FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Community Right to Bid

Appeal Reference: CR/2015/0026

Heard at Field House
On 18 May 2016

Before

JUDGE PETER LANE

Between

HAMNA WAKAF LIMITED

Appellant

and

LONDON BOROUGH OF LAMBETH

First Respondent

CAMRA SOUTH WEST LONDON

Second Respondent

Representation:

For the appellant:	Mr David Elvin QC, and Mr Jonathan Wills, Junior Counsel, instructed by Messrs Freeths Solicitors, for the appellant
For the first respondent:	Mr George Laurence QC and Mr Simon Adamyk, instructed by the Solicitor, London Borough of Lambeth
For the second respondent:	Mr Geoff Strawbridge, CAMRA Regional Director and South West London Pubs Officer

DECISION AND REASONS

A. LEGISLATION

1. For present purposes, the relevant provisions are:-

Localism Act 2011

87 List of assets of community value

(1) A local authority must maintain a list of land in its area that is land of community value.

(2) The list maintained under subsection (1) by a local authority is to be known as its list of assets of community value.

(3) Where land is included in a local authority's list of assets of community value, the entry for that land is to be removed from the list with effect from the end of the period of 5 years beginning with the date of that entry (unless the entry has been removed with effect from some earlier time in accordance with provision in regulations under subsection (5)).

88 Land of community value

(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.

(3) The appropriate authority may by regulations—

(a) provide that a building or other land is not land of community value if the building or other land is specified in the regulations or is of a description specified in the regulations;

(b) provide that a building or other land in a local authority's area is not land of community value if the local authority or some other person specified in the regulations considers that the building or other land is of a description specified in the regulations.

(4) A description specified under subsection (3) may be framed by reference to such matters as the appropriate authority considers appropriate.

(5) In relation to any land, those matters include (in particular)—

(a) the owner of any estate or interest in any of the land or in other land;

(b) any occupier of any of the land or of other land;

(c) the nature of any estate or interest in any of the land or in other land;

(d) any use to which any of the land or other land has been, is being or could be put;

(e) statutory provisions, or things done under statutory provisions, that have effect (or do not have effect) in relation to—

(i) and of the land or other land, or

(ii) any of the matters within paragraphs (a) to (d);

(f) any price, or value for any purpose, of any of the land or other land.

(6) In this section—

"legislation" means—

(a) an Act, or

(b) a Measure or Act of the National Assembly for Wales;

"social interests" includes (in particular) each of the following—

(a) cultural interests;

(b) recreational interests;

(c) sporting interests;

"statutory provision" means a provision of—

(a) legislation, or

(b) an instrument made under legislation.

89 Procedure for including land in list

(1) Land in a local authority's area which is of community value may be included by a local authority in its list of assets of community value only—

(a) in response to a community nomination, or

(b) where permitted by regulations made by the appropriate authority.

(2) For the purposes of this Chapter "community nomination", in relation to a local authority, means a nomination which—

(a) nominates land in the local authority's area for inclusion in the local authority's list of assets of community value, and

(b) is made—

(i) by a parish council in respect of land in England in the parish council's area,

(ii) by a community council in respect of land in Wales in the community council's area, or

(iii) by a person that is a voluntary or community body with a local connection.

(3) Regulations under subsection (1)(b) may (in particular) permit land to be included in a local authority's list of assets of community value in response to a nomination other than a community nomination.

(4) The appropriate authority may by regulations make provision as to—

(a) the meaning in subsection (2)(b)(iii) of "voluntary or community body";

(b) the conditions that have to be met for a person to have a local connection for the purposes of subsection (2)(b)(iii);

(c) the contents of community nominations;

(d) the contents of any other nominations which, as a result of regulations under subsection (1)(b), may give rise to land being included in a local authority's list of assets of community value.

(5) The appropriate authority may by regulations make provision for, or in connection with, the procedure to be followed where a local authority is considering whether land should be included in its list of assets of community value.

90 Procedure on community nominations

(1) This section applies if a local authority receives a community nomination.

(2) The authority must consider the nomination.

(3) The authority must accept the nomination if the land nominated—

(a) is in the authority's area, and

(b) is of community value.

(4) If the authority is required by subsection (3) to accept the nomination, the authority must cause the land to be included in the authority's list of assets of community value.

(5) The nomination is unsuccessful if subsection (3) does not require the authority to accept the nomination.

(6) If the nomination is unsuccessful, the authority must give, to the person who made the nomination, the authority's written reasons for its decision that the land could not be included in its list of assets of community value.

92 Review of decision to include land in list

(1) The owner of land included in a local authority's list of assets of community value may ask the authority to review the authority's decision to include the land in the list.

(2) If a request is made—

(a) under subsection (1), and

(b) in accordance with the time limits (if any) provided for in regulations under subsection (5),

the authority concerned must review its decision.

(3) Where under subsection (2) an authority reviews a decision, the authority must notify the person who asked for the review—

(a) of the decision on the review, and

(b) of the reasons for the decision.

(4) If the decision on a review under subsection (2) is that the land concerned should not have been included in the authority's list of assets of community value—

(a) the authority must remove the entry for the land from the list, and

(b) where the land was included in the list in response to a community nomination —

(i) the nomination becomes unsuccessful, and

(ii) the authority must give a written copy of the reasons mentioned in subsection (3)(b) to the person who made the nomination.

(5) The appropriate authority may by regulations make provision as to the procedure to be followed in connection with a review under this section.

(6) Regulations under subsection (5) may (in particular) include—

(a) provision as to time limits;

(b) provision requiring the decision on the review to be made by a person of appropriate seniority who was not involved in the original decision;

(c) provision as to the circumstances in which the person asking for the review is entitled to an oral hearing, and whether and by whom that person may be represented at the hearing;

(d) provision for appeals against the decision on the review.

108 Interpretation of Chapter: general

(1) In this Chapter—

"appropriate authority"—

(a) in relation to England means the Secretary of State, and

(b) in relation to Wales means the Welsh Ministers;

"building" includes part of a building;

"community nomination" has the meaning given by section 89(2);

"land" includes—

(a) part of a building,

(b) part of any other structure, and

(c) mines and minerals, whether or not held with the surface;

"land of community value" is to be read in accordance with section 88;

"local authority" is to be read in accordance with section 106;

"owner", in relation to any land, is to read in accordance with section 107;

"unsuccessful", in relation to a community nomination, has the meaning given by sections 90(5) and 92(4)(b)(i).

(2) For the meaning of "list of assets of community value" see section 87(2).

(3) For the meaning of "list of land nominated by unsuccessful community nominations" see section 93(2).

Assets of Community Value (England) Regulations 2012

List of assets of community value

2.

A local authority must as soon as practicable after receiving information that enables it to do so make the following amendments to an entry on the list—

… … … … …

(c) remove the entry if—

(i) an appeal against listing is successful, or

(ii) the authority for any reason no longer considers the land to be land of community value.

Definition of local connection

4.—

(1) For the purposes of these regulations and section 89(2)(b)(iii) of the Act, a body other than a parish council has a local connection with land in a local authority's area if—

(a) the body's activities are wholly or partly concerned—

(i) with the local authority's area, or

(ii) with a neighbouring authority's area;

(b) in the case of a body within regulation 5(1)(c), (e) or (f), any surplus it makes is wholly or partly applied—

(i) for the benefit of the local authority's area, or

(ii) for the benefit of a neighbouring authority's area; and

(c) in the case of a body within regulation 5(1)(c) it has at least 21 local members.

