

## **Localism Act 2011 & Assets of Community Value Regulations 2012**

### **Decision notice in response to Community Nomination to list Land as an Asset of Community Value**

**Land: The Boundary Arms (Formally the Waggon & Horses), 112 Pinkneys Road, Maidenhead (SL6 5DN)**

**Nominating Body: The Friends of the Boundary Arms**

**Freehold Owner: Colgaz Limited**

**Date nomination received: 8<sup>th</sup> June 2023**

**Date Decision must be made: 3<sup>rd</sup> August 2023**

**Date of Decision: 3<sup>rd</sup> August 2023**

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#### **Background:**

1. A nomination to include The Boundary Arms (Formally the Waggon & Horses), 112 Pinkneys Road, Maidenhead (SL6 5DN) ("the Land") in the Council's List of Assets of Community Value was made by The Friends of the Boundary Arms ("the Group") and received by Royal Borough of Windsor & Maidenhead ("the Council") on 8th June 2023. The owner of the Land registered at HM Land Registry under title number BK386966 is Colgaz Limited.
2. Under Chapter 3 of the Localism Act 2011 parish councils and community organisations may nominate land or buildings to their district or unitary council, to be included in its list of community assets. The Council must make a decision as to whether the Land should be included in its List of Assets of Community Value within within eight weeks of receiving a Community Nomination.
3. This Decision is taken in respect of the nomination to include the Land in the Council's List of Assets of Community Value. In arriving at my decision, I have considered the documents listed as background papers in the Appendix of the Decision Record. The public house closed in November 2021 and therefore the appropriate two statutory conditions to be satisfied are those contained in section 88(2) of the Localism Act 2011 and not those in section 88(1) of the Act. I also note that a recent planning application was made on 28<sup>th</sup> April 2023 (23/01049/FULL) for a Construction of 2no. semi-detached dwellings following the demolition of the existing buildings. That application was withdrawn on 7 June 2023. Furthermore the Land was previously listed as an Asset of Community Value in 2015 and the listing expired in 2020. The List of Assets of Community Value record that the authority received a notification of intention to sell on 14 July 2016 and that the interim 6-week moratorium period, according to the list, expired on 25th August 2016. There is no record of receipt of an intention to bid is included on the register. The listing was made when the Council shared services with Wokingham Council.
4. In this Decision Report any references to "the Act" means the Localism Act 2011 and any references to "the Regulations" means the Assets of Community Value Regulations 2012.

## Eligibility of the Nominating Body

5. For land to be considered for listing as an asset of community value the local authority must receive a community nomination. This requires that the nomination is made by any one of the local parish councils or by a voluntary or community body with local connections (section 89(2)). The Group have made this application as a voluntary or community body.
6. What constitutes a voluntary or community body and what constitutes a local connection is governed by regulations 4 and 5 of the 2012 Regulations as set out below:

Regulation 4 sets out the criteria for a local connection as follows:

*“(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).*

Regulation 5 provides the definition of “a voluntary or community body” as follows:

*“(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) an industrial and provident society which does not distribute any surplus it makes to its members; or*

*(g) a community interest company.”*

7. The nomination form did not state whether the Group creates an income and if it distributes any surplus to its members. To ascertain whether the Group met the criteria in Regulation 4 paragraph 1 (b) I emailed the Group's representative and requested further information. In an email to me from the Group's representative dated 9<sup>th</sup> June 2023 it was confirmed that the Group at present does not make any income whatsoever.
8. The Group is made up of 38 members and the names, addresses and signatures of those members were provided. To ensure that the group is formed of at least 21 "local members" in accordance with Regulation 4 paragraph 1 (c), the details of the members have been checked against the Council's Electoral Register by the Council's Electoral Services Team Leader. The check confirmed that 30 of the 38 listed members reside in the Council's administrative area and are registered on the electoral register. It was noted that 6 of the members who signed did not provide a postcode on the form, notwithstanding this there are 24 good records. I am satisfied that the criteria in Regulation 4 paragraph 1 (b) has been met and the group consists of at least 21 "local members".
9. The criteria in Regulation 4 paragraph 1 (a) for "Local Connection" also requires that the Group's "activities are wholly or partly concerned (i) with the local authority's area, or (ii) with a neighbouring authority's area. It is acknowledged that the Group has provided a set of aims in paragraph 3 of its draft Constitution. The document has not been agreed by the Group and is still under review, but it does provide an indication that the Group wish to become a more formal operation with an aim to provide facilities for the community in the Council administrative area for socialising, community activity and community. The Nomination Form provides information as to the activities of the Group to date which are directly related to the Land which is situated within the Council's administrative area. The Group formed initially as a "WhatsApp" Group so that local members of the community and regulars at the public house could keep up to date with any developments regarding the public house's closure and as a method of communicating feedback on conversations with the main owner, Mr Hing, regarding whether he would be willing to work with the community to find a way of keeping the Pub open. I am satisfied that the Group's activities are for the benefit of the local authority's area.
10. I am therefore satisfied that the Group meets all criteria within Regulations 4 and 5 and the nomination has been made by a "voluntary or community body".

