, I can give little weight to the claimed successful trading during that period.

(ii) The Condition of the Building

133. The condition of the building is relevant in two respects. Firstly, it goes to whether it is realistic to think that the building could be able physically to accommodate a qualifying use in the next five years. Secondly, it goes to whether the cost of the necessary works/repairs could realistically be borne by a qualifying use or otherwise provided for so as to be deliverable in that period.

134. Before me there is a range of reports and other documents setting out the works/repairs claimed to be necessary to support continued pub use, their projected cost and the value of the CA as it stands. However, there are problems with all of this evidence.

135. In relation to the Metrics Ltd costings, whilst the appraised Options 1 to 3 are the more limited in terms of intervention in the existing building fabric, they still include substantial demolition, alteration and substructure enhancements and single and two storey extensions as well as repair/refurbishment costs of the existing structure.

136. The Metrics Ltd costings do not purport to set out the minimum expenditure required to resume public house use to support, for example, the level of trade identified as Fleurets. They are costings of the options to realise the Appellants' ambitions for the building and their view on what would be a "*compliant"* building. As Mr Hickinbottom accepted at the hearing, there were many possible "*computations*" having regard to the future layout of a compliant building.

137. In this context, I note that the CA benefits from a premises licence, albeit this is presently suspended as the renewal fee has not been paid. This licence was granted following consultation with the Fire Authority and under it, the property appears to have operated to the satisfaction of the licensing authority. There is no evidence before me that any regulatory authority has required the extent of alteration proposed in any of the Options appraised by Metrics Ltd or would require them before the pub use is resumed.

138. Whilst Mr Hickinbottom may have expertise on the requirements fire safety in the context of aviation, nothing I have seen or heard persuades me that he has the appropriate experience to identify or advise on the essential regulatory requirements for pubs with accommodation or the minimum level of works required to secure compliance.

139. The consequence of the Approach taken by the Appellants is that the Metrics Ltd report includes large cost items, such as a two storey extension to provide a new staircase to the first floor living accommodation, which I am not satisfied would be required for pub use to resume in this building or would be the most cost effective means of addressing any requirement if it exists. For example, Mr Hickinbottom acknowledged at the hearing that there were alternative ways of providing a new staircase to the first floor which did not involve a two storey extension at the cost allowed for by Metrics Ltd.

140. Because it is simply not possible to disaggregate the Metrics Ltd costings in order to identify what sums would be required as a minimum to provide a serviceable pub based on the current floorspace, I can give the total costings in their report little weight in deciding the issue before me.

141. As to the Appellants' surveys and other documents, whilst Mr Hickinbottom has some past experience as a builder, none of this was recent or obviously comparable and therefore I must treat any view expressed by him as to the likely works involved, the time they would take and their costing, with considerable caution. I acknowledged that he has sought to introduce some objectivity into his reports, including reliance on BCIS data as the source of his costings, but for cost appraisals to be given any material weight they need the input either of a qualified quantity surveyor or a builder with a track record

of comparable development projects. Without that it is not possible to be satisfied that they are fair and robust. That evidence is lacking in this case and I give the Appellants' costings only very limited weight.

142. The Appellants have also sought to argue that the Metrics Ltd costings are now likely to be too light, as they do not include the costs of the repair/replacement of the roof, the external brickwork and the 14 period window frames at a minimum additional cost of £148,000. However, there are two problems with this argument.

143. The first is that it assumes that these costs, to the extent that they have to be incurred, would be incurred up front i.e. before pub use re-commenced. Whilst I can see that attending to the roof would be a priority for any building, nothing before me indicates that all of the windows would need to be replaced before the CA could be re-used as a pub. The Appellants argued at the hearing that the windows lacked thermal efficiency, but that would be appear to be poor justification for spending £28,000 as an upfront cost in advance of bringing the pub back into use.

144. Equally, the quotation for the works to the brickwork, does not indicate that this is work which needs to be urgently attended to as an upfront cost.

145. The Appellants' approach would involve loading costs onto re-use as a pub which would act as obstacles to its re-use. In contrast, the realistic outcome in my view is that, if these works are required, a purchaser would incur the costs over time as trading income allows. Phasing works is an obvious means of reducing start up costs and it is realistic to think that a purchaser of the CA would seek first to get the pub back in use at the earliest opportunity in order to generate some return on capital and then turn to address repairs which are not absolutely essential to trading.