(2) For the purposes of these regulations and section 89(2)(b)(iii) of the Act—

(a) a parish council has a local connection with land in another parish council's area if any part of the boundary of the first council's area is also part of the boundary of the other council's area; and

(b) a parish council has a local connection with land that is in a local authority's area but is not in any parish council's area if—

(i) the council's area is within the local authority's area, or

(ii) any part of the boundary of the council's area is also part of the boundary of the local authority's area.

(3) In paragraph (1)(c), "local member" means a member who is registered, at an address in the local authority's area or in a neighbouring authority's area, as a local government elector in the register of local government electors kept in accordance with the provisions of the Representation of the People Acts[1].

Voluntary or community bodies

5.—

(1) For the purposes of section 89(2)(b)(iii) of the Act, but subject to paragraph (2), "a voluntary or community body" means—

(a) a body designated as a neighbourhood forum pursuant to section 61F of the Town and Country Planning Act 1990[1];

(b) a parish council;

(c) an unincorporated body—

(i) whose members include at least 21 individuals, and

(ii) which does not distribute any surplus it makes to its members;

(d) a charity;

(e) a company limited by guarantee which does not distribute any surplus it makes to its members;

(f) a co-operative or community benefit society which does not distribute any surplus it makes to its members; or

(g) a community interest company[3].

(2) A public or local authority may not be a voluntary or community body, but this does not apply to a parish council.

(3) In this regulation "co-operative or community benefit society" means a registered society within the meaning given by section 1(1) of the Co-operative and Community Benefit Societies Act 2014, other than a society registered as a credit union.

Contents of community nominations

6.

A community nomination must include the following matters—

(a) a description of the nominated land including its proposed boundaries;

(b) a statement of all the information which the nominator has with regard to—

(i) the names of current occupants of the land, and

(ii) the names and current or last-known addresses of all those holding a freehold or leasehold estate in the land;

(c) the nominator's reasons for thinking that the responsible authority should conclude that the land is of community value; and

(d) evidence that the nominator is eligible to make a community nomination.

Procedure when considering whether to list land

7.

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

8.

A local authority which is considering whether land nominated by a community nomination should be included in the list must take all practicable steps to give the information that it is considering listing the land to—

(a) a parish council if any of the land is in the council's area;

(b) the owner of the land;

(c) where the owner is not the freeholder—

(i) the holder of the freehold estate in the land; and

(ii) the holder of any leasehold estate in the land other than the owner; and

(d) any lawful occupant of the land.

Appeal against listing review decision

11.—

(1) An owner of listed land may appeal to the First-Tier Tribunal against the local authority's decision on a listing review in respect of the land.

(2) The owner referred to in paragraph (1) may be either the owner who requested the review, or a subsequent owner of part or the whole of the land.

B. THE FACTS

2. The Grosvenor Public House, 17 Sidney Road, Stockwell, London, ran as a pub from the mid-nineteenth century until in or around August 2014. On 5 August 2015, Lambeth Borough Council ("the Council") received a nomination form in respect of the Grosvenor, seeking the listing of the property as an asset of community value under the 2011 Act.

3. The name of the organisation making the nomination was given as "Campaign for Real Ale Ltd – South West London Branch". On the nomination form, provided by the Council, the applicant was told to tick one or more of the appropriate boxes placed respectively against the expressions neighbourhood

forum; an unincorporated body with at least 21 members; a charity; a company limited by guarantee; an industrial and provident society; and a community interest company. A cross was placed in the box against "a company limited by guarantee".

4. Within the box headed "please state what your organisation does and what its main activities are (a) within the London Borough of Lambeth and (b) outside the Borough if applicable" the following was written:-

> "CAMRA, the Campaign for Real Ale is an independent, voluntary organisation campaigning for real ale, community and consumer rights.
>
> a- The South West London CAMRA Branch has 358 members in the London Borough of Lambeth.
>
> - The Branch contributes to the London Drinker magazine, which covers pubs in the area as well as London wide information.
>
> - We operate a network of volunteer District Representatives by postcode, maintain the WhatPub database of all our pubs and promote on our website the various festivals and other community events they may hold from time to time.
>
> - We provide the details and descriptions for those pubs voted for inclusion in CAMRA's annual Good Beer Guide.
>
> b- CAMRA supports well run pubs as the centres of community life – whether in rural or urban areas – and believe their continued existence plays a critical social role in UK culture. CAMRA also supports the pub as the one place in which to consume real ale (also known as cask-conditioned beer, or cask ale) and to try one of over 5,500 different styles now produced across the UK.
>
> - The Branch holds an annual Pub of the Year competition within its area comprising Merton and Wandsworth Boroughs and the SW postcodes of Lambeth. The current holder is the Eagle Ale House in Battersea. Previous winners include the Priory Arms in south Lambeth / Stockwell and the Trinity Arms in Brixton.
>
> - The Branch has held an annual beer festival for more than twenty years but sadly our venue, the grand hall at the Battersea Art Centre burnt down earlier this year".

5. In answer to the question "how many members does your organisation have?" the following answer was given:-

> "CAMRA has 173,000. 1,522 SW London Branch members, of which 358 live in Lambeth. 578 CAMRA members living in Lambeth spread over 3 Branches (Croydon and Sutton 29 and SE London 199.)".

6. The form contained the following request:-

> "If the organisation is an unincorporated body please attach the names and addresses of 21 members who are registered to vote in the London Borough of Lambeth".

No such names and addresses were included with the nomination form.

7. The name and address of the property was given as the Grosvenor Public House, 17 Sidney Road, London, SW9 0TP. A site plan showing the property and its boundaries was, apparently, supplied.

8. Section 4 of the nomination form was entitled "information to support the nomination: please state your reasons for thinking that the Council should conclude that the property is of Community Value and provide as much information as you can to support your application (to be continued on a separate sheet of paper if necessary)".

9. As completed, the box stated, in summary, that the Grosvenor was a local pub, where young and old came to relax and enjoy themselves. It was said to be "the heart of the local community". Each month an open session for musicians to play and learn folk music had been held. On most other nights the Grosvenor was said to have been "an important centre for social interests", including music of all kinds. A pool table was also provided and the Brixton Ping Pong Society was quoted as being sad to have to leave as a result of the closure of the Grosvenor. Reference was then made to the Lambeth local plan, in supporting the role of pubs in Lambeth. The response ended with a quotation from Councillor Gadsby, who paid tribute to the Grosvenor having "a long history of not just being a well run pub with great relations with its immediate residential neighbours, but also a great part of Brixton's local artistic community". As well as music, the Grosvenor had been used, according to Councillor Gadsby, by a variety of groups for community events.

C. LISTING AND REVIEW

10. The Council's ACV panel concluded on 12 August 2015 that the Grosvenor should be listed as an asset of community value. The appellant sought a review of that decision on the basis that:-

> (a) the nomination was not a community nomination within the terms of section 89(1)(a) and (2)(b) of the 2011 Act, as it was not made by a voluntary or community body; and

(b) in any event, it was not realistic to think that the Grosvenor would be used for purposes falling within section 88(2)(b) at a time in the next five years.

11. The review was undertaken by Ms Sophie Linton, the Council's Head of Valuation and Strategic Property Services. She set out the essence of the first ground of challenge as follows:-

> "The evidence provided by the Nominator does not suggest that CAMRA 'central' gave any particular sanction to the Grosvenor nomination. But was it fatal to the nomination that the Nominator ticked the wrong box on the nomination form, but was in all respects a community nomination, given the number of local residents who are members of the very Branch which made the nomination? In other words, could the regulation 5(1)(e) arguments be set aside if we find in fact that the SW London Branch qualifies under regulation 5(1)(c) and so the 'nexus' argument is negated?"