#### **Content of Community Nominations**

11. Regulation 6 provides that 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.”*

12. The Group have provided a clear description of the land being nominated being “the existing full area of the Boundary Arms Public House. This is to include the pub itself, the upstairs flats/accommodation, the pub back garden and the private parking area at the front of the pub for 5-6 cars as well as the pub cellar which is in the basement of the building”. The Group also provided two plans showing the boundary of the land which matches with the description.
13. It also provided a statement with all the information it had with regard to the occupants and owners of the land and the names and current or last-known addresses of all those holding a freehold or leasehold estate in the land. The Group gave the details of Mr Colin Hing as the freehold Owner of the Land. The actual named owner of the Freehold interest in the land recorded at HM Land Registry under title number BK386966 is Colgaz Limited. Mr Colin Hing is a Director at Colgaz Limited and has made representation in respect of the nomination of the Land.
14. The Group provided its reasons for thinking that the Council should conclude that the land is of community value and given evidence of its eligibility to make a community nomination. As discussed in paragraph 7, additional information was sought from the Group to clarify whether the Group makes an income and if it distributes its surplus to its members. Whilst the information was provided separately from the nomination form, I do not consider that any prejudice has been caused by the information not being presented in the nomination form. Should the application have been rejected on the basis that this information was not transparent in the nomination form, the Group would have been free to make a further nomination.
15. I am mindful that it is acceptable for allowances to be made for the involvement in the nomination process by non-lawyers. On this point in *Admiral Taverns -v- Cheshire West and Chester Council CR/2016/0022* Judge Christopher Hughes stated at paragraph 10 that the “initial nomination form completed by the Parish Council contains very little information some of which may not have reflected the actual position on the date that it was submitted and some of which may have been irrelevant. This is unsurprising considering that this Parish Council is a small public body with minimal resources consisting of volunteers who are trying to represent the interests of their community. These volunteers are unlikely to have completed such a form before and will have little understanding of the legal framework. However, that form is merely the start of the nomination process by which a Council determines whether the criteria for listing as an ACV are met. Furthermore, as the Council properly observed, it was entitled to accept the nomination in good faith.”
16. I am therefore satisfied that a valid nomination has been received by the Council.

#### **Procedure when considering whether to list land**

17. To satisfy its obligations under Regulation 8 the Council provided information that it is considering listing the land to the Mr Colin Hing at the address given on the nomination form on 15<sup>th</sup> June and to Colgaz Limited 19<sup>th</sup> June at its address registered at Companies House. Information that the Council was considering listing the Land was also sent addressed to the “occupier” of the Land. The Land does not fall within a Parish Council area and therefore no notice was required to be served on a Parish Council.
18. It is the Council’s general practice to invite comments from the owner of land which has been nominated to be listed as an asset of community value. Invitations to comment was sent to both Colgaz Limited and to Mr Colin Hing. Mr Colin Hing provided his comments in respect of the nomination on 27<sup>th</sup> July 2023.
19. Additional information in respect of the information was requested from the Group and Colin Hing on 1<sup>st</sup> August 2023.

