

Mr H Rai
Communities and Neighbourhoods
Melton Borough Council
Station Approach
Burton Street
Melton Mowbray
LE13 1GH

19th November 2017

Dear Mr Rai,

Asset of Community Value – car park of the Red Lion, Stathern

In response to the Council's letter of 2nd October 2017 and following our email exchange of 6th November 2017, please find attached our formal written response to the Asset of Community Value listing application of Stathern Parish Council dated 2nd October 2017.

We have retained the advice of specialist planning counsel in this matter who has provided expert advice on the ACV regime.

From the attached representation, you will see his confirmed advice that the car park cannot be listed under the legal tests in the Localism Act 2011.

Yours sincerely,



Karen and Wayne Hammond

Dear Mr Rai

Re: Our clients – BLZEE PUBS LTD

1. Please accept this letter as BLZEE PUBS LTD's response to the Asset of Community Value listing nomination for the car park of the Red Lion pub, Stathern (dated 2nd October 2017). This is the second listing application made this year in relation to land at the Red Lion pub, Stathern. The owners have taken advice from specialist counsel who has advised them as to the shortcomings of this listing nomination.
2. We would note that the Council's letter requested a nomination response by 30th October 2017. However, that letter was sent to the owners at the Red Lion address despite the pub being shut and the nominators supplying the owners' actual address. This letter of response has been sent as soon as possible after the owners discovering the letter at the pub on 6th November 2017.
3. The Act is clear that in order to designate a building or other land as an Asset of Community Value both parts (a) and (b) or section 8(1) or (2) must be satisfied. Given that the car park of the Red Lion pub is currently closed (since 2nd January 2017) section 88(2) applies:
 - (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.

4. The nominators have nominated the car park in respect of ancillary uses which do not fall within s.88(2)(a) of the Localism Act. The ‘not an ancillary’/‘non-ancillary use’ test within s88(2)(a)&(b) cannot be satisfied by any of the relied upon uses so that the listing is not confirmable at all.

Case law principles

5. There is no definition or guidance as to what non-ancillary means and therefore it is up to the authority to determine. However, there is extensive case law from the Tribunal which indicates some principles to consider in applying the test to the circumstances of this pub.
6. In a briefing paper for the House of Lords Report Stage prepared by Locality it was stated that ancillary meant “an incidental and minor feature of the use of asset”.
7. In the Kassam Stadium¹ case Judge Warren made the point that it is not necessary that the community use is the “primary use” (para. 9) which the legislators could have easily provided but omitted to do so. Rather it is necessary to look at the overall picture to ascertain whether the community use is a significant use in its own right in the context of the particular property and not subsidiary to another major use. All the circumstances will need to be looked at including the history of the building and the nature of the connection with the local community.
8. In Dorset County Council v Purbeck DC² the judge upheld the appeal against listing on the ground that the community use was ancillary use. School playing fields had been listed on the basis that they were used by two local sports clubs. The school closed and there was a proposal to sell the school for housing. The judge considered that he was dealing with a school and attached playing fields even though the school

¹ Firoka (Oxford United Stadium) Ltd v Oxford City Council – CR/2013/0010

² CR/2013/0004

was closed. In consequence the playing fields were ancillary to the school. However, this will not always be the outcome.

9. In Idsall School v Shropshire CC³ the listing of the playing fields of a private school was upheld. In that case there was significant use of the playing field through a community leisure centre which had a formal joint user agreement with the school.

10. This issue was also analysed by Judge Lane in General Conference of the New Church v Bristol CC⁴. The original and sole purpose was use as a church and this was the primary purpose on the facts. The building had been used for dance classes, Brownies and other such uses but this had dwindled to only one club on a regular basis. It was relevant that the running costs of the building were not being met by the community use. In consequence “the reality was that the church was still a church; not a community or social centre”. In consequence the uses were ancillary and the church should not have been listed.

11. Of course, every decision is fact specific and non-binding but these decisions raise some points that can, and should, inform the Council’s analysis as to whether the uses for which the nomination is made satisfy the non-ancillary test.

12. In this case it is apparent that a variety of community uses are relied upon for the listing.

<u>Past Uses</u>		
	Use	Frequency
	Car park use to	Presumably five

³ CR/2014/0016

⁴ CR/2014/0013

	attend school	days a week
	Car park use to attend church services and events	Primarily on Sundays
	Erection of marquees for fundraising events	Frequency unspecified
	10k run	Annual
	Duathlon	Annual

Not ancillary – s.88(2)(a)

13. In this case the car park uses claimed as having occurred in the recent past are all of an incidental or minor nature: use for infrequent events, brief use for school pick ups and drop offs, weekly use by members of the church. That is ‘ancillary’ for the purposes of the briefing paper to the House of Lords (cited above).