12. Ms Linton noted that George Laurence QC had provided an opinion to the Council, in which he advised that even if it was established on review that the evidence was insufficient to show that the nominator was a qualifying company and was thus ineligible to make a community nomination on that ground, the listing could still be upheld if, in the course of the review, further evidence was adduced which showed that the nominator was a qualifying unincorporated body. In any event, according to Mr Laurence, "the overwhelming probability was that the requirement (i.e. at least 21 members of those living in Lambeth were on the electoral role) was satisfied".

13. Having noted the appellant's submission that it could not be assumed that members of the CAMRA Branch would be happy to have their names put forward in order to fulfil the "electoral role test," as they may face legal consequences for being a party to the proceedings, Ms Linton noted that, for the purposes of an appeal, individual members of the nominating group would not themselves be party to the proceedings by reason of having their names put forward.

14. So far as ground (a) was concerned, Ms Linton concluded that CAMRA's SW Branch was a qualifying unincorporated body within regulation 5(1)(c). She therefore dismissed the challenge brought on that ground.

15. Turning to ground (b), Ms Linton observed that, subsequent to the listing of the Grosvenor, the appellant had entered into an agreement for a lease (25 September 2015) with the Co-Operative Food Group, in respect of the ground floor of the property, for a term of fifteen years. In this regard, Ms Linton noted that the effect of the Town and Country Planning (General Permitted Development) (England) Order 2015 was that, as from 15 April 2015, a building used for a purpose falling within class A4 (drinking establishments) which is

listed as an asset of community value under the 2011 Act does not enjoy the permitted development rights, which would otherwise be conferred by the Order, in respect of the change of use of the building to one falling within class A1 (shops) or class A2 (financial and professional services). Ms Linton accepted the advice of Mr Laurence, which was that in determining whether the Grosvenor met the requirements of section 88(2) of the 2011 Act, it was relevant to take account of the fact that, as a listed asset, conversion from pub to shop use would require an express grant of planning permission.

16. Ms Linton also took account of the fact that the appellant had applied to the local planning authority for conversion of the upper floors of the Grosvenor to residential use (that is to say, from class A4 to class C3). At the time of the review, that application had not been determined. It nevertheless showed, according to Ms Linton, that there were "still a number of possible outcomes, and one of those, assuming the application for residential use is accepted, is the possibility of making a pub/community use on the ground floor more viable because there could be a significant rent roll from the letting of the flats above". Alternatively, she considered that the owner might convert the upper floors to "some kind of hotel/guest house/Air B and B operation which is more in keeping with there being a pub on the ground floor, and thereby the whole property may be converted into a pub/hotel".

17. For those reasons, Ms Linton's review decided that the Grosvenor should remain listed.

D. CAMRA AND ITS BRANCHES

18. The Campaign for Real Ale Limited is a private company limited by guarantee under the Companies Act 2006. Its articles of association designate the directors of the company as its "National Executive". Amongst the company's objects are protecting the interests of all those who wish to drink beer; campaigning for an improvement in the quality and variety of British beer; and promoting and fostering activities concerned with the consumption of good quality beer. In furtherance of its objects the company has power, amongst other things:-

> "h. to establish and support Branches whose objects are the same as the objects of CAMRA and to supply or aid in the establishment and support of clubs or association whose objects are sympathetic to the objects of CAMRA".

19. The income and property of CAMRA whencesoever derived is to be applied "solely towards to the promotion of the objects of CAMRA as set forth in these Articles, and no portion thereof shall be paid or transferred directly or indirectly, by way of dividend, bonus or otherwise howsoever by way of profit to the members of CAMRA …". Upon the winding up or dissolution of the company, any surplus assets "shall not be paid to or distributed among the members of

CAMRA but shall be given or transferred to some other institution or institutor having objects similar to the objects of CAMRA …"

20. Article 12 provides that:-

> "12. No member may make any public statement or announcement in the name of CAMRA without the consent of the National Executive".

21. The Articles make provision for the powers and duties of the national executive. Article 56 enables the national executive to delegate any of its powers to committees of members, provided that any such committee conforms to any regulations that may be imposed upon it by the national executive.

22. CAMRA's internal policy document 2014-2015 contains a model Branch Constitution. All Branches of CAMRA are required to adopt the most recent such model "which gives instructions on the way that all Branches shall operate". Any alteration to the model Constitution proposed by a Branch must be approved by the National Executive or a duly authorised representative.

23. Paragraph 1.31 sets out what Branches of CAMRA are expected to do. Paragraph (j) requires a Branch to:-

> "Liaise with local planning departments and licensing authorities to discover which pubs are threatened with closure or alteration and take any appropriate action and to seek agreement that the relevant CAMRA Branch is informed whenever a planning application is received in respect of licensed premises".

24. Paragraph 2.2, under the heading "Finances", says:-

> "From the memorandum of articles of association of a campaign (sic) and from the Model Branch Constitution contained herein, it follows that CAMRA is not a loosely affiliated grouping or federation of individual Branches but rather one large organisation whose members choose to organise the campaign's activities through a network of Branches".

25. The model Branch Constitution provides that the objects of the Branch are to support the aims and objectives of the Campaign for Real Ale Limited within a specified geographical area. The Branch is required to observe the regulations for Branches laid down from time to time by the national executive. As for membership:-

> "3.4 Membership: any member of CAMRA living within the geographical area of the Branch is allocated to that Branch. Any other member of CAMRA may apply to become a member subject to the approval of the Branch committee who may refuse membership without assigning any reason.

> 3.5 If any member of the Branch shall cease to be a member of CAMRA his membership of the Branch will automatically terminate".

26. The model Constitution also makes provision for meetings of the Branch and for the creation of a Branch committee. The assets of the Branch "shall be under the control of the Branch committee and no payment shall be made out of the Branch monies except by the authority of the Branch committee".

27. Paragraph 3.17 makes provision for winding up of the Branch. This may occur by reason of the action of the national committee or by a special general meeting of the Branch called for that purpose, followed by at least a two thirds majority in favour of winding up "upon dissolution the assets shall be used firstly to pay off all proper liabilities of the Branch and any surplus thereafter shall be paid to CAMRA".

28. An internal memorandum from the "Chair of key campaign number two, Paul Ainsworth" to the "regional directors (England only)" of 18 June 2015 was written in order to provide "an update on our new campaign to increase the number of pubs registered as assets of community value (ACV) and the support that is available to Branches".

29. The memorandum was written in the light of the Permitted General Development Order 2015, which was considered to give "CAMRA Branches in England a real opportunity to actively protect pubs in their area by nominating them to be registered as ACVs ..... . To encourage all Branches, including those with no prior knowledge of the ACV process, CAMRA will launch a new in-house support service to assist CAMRA Branches with nominating pubs as ACVs in the next week". Amongst the things to be offered was an "online nomination service" to enable Branch officials to complete a short online form for each nomination, which would then be processed to produce a "pre-populated local Council nomination form", which would be returned to local Branches for the Branch to approve and submit to the Council in question. However, "CAMRA's support service will play a facilitating role in CAMRA Branches and members will still play a pivotal role in the process".

30. A further CAMRA internal memorandum, dated 8 April 2016, described how "CAMRA Branches are working hard at the local level to engage with local Councils to list pubs of assets of community value". The memorandum sought to explain the benefits of a Branch having a good relationship with its local Council, together with tips for contacting that Council. The memorandum said that:-

> "In some instances, CAMRA Branch nominations are being rejected on the basis that Councils do not understand the structure of our organisation and the local connection the Branch has to the area. Contacting the Council in the first instance can therefore be the difference between a pub accepted or rejected onto the Asset Register. Building good relationships also means the

Council have a contact in the CAMRA Branch should any local issues arise and may consult you on other local issues regarding pub protection".