**Is the Land Capable of being included on the List of Assets of Community Value**

20. The Group has identified the land to be listed as “the pub itself, the upstairs flats/accommodation, the pub back garden and the private parking area at the front of the pub for 5-6 cars as well as the pub cellar which is in the basement of the building”.
21. There are three categories of land and buildings which are excluded from the operation of the listing regime in accordance with Schedule 1 to the Regulations. The principal exclusion relates to residences. The other two exclusions are caravan sites and land held by a statutory undertaking for its operations.
22. There is an exception to the exemption where a building which is only partly used as a residence may still be listed if it otherwise qualifies for listing. Paragraph 1(5) of Schedule 1 to the 2012 Regulations provides, “*Land which falls within sub-paragraph (1) may be listed if— (a) the residence is a building that is only partly used as a residence; and (b) but for that residential use of the building, the land would be eligible for listing.*” In paragraph 2 of Schedule 1 residence is defined as “*a building used or partly used as a residence*”. Section 108 of the 2011 Act provides that a building includes a part of a building. In applying paragraph 1(5) it will be necessary to determine whether there is a part of the building used for residential purposes which for the purposes of the ACV regime is separate from the remainder of the building.
23. The Group did not provide information in the nomination form as to how the upstairs flat/accommodation was used. Mr Hing did not provide any comments in respect of the inclusion of the upstairs flat/accommodation in the nomination. Additional information on how the upstairs flat/accommodation was used was sought from both the Group and Mr Hing on 01 August 2023
24. The Group provided information that Mr Hing renovated the upstairs of the pub and refurbish the rooms to let them out on a commercial basis prior to opening the pub when he purchased it in January 2017. Prior to these rooms being rented out on a private basis, the upstairs was used as accommodation for previous Landlords which is common for a Public House as a brewery often employs Managers or leases the pub to someone so living accommodation as part of that package is normal practice as part of the terms of employment. The Group does not have information as to whether the rooms were rented privately or whether an estate agency was used.
25. According to the Group the kitchen was also used by previous owners as a means to providing cooked meals on a commercial basis to members of the community who used the pub. This use of the kitchen ceased in 2017 when the upstairs began to be used as flats and the kitchen was then

used by the tenants. The Group confirmed the kitchen is upstairs above the pub next to the flats. Towards the end of the Pub trading (probably down to Covid), less and less rooms were rented out until Mr Hing's son was living above the pub when he returned to work in the UK from his home in Thailand for approximately 6 months of the year.

26. Colin Hing provided gave the following response:

*“between 2018 - 2019 we had 2 renters who became very difficult, their tenancy was not renewed. also the manager had used one of the 3 bedrooms so he could stop over when needed on late shifts as part of his contract, occasionally friends and family used it over long weekends from around the country to visit us from then on my son stayed in the pub as we needed to have someone living in it for insurance purposes”.*

27. The author of the Planning Viability Report carried out an inspect of the property on 12 November 2020 and the report describes the layout of the building as follows: *“Internally the property is arranged over basement, ground and first floors. The basement provides chilled beer store and general storage areas. The ground floor comprises trade areas comprising servery and seating areas. The remainder of the ground floor provides the trade kitchen and customer WCs. The first floor provides the domestic accommodation comprising 3 double bedrooms, bathroom and storage areas”.*

28. The Government Guidance document “Community Right to Bid: Non-statutory advice note for local authorities” published in 2012 gave on the application of paragraph 1(5). It states at paragraph 3.7 *“There is an exception to this general exclusion of residential property from listing. This is where an asset which could otherwise be listed contains integral residential quarters, such as accommodation as part of a pub or a caretaker’s flat.”* It is recognised that the Government guidance document is guidance and is not statute, however in *Kicking Horse Limited v Camden LBC CR/2015/0012*, Judge Lane considered that although it is non-statutory, para. 3.7 of the 2012 Government Guidance makes plain what is the effect of paragraph 1(5) Schedule 1 of the Regulations.

29. The application of paragraph 1(5) was explored by Judge Lane in the case *Wellington Pub Limited v Kensington & Chelsea BC CR/2015/0007*. In the case it was determined that caution should be exercised when interpreting paragraph 1(5) because it is an exception to a general exception. To be a part of the listed ACV there must be a current physical and functional relationship between the residential part and the remainder. The decision has to be based on all the relevant facts as to whether there is a sufficient physical and functional relationship between the residential area and the remainder of the nominated asset and that decision is made against the historical background of the nominated asset.