146. The extent of repair/work necessary to facilitate re-use, the realistic detailed phasing of that repair/work and the costs repair are matters requiring appropriately qualified expertise. The Appellants are not qualified either by relevant experience or qualification on such matters, I therefore very little weight to their evidence on these matters.

147. The second problem with the Appellants' contention that yet more costs should be added to the Metrics Ltd's appraisals, is it assumes that these additional costs would be borne by the purchaser, as opposed to being reflected in the value of the CA i.e. as additional costs which any purchaser would seek to deduct from the purchase price. I agree with CPC that, one would expect the cost of repairs and other works which were not appreciated

in 2013 to impact on the current value of the CA in the market, subject always to the issue of any hope value which the site may have for development.

148. Moving to the issue of values, as with the cost of repairs, the Tribunal has been presented with little helpful evidence on the current value which the CA (with or without the Bowling Green) may have.

149. As to the evidence which is before the Tribunal, the 2013 purchase price was £185,000 plus VAT i.e £233,000 and can be said to have reflected the market value at that time when the building was in serviceable condition.

150. As to its current value, the Appellants' principal valuation appears to be based on the £325,000 asking price for the Bucks Head, Long Lane, Telford. However, asking prices are not good evidence of market value in the context of pubs, as is clear from the bundle before the Tribunal which show that the Bucks Head £325,000 asking price related to the May 2014 sales particulars. By June 2015, as the revised particulars show, the new asking price had reduced to £265,000. This was for a public house in apparently good condition with a rateable value of £27,500.

151. That may be compared with the rateable value for the CA quoted in the Fleurets report of £10,500. As I have indicated above, Fleurets make the point that the CA's rateable value suggests a relatively low historic turnover. The level of turnover clearly has a potential effect on value and I cannot be satisfied on the information before me that the Bucks Head is a relevant comparable for the purposes of valuation. Any relevance it may have is limited to indicating that the value of the CA in its present condition for public house use is likely to be less than the £265,000 asked for the Bucks Head in 2015.

152. Mr Hickinbottom referred at the hearing to an unsolicited offer of £275,000 for the CA which he had received from a developer. However, this was an informal offer and no agreement for sale is in place. I can attach no weight to such an offer in the absence of any evidence as to the basis upon which it is made.

153. Given the general inadequacy of the evidence before the Tribunal on repair/works, costs and values, it is necessary to focus on the best evidence available. In my view, that is to be found in the Fleurets report. This was prepared by a expert on the future viability of public houses who undertook independent analysis of the building as it existed at June 2016, its catchment and market competition, repair/refurbishment costs and the CA's value.

154. Fleurets concluded that, taking account of the age, location, style, configuration and accommodation of the CA, a Fair Maintainable Trade ("FMT") of £150,000 could be expected if operated by a reasonably efficient operator notwithstanding the competition. This assumed further investment and available capital to support the build up of the business, but not significant capital investment by way of extensions or remodelling of the building which their report concluded was of a satisfactory size for trading purposes although not efficiently laid out.

155. The Fleurets' viability appraisal showed that this level of trade would not support a viable business. That assumed a notional acquisition price of £185,000, a minimum repairs cost of £75,000, remuneration at £28,500 and annual payments on borrowed capital of £25,152. A similar view, albeit unsupported by any appraisals was expressed in Mathew Philips e-mail of 11 January 2018.

156. In terms of the costs of repair/work, whilst the Fleurets' report predated some of the more recent exploration of the CA's structure and repair by the Appellants and was expressed as a minimum figure, I give it significant weight. The author of the report is an expert in the viability appraisal of public houses and will have experience of the broad order of costs which a given building is likely to require in order to support the assessed FMT.

157. I accept that the £75,000 figure was expressed as a bare minimum and that this figure is likely, in 2018, to be significantly higher, given the current condition of the building which I viewed on the site visit. However, even allowing for a doubling or indeed tripling of the figure, to allow for the present condition of the building, the costs come nowhere near the Metrics Limited or other costings relied upon by the Appellants.

158. I am also not satisfied that any increased repair costs would necessarily leave the assumed value of the CA at the £185,000 used by Fleurets as opposed to a lower figure. A reduced acquisition cost would have the effect of reducing the capital expenditure required upfront , although I accept that any reduction would not necessarily reflect the total costs of the required repair/work, given the potential for some hope value here.