31. The memorandum included a proposed draft letter to be sent by a Branch to the relevant Council. The following passages are of particular significance:-

> "I am writing on behalf of the X Branch of CAMRA, the Campaign for Real Ale, with regards to our campaign to nominate pubs as 'assets of community value'.
>
> The CAMRA Branch represents X number of members in your local authority area, who are all passionate about keeping pubs in the local area alive …
>
> As outlined in the 2011 Localism Act, there are a number of relevant bodies who are eligible to submit nominations. These include:
>
> 1 Parish Councils. This may be for an asset in its own area, or a neighbouring parish Council.
>
> 2 Unincorporated groups. These are groups of people with a membership of at least 21 local people who appear on the electoral role within the local authority or neighbouring local authority area.
>
> 3 Neighbourhood forums
>
> 4 Community interest groups with a local connection
>
> 5 A charity
>
> 6 A company limited by guarantee which does not distribute any surplus it makes to its members.
>
> CAMRA, the Campaign for Real Ale, is an independent consumer organisation campaigning for real ale, community pubs and consumer rights. CAMRA is a company limited by guarantee, registered in England with company number 1270286. CAMRA's national surplus is not distributed to its members and the individual CAMRA Branch activity where the pub is nominated is wholly or partly applied to the local authority area. The local CAMRA Branch submitting this nomination does not distribute any surplus it makes to its members in line with Section 5 of the regulations. The CAMRA Branch has a local connection as demonstrated by the following activities which are run and funded by the Branch within the local authority district:
>
> … … … … …
>
> Our nominations to list pubs as ACVs are being submitted by the CAMRA Branch in line with Judge N J Warren's First-tier Tribunal General Regulatory Chamber decision in *St Gabriel Properties Limited -v- London Borough of Lewisham and South East London Branch of CAMRA …* the decision outlined that CAMRA and its local Branches can be treated in a 'hybrid' way and relies

> upon CAMRA's status as a company limited by guarantee which does not distribute any surplus it makes to its members as well as the local Branch's own activities that provide a local connection with the land/property nominated …".

E. THE POSITION REGARDING PLANNING PERMISSION

32. On 7 March 2016 the Council, as local planning authority, issued a draft decision notice which, when implemented, will grant planning permission to the appellant for the change of use of the upper floors of the Grosvenor from public house (A4) use to residential (C3) use, including the erection of single storey extensions at first floor level and the formation of balconies with privacy screens at first and second floor levels, so as to provide self-contained residential units. Also to be permitted are an erection of a single storey ground floor rear infill extension to the public house and the installation of a roof cover over the existing rear yard.

33. Amongst the conditions that would be imposed in respect of this permission is the following:-

> "3. The premises on the ground floor and ancillary basement level shall be used for a Public House and for no other purpose (including any other purpose in class A4 of the Schedule to the Town and Country Planning (Use Classes) Order 1987 (as amended) and Town and Country Planning (General Permitted Development Order 1995 (as amended)).
>
> Reason: to ensure the retention of the public house in accordance with Policy ED8 of the Lambeth local plan (2015)."

34. In connection with the present appeal, on 4 May 2016, the appellant submitted "further representations on behalf of the owner", exhibiting a draft agreement made pursuant to section 106 of the Town and Country Planning Act 1990. These representations said that the section 106 agreement, prepared in conjunction with the draft planning decision, would be executed "imminently" by the appellant. Accordingly, the appellant contended that, even if the remainder of the Grosvenor were to be found to meet the "test in the Localism Act 2011", the part of the property that is to be converted to for self-contained flats would not do so, and so should be excluded from listing in any event.

35. The draft section 106 agreement makes provision for a number of matters, including a contribution by the appellant to the Council in respect of affordable housing. The recitals to the draft agreement record, amongst other things, that:-

> "F. Having regard to the provisions of the Lambeth local plan (2015), the national planning policy framework and the planning considerations affecting this Site, the Council considers that the Development ought only to

> be permitted subject to the terms hereof and determine to grant the permission by delegated authority exercised on 5 August 2015".

36. Upon the execution of the section 106 agreement, the Council will grant planning permission in accordance with the terms of the draft decision.

F. THE APPEAL

37. The appellant appealed against the Council's decision on the listing review. The hearing of the appeal took place on 18 May 2016.

G. TRIBUNAL DECISIONS

38. Two decisions of the Tribunal are of particular relevance to the issues in this appeal. We have encountered the first in Part D above. St Gabriel Properties Limited v London Borough of Lewisham and CAMRA – South East London Branch (CR/2014/0011) concerned a pub known as the "Windmill" in Sydenham. An issue raised by the appellant in that case was that CAMRA South East London did not fall within regulation 5(1)(c) because it was not an unincorporated body but, rather, a branch of a body corporate. Although CAMRA itself could fall within regulation 5(1)(e), the appellant submitted that "national CAMRA did not have a local connection within regulation 4. In any event it was not the national organisation which made the nomination but its South East London Branch" (paragraph 15).

39. Judge Warren made the following findings:-

> "19. At one point during the hearing, it was suggested on behalf of Lewisham that a national body such as CAMRA might be taken to fulfil the definition of 'local connection' in regulation 4 unless it could be shown that its national activities did not impinge upon the relevant local authority and its neighbours. I am unable to accept that submission. It seems to me to be implicit in section 89(2) of the Act that a 'community nomination' cannot come from a national organisation relying solely on its national activities. Something more by way of local connection is required.
>
> 20 The case is different, in my judgement, subject to the facts of any one individual case where a national charity or national company limited by guarantee also has a network of branches. In these circumstances, to regard a local branch and a national organisation as legally separate does not accord with actualities or with the purpose of the statute. It seems to me to be entirely artificial to regard a branch's link with a national organisation as strong enough to prohibit the branch from having an independent existence under reg 5(1)(c) and yet not strong enough to permit the branch to take advantage of the national organisation status under regulation 5(1)(e). A proper application of the regulations, in my judgment, treats organisations

> such as this in a hybrid way. CAMRA South East London Branch is entitled to rely on CAMRA's status as a company limited by guarantee which does not distribute any surplus it makes to its members in order to satisfy Regulation 5(1)(e). It is then entitled to rely on its own activities in order to satisfy Regulations 4(1)(a) and (b) and I find those sub-paragraphs to be satisfied in this case.
>
> 21. I should record that, for Lewisham, Mr Hopkins also submitted that the South East London Branch satisfied regulation 5(1)(c) as an unincorporated body. I prefer to rest my decision on what I regard as the proper and realistic approach to national organisations with local Branches. However, if I am wrong in this approach then I would accept this submission. 'Unincorporated body' is a broad term which includes community groups of any descriptions. St Gabriel Properties correctly point out that the Branch Constitution, unlike CAMRA's national articles of association, does not prohibit distribution of any surplus to members. There is no requirement, in my judgement however, for an unincorporated body within Reg 5(1)(c) to even have a written constitution; let alone a further requirement that a particular clause should be included.
>
> 22. Taking into account the branch's link with CAMRA nationally, and having heard evidence of what the branch actually does with its money, I consider that, as a matter of fact, CAMRA South East London Branch would satisfy Regulation 5(1)(c)(ii)."

40. In Mendoza Limited v London Borough of Camden and Carpenters Arms Supporters (CR/2015/0015), the Tribunal found that there was no requirement in the legislation for a voluntary or community body falling within regulation 5(1)(c) to be an unincorporated association, involving contractual obligations as between its members, or for the membership of the unincorporated body to be capable of comprehensive identification, provided that it included at least 21 identified individuals.