14. It is of note that the actual nomination form acknowledges that the uses that the nominators foresee for the car park would be unrelated to the pub (section 5).

15. In light of the Kassam Stadium judgement it is noteworthy that none of the relied upon uses are ‘significant’ uses: annual uses, brief drop offs, weekly church services.

16. Like the Purbeck case this car park remains a pub car park (even with the pub closed). In light of the Purbeck judgement it is clear that the car park uses are all ancillary to the pub use as the car park is an ancillary facility of the pub. This case is analogous to

Purbeck, whilst having no formal arrangements (indeed having had very few arrangements of any kind) like in the Idsall case.

17. The uses relied upon by the nominators in this case are analogous to those cited in General Conference of the New Church and like those make no contribution to the primary use of the land. To misquote Judge Lane, ‘the reality was that the [pub car park] was still a [pub car park], not a community [car park]’ and the uses are ancillary.
18. The owners would submit that the uses relied upon as having occurred in the past are all ancillary, incidental and minor and do not satisfy the test in s.88(2)(b) such that the pub car park cannot be listed.

All car park use is ancillary

19. Further, it is submitted that any use of the car park (whether for an off-site event or to frequent the pub) **must** be ancillary and as such the car park cannot be listed. In this the owners place particular reliance upon the reasoning of Judge Lane in Trowth v Shropshire CC⁵ where a car park had been nominated. The landowner argued that the use of the car park was ancillary to the use of the village hall. Judge Lane considered that whether a use is ancillary must be considered within the context of the unit which includes the nominated land. Dependent on the circumstances the unit may just be the nominated land or it may be a larger area of land.
20. The judge cited the example of a café or restaurant used by members of the local community in a garden centre (much like the local community in this case has used the car park separate from the pub).

⁵ CR/2015/0002

21. Judge Lane considered that Parliament could not have envisaged the ACV regime catching the café or restaurant. There was no threshold test which would prevent a nomination being made which limited the listing to the café or restaurant and so reliance had to be placed on the ancillary test. With the example suggested, the unit was the garden centre and the use of the cafe and restaurant would be ancillary to the use of the garden centre. What constitutes the unit for this purposes is a matter of fact and degree.

22. In the Trouth case itself the judge held that the car park was an independent unit rather than being part of a larger unit including the village hall. This was due to the history of different ownership and different uses and objectives of the car park and the village hall.

23. Following the decision in Trouth it is clear that land consisting only of a car park can be listed as an ACV if the use of it is not viewed as ancillary to the use of a larger unit. Those circumstances do not pertain here, the car park use is ancillary to the use of the wider site as a pub. The additional uses of the car park by members of the local community are minor and without the separation apparent in Trouth.

Non-ancillary – s.88(2)(b)

24. With regard to the non-ancillary test in s.88(2)(b) for prospective uses within the next five years it is submitted that the suggested future uses fall foul of exactly the same problem as the past community uses relied upon: they are all ancillary, minor, and incidental. **The same freestanding submission as to car park use always being ancillary is made again.**

<u>Prospective uses</u>	
Use	

Public car park	To access village shops, school, and church. It is understood that the shop marked on the nomination plan is now closed.
School use for cycling proficiency	Suggested possible use
Use to park school bus for trips	Suggested possible use
Use as car park for leisure walkers	Suggested possible use
Use as church car park for weddings or funerals	
Use as car park for play park	
Duathlon car park	Annual
Use for placement of recycling bins	Suggested possible use

The Council's previous decision

25. The uses relied upon by the Parish Council are the same as those in its previous application for ACV listing of 23rd January 2017. In considering that application the Council issued a decision letter dated 20th March 2017 where it is noted:

‘When considering the car park itself, from looking at the evidence submitted, it seems that the use is ancillary to the primary use of the land as a public house’.

26. The Council has considered a substantively same application on this piece of land and from the same evidence concluded that application to be for ancillary uses. The same conclusions should be reached here.
27. From the foregoing it is apparent that the listing nomination is flawed. The Council should not confirm the nomination. The uses relied upon by the nominating Parish Council, both past and prospective, are ancillary and therefore do not meet the test.