159. On the assumptions used in the Fleurets appraisal, the CA could not sustain a viable pub business. However, it assumed that the business would have to bear the cost or repairs and capital repayments on commercial terms as well as supporting the owner's remuneration of £28,500. It did not address the viability of a scheme supported by some element of enabling development, which is the Appellants' chosen model , one variant of which they pursued in their planning appeal. Similarly, there is no evidence that Matthew Philips

was asked to comment on pub use cross subsidised by some enabling development.

160. Whilst the planning appeal did not succeed, it related to a particular development scheme in the context of enabling development proposals which could not be secured in the context of the appeal before the inspector. It also turned on the evidence put before the Inspector. That is the context for the Inspector doubting the values which the enabling development was said to be able to generate and, in consequence, the viability of those clearly ambitious proposals.

161. I heard evidence from CPC on the plot values which have been used to inform the affordable housing requirement on the development to the north of the village and these values would support the Appellants' contention that, were it to secure a planning permission for residential development, the Bowling Green would have a value of £400,000. Whilst the Inspector who determined the planning appeal queried the robustness of that figure, largely on the ground that the development capacity of the site was untested, I am satisfied that if the whole of the Bowling Green did have development potential, its value would be in the region of £400,000.

162. There is also the potential availability of £400,000 from re-directed section 106 monies and/or the trustees of CPC.

163. The advantage of these sources of funding is that that they would not require loans to be taken out by the business on commercial terms and this offers the potential to materially improve its viability.

164. However, it is in not in my view realistic to think that investment in the business would occur by way either of a loan or the re-direction of section 106 monies without the lender or the Council being satisfied that the asset to be invested in provides adequate security for that loan/investment in the event that the pub were to close.

165. In this context, the value of the Bowling Green as a development site (£400,000) coupled with the value of the CA would, on any assessment, allow for a substantially greater level of repair/refurbishment work to the existing building so as to facilitate pub use than allowed for in the Fleurets appraisal, whilst still providing adequate security for any loan, even if the acquisition cost were still £185,000. Just by way of example, it would allow sufficient headroom for the exclusively refurbishment costs of between £170,000 and £180,000 identified by Metrics Ltd in the context of the extensive re-modelling options.

166. If the value of the public house is now higher, as the Appellants contend then, whilst that would increase the capital cost of reopening the pub, it may also increase the likelihood of loan finance being available potentially on favourable terms, because the value of the available security is likely to be greater.

167. In my view, on the evidence before me it is realistic to think that a pub use could be made of the CA (with its car park and beer terrace) in the next five years provided that provision for enabling development is secured on the Bowling Green. On the basis of the Fleurets report and having regard to the current condition of the ground floor which I witnessed on site, the scale of the essential repair/refurbishment work albeit principally limited to the ground floor of the CA is such that it is not in my view realistic to believe that re-use of the CA could occur in the next five years without the Bowling Green being sold for development, even with the less commercial approach to the business which CPC or another similar community group might adopt.

168. As to whether it is realistic to think that planning permission might be granted for enabling development of a scale which would support a value of £400,000, whilst residential development delivering no community benefit would be likely to be refused, the Council is clearly very supportive of the retention of the CA and its planning policies do allow for the loss of sports pitches such as a Bowling Green where the wider public benefits of a development, such as facilitating the retention of another community asset, outweigh the disadvantages of the loss of open space. The Bowling Green is sited outside the Conservation Area albeit adjacent to it and, I was presented with no evidence to indicate that this would necessarily impose any material constraints to maximising the site's development potential.

169. Although the Council in its evidence to the recent planning appeal queried whether the £400,000 value relied on by the Appellants was achievable, in that appeal, the need for enabling development was not properly established by the Appellants, whereas on the evidence before me, I consider that enabling development will be essential and the level of subsidy required will require the opportunity presented by the Bowling Green to be maximised.

170. I am therefore satisfied that it is realistic to think that the Council would grant planning permission for residential development on the Bowling Green of a sufficient scale to enable the bringing back into use of the CA.

171. Potentially, this would be a commercial scheme, a less ambitious version of the Appellants planning appeal scheme and one far less likely to suffer from the disbenefits which led to the dismissal of the appeal.