G. THE COMPETING ARGUMENTS

(1) The appellant

41. The case for the appellant essentially remains the same as it was at the review, although it was substantially elaborated by Mr Elvin QC both in writing and at the hearing. Section 89(1)(a) provides that – except where permitted by regulations made by the Secretary of State, etc. – land may be listed as an asset of community value only in response to a community nomination. Section 89(2) defines a "community nomination" as one which complies with paragraphs (a) and (b). Where section 89(2)(b)(iii) applies, the nomination must be by a "person" (as defined in the Interpretation Act 1978) that is "a voluntary or community body with a local connection". In order to meet the definition of "local connection", the body must satisfy the requirements of regulation 4. In order to be "a voluntary or

community body", the body must satisfy the relevant requirements of regulation 5. In addition, a community nomination must satisfy the requirements of regulation 6, as to the description of the nominated land, information regarding current occupants, owners and lessees, the reasons for thinking that the land is of community value and evidence that the nominator is eligible to make a community nomination.

42. According to the appellant, it was impermissible for a nomination that purported to be a community nomination made by a company limited by guarantee falling within regulation 5(1)(e) to be treated by the Council as a nomination falling within regulation 5(1)(c); that is to say, one made by an unincorporated body, which includes at least 21 individuals and which does not distribute any surplus to its members. The requirement in regulation 6(d) that the nomination should include "evidence that the nominator is eligible to make a community nomination" reinforced the fact that one could not, in effect, treat one form of purported community nomination as if it were another form.

43. It was, Mr Elvin said, also important to observe that section 89(2)(b)(iii) required the community nomination to be by "a person that is a voluntary or community body". "Person" is defined in the Interpretation Act 1978 as including "any body of persons corporate or un-incorporate". It was, accordingly, not enough to be an unincorporated body; one needed to be a person as well.

44. Mr Elvin submitted that the Regulations needed to be construed strictly, since the effect of listing under section 87 involved significant restraints upon property rights. He pointed to the changes that had occurred in the regime relating to general permitted development and to the fact that listing was a material consideration in determining planning applications.

45. According to the appellant, the nomination form, with the cross placed against the box relating to a "company limited by guarantee", showed plainly that the nominator was being described by reference to regulation 5(1)(e). A reading of CAMRA's articles of association and associated documents showed that CAMRA Branches in fact have no independent legal identity and that CAMRA is a "single organisation". CAMRA's internal memoranda demonstrated that CAMRA Limited leaves the nomination of assets of community value to its Branches. CAMRA Limited plays only a supporting role.

46. Both the appellant and the first respondent were, Mr Elvin said, agreed that there was no evidence to support a conclusion that, as a matter of company or agency law, CAMRA SW London Branch had been authorised by the Campaign for Real Ale Limited to make a community nomination in the company's name in respect of the Grosvenor. On the contrary, the company expected the Branches to make nominations.

47. The second respondent's statement of case was, according to Mr Elvin, confused as to the basis upon which the purported nomination of the Grosvenor had been made. At paragraph 16.1.18 of the statement, it seemed to be suggested that the SW London Branch did not, in fact, make the nomination as an unincorporated body.

48. Mr Elvin parted company with Mr Laurence on whether the reviewer, Ms Linton, had been entitled to view the nomination as made under regulation 5(1)(c). The community nomination had to be viewed by reference to what was in the nomination form submitted to the Council. The basis of nomination could not be reformulated at the review stage. The Tribunal in the St Gabriel decision had been wrong to conflate the statuses of Campaign for Real Ale Limited and its Branch in order to bring the nomination within regulation 5(1)(e). Both the appellant and the first respondent were agreed on that matter. They were not, however, agreed on the Tribunal's alternative finding that the Branch met the requirements of regulation 5(1)(c).

49. Mr Elvin noted that Mr Laurence, in his written materials, had relied upon the case of R (Warden and Fellows of Winchester College and Another) v Hampshire County Council [2008] EWCA Civ 431. In that case, the court held that an application to modify a definitive map by upgrading certain rights of way to byways open to all traffic had to be made in accordance with all of the requirements of paragraph 1 of Schedule 14 to the Wildlife and Countryside Act 1981, in order for the rights of way to be safe from extinguishment by the operation of section 67(3) of the Natural Environment and Rural Communities Act 2006, because section 67, on its true construction, made compliance with those requirements mandatory for the purposes of section 67(3) (my emphasis).

50. The court drew a distinction between what section 67 of the 2006 Act required, on the one hand, and the wider question of whether it was open to the council in that case:

> "to treat an application which was not made in accordance with that paragraph as if it had been so made because the failure could be characterised as a breach of a procedural requirement rather than a breach which was so fundamental that (to use the judge's language) the application failed to 'constitute an application' at all. I readily accept that the wider question is relevant and important in the context of applications made under section 53(5) generally and whether an authority has jurisdiction to make a determination pursuant to paragraph 3 of Schedule 14" (paragraph 36).

51. At paragraph 67, the court (per Dyson LJ) found that:-

> "The judge was right on this issue. As Mr Mould submits, the correct approach is to apply ordinary public law principles. Insofar as there is shown to have been a failure to comply with the procedural requirements of paragraph 2, it is necessary to ask whether and, if so, to what extent any

> substantial prejudice has been suffered as a result. On the facts of this case, the Council was entitled to waive the failure to comply with the procedural requirement.
>
> 68. In my view, the difference between the failure to comply with paragraph 1 (the first issue) and the failure to comply with paragraph 2 (the second issue) is fundamental. As I have explained, in the first case the effect of section 67(6) was that section 67(3)(a) was not engaged and section 67(1) applied. It was irrelevant whether the failure was a breach of a procedural requirement which could be waived. On the other hand, in the second case section 67(6) is not in play. The only question here is whether the determination was a determination under paragraph 3. On the face of it the Council unquestionably decided to make a determination …"

52. According to Mr Elvin, the Winchester College case supported the appellant. The requirements in the legislation with which the Tribunal was concerned were, in effect, analogous with those in section 67 of the 2006 Act.

53. On the issue of future realistic use, Mr Elvin submitted that the antithesis of "realistic" was not, as the Tribunal had elsewhere suggested, "fanciful". According to the Shorter Oxford English Dictionary, "realistic" meant "tending to regard things as they really are; characterised by a practical view of life" whereas "fanciful" meant "suggested by fancy; imaginary, unreal". Thus, according to Mr Elvin, something could be not "realistic" even though it was more than "fanciful".

54. Marketing reports submitted by the appellant had demonstrated the lack of interest in continued use of the Grosvenor as a pub. So far as the condition attached to the draft planning decision was concerned, Mr Elvin said that the Co-Operative had taken an agreement for a lease. Once the section 106 agreement was signed, it was realistic to think that the owner would carry out the residential development of the upper floors and let the ground floor to the Co-Op. Such a store would not, in the circumstances, amount to a social asset, contrary to Mr Laurence's submission, since a store in the Grosvenor would not constitute the sort of social lifeline that, say, a shop in a rural location might do.

55. Mr Elvin urged the Tribunal to address the section 88(2) test without regard to the fact that the current listed status of the Grosvenor meant that conversion from pub to shop use would require express planning consent.

(2) The Council

56. For the Council, Mr Laurence submitted that what separated his client's position from that of the appellant was regulation 6. The appellant's stance was that unless each of the requirements in paragraphs (a) to (d) was met, the nomination could not amount to a "community nomination" for the purposes of

the 2011 Act. Any such "threshold failure" could not, accordingly, subsequently be rectified.

57. The Council's approach was more nuanced. If on its face the nomination "fairly" satisfied regulation 6, then evidence could subsequently be admitted to make good what might have been an initial omission in the nomination.

58. Mr Laurence proceeded to "test" the appellant's stance by reference to the paragraphs of regulation 6. Accordingly, if the land as set out in the verbal description was inaccurate to some extent or if the delineated boundaries on the plan were slightly incorrect, then, on the appellant's stance, this would doom the nomination, without possibility of repair. The same point could be made of regulation 6(b). As for regulation 6(c), Mr Laurence asked rhetorically what the position might be, according to the appellant, if the nominator subsequently thought of other reasons for the nomination. In short, if the nomination was in any way deficient, then, according to the appellant, any attempt to rectify this had to be ruled out.

59. Mr Laurence said that if it were to be accepted that rectifying material could be adduced before the Council made its decision whether to list, then it was difficult to see why such material could not be adduced in connection with the review stage of the process, such as happened in the present case. The first respondent's approach to the legislative requirements, in short, enabled the latter to operate in a sensible manner.

60. It could not be right, Mr Laurence argued, that placing a tick or a cross in the wrong box in the nomination form meant that the Council could not treat the nomination as made on what was evidently the correct basis; in this case, regulation 5(1)(c). So far as concerned the requirement to have at least 21 local members, defined in regulation 4(3) as a member registered as a local government elector in the relevant register, Mr Laurence said that there was nothing legally wrong in such a list being supplied after the nomination. In any event, it must be possible in law to satisfy regulation 4(3) otherwise than by direct reference to the register; for example, if that register had been physically destroyed.

61. So far as the Winchester College case was concerned, Mr Laurence said that Dyson LJ had drawn a clear distinction between, on the one hand, the need for the purposes of section 67(6) of the 2006 Act to make the application exactly in accordance with the requirements of the 1981 Act and, on the other hand, the fact that in all other circumstances it was permissible for the council to waive requirements and treat the application as compliant with the legislation. In the case of the 2011 Act, Mr Laurence submitted that Parliament had, in effect, made provision for such waiver, by including the legislative requirement for there to be a review, when fresh evidence could be adduced.

62. Mr Adamyk addressed the Tribunal on the position of CAMRA under company and agency law. In order for a CAMRA Branch to bind the company, the Branch needed to have express, implied or apparent authority to act on behalf of the company. The CAMRA material before the Tribunal demonstrated that no such authority existed in the present case. The St Gabriel case was wrongly decided, in that the Tribunal had impermissibly conflated the different "heads" set out in regulation 5. The Regulations could be taken to have been made against the background of established company and agency law.

(3) CAMRA

63. For the second respondent, Mr Strawbridge said that in his view there was no "CAMRA Central" and that CAMRA's Branches did not do anything other than on behalf of CAMRA. CAMRA had followed the approach taken in the St Gabriel case but, in the light of recent experience, it had now been decided that a Branch nominating a pub as an asset of community value would include in the nomination a "statement of support" letter from the Campaign for Real Ale Limited, making it plain that the Branch "is acting on behalf of and with full authority of the Campaign for Real Ale (CAMRA). CAMRA is a limited company, registered in England with company number 1270286".

64. So far as section 88(2) was concerned, Mr Strawbridge submitted that the draft planning decision notice, containing the condition requiring pub use of the ground floor and cellar of the Grosvenor, meant that it was plainly realistic to expect such a use to occur. Mr Strawbridge contended that the involvement of the Co-Op could not be regarded as a "given".

(4) The appellant in reply

65. In reply, Mr Elvin said that the difference between the appellant and the first respondent was not about the nature of supplementary evidence in relation to regulation 6. Rather, it had to do with the question of whether one could change the identity of the nominator at the review stage, and the basis of the community nomination. Mr Elvin accepted that supplementary material could be used at a post-nomination stage; for example, evidence clarifying the boundaries of the property. What the present appeal was about, however, was an attempt to change the identity of the applicant. There was, according to Mr Elvin, a "world of difference" between, on the one hand, some uncertainty regarding the extent of the nominated property and, on the other hand, the nature of the bodies concerned for the purposes of regulation 5.

66. As for section 88(2), Mr Elvin said that the appellant's stance on the draft planning decision in the section 106 agreement was as follows. The appellant intended to execute the agreement, with the result that the Council would grant planning permission in the terms of the draft decision. The appellant could then be expected to appeal against the condition requiring use of the ground floor and

basement as a pub. In that regard, the appellant would rely upon the planning practice guidance issued by the Secretary of State, which provided that:-

> "Conditions restricting the future use of permitted development rights or changes of use will rarely pass the test of necessity and should only be used in exceptional circumstances."

67. The appellant would contend that, once the Grosvenor had ceased to be listed as an asset of community value (pursuant to the correct outcome of this appeal), the condition as to pub use would fall foul of the guidance, since the condition would have the effect of precluding the appellant from changing the ground floor and basement from pub use to that of a shop.

H. DISCUSSION

(1) The nature of the legislative requirements

68. As can be seen from section 89 of the 2011 Act, one of the two gateways leading to the listing of an asset of community value is in response to a "community nomination", which is defined by subsection (2) so as to require (a) the nomination of land in the relevant local authority's area; and (b) the nominator to be the relevant parish or community council or "a person that is a voluntary or community body with a local connection".

69. Section 89(4) contains a power for the Secretary of State to make provision by regulations as to the meaning of "voluntary or community body; the conditions to be met for a person to have a local connection; and the contents of community nominations".

70. I am entirely unpersuaded by the submission of the appellant that Parliament's use of the word "person" in section 89(2)(b)(iii) imposes any material restriction upon what can constitute a "voluntary or community body" within the scope of the Regulations. A "person" is, obviously, an individual living human being or (as a result of section 6(c) of the Interpretation Act 1978) more than one such individual. By reason of Schedule 1 to the 1978 Act, a "person" also "includes a body of persons corporate or unincorporate". I consider that Parliament's inclusion of the words "a person that" in the phrase "a person that is a voluntary or community body" in section 89 of the 2011 Act is intended to make it plain that regulations made under section 89(4) can define a "voluntary or community body" by reference to individuals, bodies corporate and bodies unincorporate. The fact that a body corporate can, as a result, be a voluntary or community body accounts, in my view, for regulation 5(2), which shows the drafter considered it necessary to say expressly that a public or local authority

(which, of course, is a body corporate) may not be a voluntary or community body, unless it is a parish council.

71. In any event, the suggestion that the reference to a "person" in subsection (2)(b)(iii) imposes some sort of restriction on how one is supposed to read the reference to "an unincorporated body" in regulation 5(1)(c) lacks coherence. Nothing meaningful emerges from an expansion of the word "person" that makes subsection (2)(b)(iii) and regulation 5(1)(c) read "an unincorporated body that is … 'an unincorporated body …'". The word "body" is, for this purpose, to be given the same meaning in both the primary and secondary legislation.

72. The Concise Oxford Dictionary defines a "body" as "3 An organised group of people with a common function". No satisfactory reason has been given by the appellant for why the "body" inherent in the definition of "person" should require any greater degree of organisation or common functionality than it bears in the expression "unincorporated body" in regulation 5(1)(c).

73. The next issue is to construe the Regulations made under section 89(4)(a) to (c). In the appellant's view, they fall to be construed strictly. The adverse effects of listing upon an owner are such that, according to the appellant, no other approach is valid.