172. It would not need to involve CPC or any other local community group, but if it did, the viability may be strengthened because there may be no need for owner's remuneration and the repairs costs could be reduced through the philanthropic donation of time by the skilled persons who are supporters of CPC's objectives.

173. Whilst CPC have no business plan as yet, that is in part due to the absence of access to the CA to enable them to undertake surveys to support such a plan. I do not find convincing, the Appellants' contention that they have generated or made available more than sufficient information to enable the preparation of a business plan and a bid. As I myself have found, the evidence available clouds rather than crystallises the true costs and values and the best evidence, the Fleurets report, expressly acknowledges that the repair costs *may* be higher. In that context, it is entirely reasonable to expect that CPC would need to commission it own surveys before progressing matters and, in this context, I do not consider that the absence of a bid to date weighs against my conclusion that the pub has a viable future with enabling development.

174. However, given that I have found that it is realistic to think that re-use of the CA subsidised by some element of enabling development could occur in the next five years, potentially on a commercial rather than a charitable basis, the fact that CPC currently as one potential bidder has no business plan, is of little significance. In my judgment it is realistic to think that a commercial operator will be found for the opportunity which the pub (and its Car Park) and Bowling Green present subject to planning permission being granted for enabling development.

175. That conclusion is not altered by the Inspector's decision dismissing the planning appeal. The community value of the CA as identified by the Inspector as being important, would equally be a part of the operation appraised by Fleurets and assessed as capable of generating estimated sales of £150,000 which, for the reasons I have set out above, it is realistic to think could be viable with enabling development.

176. Equally, I give little weight to the Appellants' contentions that the company would not sell to CPC or would impose some form of overage clause to frustrate development. I see no reason why the owner of the CA, which is a company and not the Appellants themselves, would seek to frustrate a commercial solution to the future of the CA by refusing to sell or by imposing terms which would render a sale less likely.

177. The obligation on the Appellants as directors of the company is to act prudently in the company's interests and it is realistic to think that a sale,

whether or not to CPC, to facilitate a scheme involving enabling development, could be the required, prudent course to take in the next five years. It is equally realistic to think that the Appellants themselves might choose not to pursue a properly formulated and robustly supported planning application for enabling development. The enforcement notice if upheld, which is a realistic outcome of the appeal against it, would be an added incentive to secure the re-opening of the CA on this basis.

178. I therefore conclude that the section 88(2)(b) test is met in relation to the CA and its car park and the appeal in relation to it is dismissed.

The Bowling Green

179. The Bowling Green is now disused and overgrown. Whilst the costs of restoration lack robustness for the same reasons as the other cost estimates, there has been no suggestion that the costs of restoring the Bowling Green to a playable surface for bowls would be anything other than substantial. There is also no evidence before me that there is any prospect of the former members of the Bowls Club or anyone else being either able or willing to incur the likely expenditure for the required restoration.

180. Equally, nothing before me indicates that there is or would be any interest in the Bowling Green for any alternative community use unrelated to the CA. The Parish Council's nomination form and evidence and the evidence of CPC indentify no qualifying use which could be made of the Bowling Green in the next five years independent of use of the CA. The focus is on the pub. The reality is that the Bowling Green is a private, well screened open space in a rural village for which there are no obvious alternative uses, given the range of facilities already available. village.

181. In my view, any future it could have as a facility furthering social wellbeing or social interests, would only realistically be as providing some ancillary space for the CA, whether by way of a beer garden or otherwise.

182. However, given my conclusion that re-use of the CA will require the development opportunity presented by the Bowling Green to be maximised if that re-use is to be enabled, it is not in my view realistic on the evidence before me to think that any part of it could be used for a qualifying use in connection with the pub use in the next five years.

183. Any longer term potential community value the Bowling Green might be said to have is a matter for the Council to take into account as local planning authority applying its planning policies, in the event that any development

proposals are advanced for development of the Bowling Green and in the light of the evidence of its potential use at that time. It cannot justify inclusion in the LACV.

184. In these circumstances, I am not satisfied that the Bowling Green is appropriately included on the LACV whether or in part and the appeal is allowed in part.

O Conclusion

185. I accordingly find that the requirements of section 88(2) are satisfied in respect of the CA, its Car Park and beer terrace/garden but not as regards the Bowling Green. The Bowling Green should, accordingly, be removed from the Council's list kept pursuant to section 87.

11 July 2018 **JUDGE SIMON BIRD QC**