74. Although, in reply, Mr Elvin appeared to accept that there might be scope for some leeway regarding at least some of the requirements in regulation 6 (contents of community nominations), the appellant's stance is that the requirements of the Regulations not only fall to be strictly construed but also need to be satisfied at the point at which the would-be nominator makes the purported nomination. It is not, on this view, possible for the local authority to which the nomination is made to seek thereafter to make good any failure; in particular, by seeking evidence pursuant to regulation 6(d) to show that the nominator is eligible to make a community nomination.

75. The Council's position is that it is necessary to take what it describes as a "sensible view", which entails finding that the legislature has, in effect, provided the local authority with what might be called a form of waiver.

76. Both the appellant and the Council placed reliance on the Winchester College case. It seems to me that this case makes it plain the answer to the question lies in statutory interpretation. In Winchester College, the effect of section 67 of the 2006 Act was that the applications had, for the purpose of that section, to be made in accordance with the requirements of paragraph 1 of Schedule 14 to the 1981 Act. That did not mean, however, that the authority concerned could not, for other purposes, waive a failure to comply with procedural requirements, depending upon whether and if so to what extent, substantial prejudice had been suffered as a result.

77. The fact that statutory construction lies at the heart of questions of this kind was established by the House of Lords in R v Soneji and Another [2006] 1 AC 340. The House described the former approach as follows:-

> "14. A recurrent theme in the drafting of statutes is that Parliament casts its commands in imperative form without expressly spelling out the consequences of a failure to comply. It has been the source of a great deal of litigation. In the course of the last 130 years a distinction evolved between mandatory and directory requirements. The view was taken that where the requirement is mandatory, a failure to comply with it invalidates the Act in question. Where it is merely directory, a failure to comply does not invalidate what follows. There were refinements. For example, a distinction was made between two types of directory requirements, namely (1) requirements of a purely regulatory character where a failure to comply would never invalidate the Act, and (2) requirements where a failure to comply would not invalidate an Act provided that there was substantial compliance …"

78. In London & Clydeside Estates Limited v Aberdeen District Council [1980] 1 WLR 182, a different approach emerged:-

> "… it led to the adoption of a more flexible approach of focusing intensely on the consequences of non-compliance, and posing the question, taking into account those consequences, whether Parliament intended the outcome to be total invalidity. In framing the question in this way it is necessary to have regard to the fact that Parliament ex hypothesi did not consider the point of the ultimate outcome. Inevitably one must be considering objectively what intention should be imputed to Parliament." (15).

Accordingly, at paragraph 23 the House (per Lord Steyn) held that:

> "the emphasis ought to be on the consequences of non-compliance and posing the question whether parliament can fairly be taken to have intended total invalidity. That is how I would approach what is ultimately a question of statutory construction".

79. How, then, should we approach the legislative regime in the present case? Whilst I acknowledge Mr Elvin's point that listing of an asset can have adverse consequences for an owner, not only in respect of the imposition of a moratorium on sale but also, indirectly, as regards the planning regime, in enacting the 2011 Act, Parliament has clearly been at some pains to strike a careful balance between the position of owners, etc., on the one hand, and the interests of the local community, on the other.

80. By conferring a power of nomination on "a voluntary or community body with a local connection", in addition to parish and community councils, Parliament in my view envisaged that the nomination process may fall to be undertaken by those without any expertise in compiling formal legal documentation. Furthermore, Parliament would have been aware that a

voluntary or community body may often be one formed at short notice in response to a previously unforeseeable threat to a community asset. In such circumstances, the body may well find itself having to make the nomination in haste.

81. In view of this, it would be contrary to Parliament's purpose to interpret the subordinate legislation made by the Secretary of State in pursuance of section 89(4) as requiring strict adherence to each of the obligations set out in regulation 6. The true construction of the overall statutory scheme is, I find, such that the local authority in question has discretion to waive a requirement in regulation 6, where the authority reasonably concludes that no substantial prejudice would be caused. Furthermore and in any event, the authority may, on the same basis, permit a nominator to make good a failure under regulation 6, following initial receipt of the nomination documentation.

82. My conclusion that the legislation must be construed in essentially the way for which the Council contends is strengthened by the fact that the legislative scheme contains detailed provision in Schedule 2 to the Regulations for the authority concerned to undertake a listing review, at the request of the owner of listed land. The owner can appeal an adverse decision resulting from the review to the First-tier Tribunal. It follows that, in my view, the owner has no legitimate basis for contending that the validity of a nomination is to be construed on a strict and "once and for all" basis as regards each and every requirement, as at the date when the purported nomination was made. The process is designed to produce a robust conclusion on the merits regarding matters of substance; in particular, whether section 88(1) or (2) is satisfied.

83. These findings do not, however, entirely dispose of the appellant's submissions on this issue. Mr Elvin contends that it is simply not possible for a nominator, after the nomination is made, to switch from one kind of voluntary or community body as defined by regulation 5, to another such body. In the present case, he says that the Council was faced with an application purportedly made by a body falling within regulation 5(1)(e) – namely, a company limited by guarantee – and that the Council subsequently and wrongly treated that nomination as being made by an unincorporated body, within the scope of regulation 5(1)(c).

84. It seems to me to be evident that a local authority cannot waive the requirements of regulation 5 (voluntary or community bodies) or of regulation 4 (local connection). To do so would thwart Parliament's will, in enacting section 89(2)(b). There has to be an identifiable local interest in having the asset nominated. Without such an interest, it is, at best, unlikely that there would be a community interest group to make a written request under section 95(3)(a), triggering the full moratorium period under that section. I also consider that it is not a proper interpretation of the Regulations that one of the bodies described in regulation 5 can take over and validate a purported nomination made by a body

which does not fall within regulation 5. For example, if body A nominates an asset on the basis that body A is a company limited by guarantee which does not distribute any surplus it makes to its members, but it transpires that body A is in fact a company limited by shares, then it is not possible for any other body B to be treated as making the nomination, notwithstanding that body B falls within Article 5. Body B would have to make its own nomination.

85. To this limited extent, I agree with the appellant that the nomination has a "once and for all" nature. But this does not avail the appellant. The finding of Ms Linton's review was that CAMRA South West London Branch was, and had at all material times been, a body falling within regulation 5(1)(c). She concluded, in effect, that it did not matter if the Branch (or those acting on its behalf) had thought that, in some way, it fell to be treated as a company limited by guarantee.

86. I consider that Ms Linton's approach was entirely permitted by the legislation. Subject to issues of procedural fairness, regulation 6(d), properly construed, enabled her to consider evidence, albeit not submitted at the time of the nomination, which showed that the nominator was at that time a body within regulation 5(1)(c). For the reasons I have given earlier, Parliament cannot in my view be regarded as contemplating that regulations made under section 89(4) could prohibit a local authority from (as here) ignoring a tick or cross, which turns out to have been placed in the wrong box on a form.

87. What I have just said is, of course, predicated on the basis that, as both Mr Elvin and Mr Adamyk submitted, CAMRA South West London Branch did not have authority to make the nomination on behalf of the Campaign for Real Ale Limited. I accept all that has been said (as recorded above) on this issue. Insofar as what the Tribunal said in the St Gabriel case conflicts with the law of agency and company law, I accept it must be regarded as wrong.

88. That is, however, not to say that the character of a body such as the Campaign for Real Ale Limited cannot play any part in determining the characteristics of the Branch, for the purposes of the legislation with which we are concerned. For example, in deciding whether the requirement in regulation 5(1)(c)(ii) is met in the case of the Branch, the fact that the Campaign for Real Ale Limited meets this requirement may dispel any doubt that may exist as to whether the Branch does so.

89. I reject the appellant's contention that CAMRA's Branches cannot legally be distinguished from the Campaign for Real Ale Limited, for the purposes of regulation 5. It is clear from the materials to which I have referred, especially the model Branch Constitution and the internal memoranda, that the South West London Branch has an identity as an organised group of people in South West London, with the common functions described in the nomination form. That form also specified that 358 members of the Branch live in Lambeth.

90. In the light of my findings, I conclude that the Council was entitled, after the nomination was made, to seek additional evidence on the subject of the Branch's eligibility to make a community nomination. That evidence resulted in material being supplied, which put beyond any doubt that the Branch had at least 21 local members, registered as local government electors, as described in regulation 4(3). In any event, however, I accept Mr Laurence's submission that, in the light of the very large numbers of members specified in the nomination form, it was more likely than not that at least 21 individuals fell within regulation 4(3).

(2) Section 88(2) of the 2011 Act

91. It is, accordingly, necessary to deal with the second of the appellant's grounds, which contends that the requirements of section 88(2)(b) of the 2011 Act are not met in the case of the Grosvenor. There is no dispute that the Grosvenor satisfied section 88(2)(a), given the activities carried on there until it closed in 2014.

92. In determining whether it was realistic to think that there is a time in the next five years when there could be relevant use of the Grosvenor, Mr Elvin urged the Tribunal to eschew any use of the word "fanciful" as the antithesis of "realistic". Dealing with the same issue in Banner Homes Limited v St Albans City and District Council and Verulam Residents Association [2016] UKUT 0232 (AAC), the Upper Tribunal said:-

> "38. In my opinion it is always wiser to use the statutory language. That is more likely to focus the mind and avoid the risk of error. However, in the present context I cannot envisage any empty space between what is 'not fanciful' and what is 'realistic' and the First-tier Tribunal was not in error of law on this point".

93. I do not intend to depart from the Upper Tribunal's advice. I do not, however, accept Mr Elvin's contention that paragraph 38 of the Upper Tribunal's decision was wrong and that something can be more than fanciful but less than realistic. The Shorter Oxford English Dictionary defines "fanciful" as: "2 Suggested by fancy; imaginary, unreal". The definition of "fanciful" given in answer to a Google search is: "1. over-imaginative and unrealistic".

94. I do not consider that the evidence before me shows the recent trading history of the Grosvenor, up to its closure, was so bad that it is unrealistic to expect any pub use to resume at the premises within the next five years. Indeed, the appellant did not advance its case in those terms. Reliance was, however, placed on the marketing materials. The following passage from the first marketing report is of significance:-

> "2.4 Since we began marketing the property we have carried out over 12 onsite inspections with various potential occupiers and what has become

> abundantly clear is that the majority of parties who have inspected the property have failed to make offers for two main reasons. Firstly, a large number of the parties felt that the area was very quiet from a trading point of view as there was limited footfall activity to support any form of leisure or retail operation.
>
> The second major factor behind a lack of offers on the property is that it appears interested parties have no interest in taking the property as a whole. The idea of taking on 2 residential flats puts interested parties off the property. Leisure and retail tenants are exactly that – and it appears they do not like getting involved in the management hassle of taking on residential dwellings and effectively becoming a 'landlord'. Interested parties were advised that the upper floors of the property could be used as ancillary storage (subject to planning) but again this was met with negativity as the property in its entirety is too large for the amount of trade the unit would benefit from.
>
> Those parties who were comfortable with the location of the property did enquire as to whether the landlord would allow a letting of the ground floor and basement only as the upper floors were surplus to requirement".

95. It is plain the appellant does not share the view that there are "limited footfall activities to support any form of leisure or retail operation", since it has entered into an agreement for a lease for the Co-Op to use the ground floor as a retail store. Furthermore, the appellant has been at pains to emphasise its ability (but for the current listing) to change the use of the ground and basement floors from pub use to shop use.

96. I have already described the recent developments regarding the planning application made for the conversion of the upper floors of the Grosvenor, so as to create self-contained flats. Mr Elvin urged me to find that it was not realistic to expect any future pub use of the ground and basement floors of the Grosvenor. He made this submission, notwithstanding the fact that his client was, at the date of the hearing, said to be on the point of executing the section 106 agreement, which would trigger the grant of planning permission in the terms of the draft decision notice. The grant of permission would, accordingly, be subject to a condition that the ground and basement floors must be used as a pub.

97. Mr Elvin submitted that the current planning guidance (see paragraph 66 above) makes it plain that, except in exceptional circumstances, conditions should not be used to remove or restrict permitted development rights. As a result, the appellant would be likely to appeal the condition, once the planning consent crystallised, and win the appeal.

98. As has been stated in other appeals under the 2012 Regulations, what is "realistic" for the purposes of section 88 is not to be equated with what is more likely than anything else to occur. More than one future scenario may, in other words, be realistic. In the present case, it is simply not possible, on the facts, to

conclude that it is unrealistic to expect the appellant to carry out the development in the terms set out in the planning decision. The Tribunal is not in a position to second-guess whether an appeal against the condition would be likely to succeed. Apart from anything else, the local planning authority's likely case is unknown. It may be that, in the event, the appellant will conclude for commercial reasons that it would be preferable to avoid the delay that would be occasioned by appealing the condition, so as to commence conversion of the upper floors earlier, rather than later.

99. The appellant's case is further undermined by its stance regarding shop use of the Grosvenor. The Tribunal has not been shown the agreement for a lease with the Co-Op but it is reasonable to assume that its existence is indicative of a willingness on the part of the appellant to see residential development take place on the upper floors, with a different form of use in the lower ones. It is, therefore, difficult to see why the appellant should go to the trouble of challenging the planning condition relating to pub use, unless it was persuaded that pub use would be uneconomic; whereas shop use would be.

100. There is, however, an absence of reliable evidence to show that this is or even may be so. Since we have not seen the terms of the agreement, it is not possible to assume that the Co-Op has committed itself to any medium to long-term use of the Grosvenor as a shop. The viability of such an enterprise is any event questionable, given the evidence regarding existing rival stores. Neither of the marketing reports prepared for the appellant suggests that a pub use of the ground and basement (compared with some other trading use) would be unlikely to be economic. In short, resumption of such a pub use within five years is, on the totality of the evidence, realistic.

101. The planning position, considered together with the marketing reports, leads me to conclude that, whatever the position may have been at the review, it is no longer realistic to expect the entirety of the premises comprising the Grosvenor would be used within the next five years for relevant section 88 purposes. The appellant is, clearly, determined to see the conversion of the upper floors into self-contained residential flats and has the legal means to do so. The evidence leads me to conclude that pub use of the ground floor (with the basement) is the only realistic way in which such the pub use could return. I do not accept the Council's belated contention that a shop use of the lower floors would satisfy section 88(2). There is no evidence that, given its nature and location, a shop would serve the social wellbeing or interests of the local community, as would a neighbourhood pub.

102. I have reached these conclusions, irrespective of the current position of the Grosvenor under the General Permitted Development Order 2015. Even if the appellant could change the lower floors from pub to shop use, the evidence fails to show that the Co-Op or any other retailer would be so likely to run a shop at the property as to make a return to pub use in the next five years unrealistic.

103. I accordingly find that the requirements of section 88(2)(b) are satisfied in respect of the ground and basement parts of the premises known as the Grosvenor but not as regards the upper floors. Those floors should, accordingly, be removed from the Council's list kept pursuant to section 87.

Decision

104. The appeal is allowed to the above extent.

Judge Peter Lane

19 July 2016