30. From the information which has been provided I understand that since 2021 the public house has been closed and the bedrooms have not been rented out. The nominating Group claim that there is a kitchen on the first floor which was being used by the tenants of the flats but was previously used to provide food for the customers of the public house. The Viability report makes no mention of a kitchen being upstairs but confirms that the whole of the first floor provides domestic accommodation.

31. The residential part of the building on the first floor has been used in a number of ways. It had been rented out privately by the owner for a short period between 2018-2019. The pub continued to operate after the last of these tenants vacated the premises. The renting of the room was short term and did not create a separate legal interest in the land to the tenant. The first floor comes within the same freehold ownership as the rest of the land under HM Land Registry title number BK386966.

There is no leasehold recorded at HM Land Registry creating a separate legal interest of the first floor of the Public House building. It has not been suggested that access from the ground floor to the first floor has been removed. One of the bedrooms rooms could be used by the pub manager when working late at the pub and this formed part of his employment contract – I am of the opinion that this a physical and functional relationship between the residential area and the remainder of the building. One of the rooms had been lived in by Mr Hing’s son for insurance purposes.

32. For the reason that the use of the rooms by Mr Hing appears to be informal, the pub continued to operate after the last tenant had vacated the premises in 2019 suggests that the residential area had not been formally or physically separated from the rest of the building to become a residential dwelling. There is a clear physical and functional relation of the upstairs by the availability of the room for the pub manager which was secured by a contract. I am informed by the Group that this type of use of the upstairs by previous managers of the public house occurred historically before Mr Hing purchased the Public House. I am of the view that there was a physical and functional relationship between the first floor of the building and the rest of the Land and the first floor was available for use as described in paragraph 3.7 of the Government Guidance.
33. I am therefore of the opinion based on the information provided to me and for the reasons above that the residential part of the land on the first floor benefits from the exception in paragraph 1(5) Schedule 1 of the Regulations, and is land which may be listed.

#### **Legal Test of Community Value**

34. There is no actual current use of the Public House and therefore the appropriate legal test to use when assessing whether the Land is of community value is Section 88(2) of the Act. Section 88(2) states that a building or other land in a local authority’s is land of community value, if in the opinion of the 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.”*

35. Section 88(6) of the Localism Act 2011 provides that “social interests” includes (in particular) each of the following- (a) cultural interests, recreational interests, sporting interests”.

#### **Recent Past**

36. Section 88(2) a is a two-part test. First, a decision must be made regarding whether there is a time in the recent past when an actual use of the Land. Secondly that part of the test is that there must have been an actual use of the Land which furthered the social wellbeing or interests of the local community.
37. There is no statutory definition of recent past and the term has been left deliberately imprecise. In *Sandhu v South Oxfordshire DC CR/2019/0008* Upper Tribunal, Judge O’Connor sitting as a First-Tier Tribunal Judge emphasised that the term “is a flexible concept and must depend upon all the circumstances of a particular case” (para. 15). The judge highlighted as one material factor the length of time the public house had operated before the closure. In that case it “was for over 100

years in a very small community area". The White Lion had in fact been run for about eight years as a restaurant until it closed in August 2013. It was listed as an ACV in October 2013 and came off the list in October 2018. The Parish Council nominated it again in May 2019 which is just short of six years since the closure of the business. It was held that the activities prior to that closure were within the recent past. The same judge adopted a similar approach in *Roffe v West Berkshire Council* CR/2019/0010 when there was only just over two years before its nomination and it was determined that the activities relied on were held to be within the recent past.

38. From the information which has been provided to me by the Group and Mr Hing it is understood that the public house closed in November 2021. Prior to that Mr Colin Hing purchased the Land in 2016 and operated it as a Public House via a manager for 6 years. There was a temporary closure of the Public House due to Covid 19 Government Restrictions between March 2020 – July 2020. The information regarding the operational status of the Pub between July 2020 to January 2021 is ambiguous but it appears from Mr Hing's submission that in 2021 the pub was opened at restricted hours because of the difficulty of securing full time staff before it closed permanently in November 2021.
39. Neither the Group nor Mr Hing provided information relating to the operation of the public house prior Mr Hing's involvement. A request for additional information on this point was made to both the Group and Mr Hing on 1<sup>st</sup> August 2023.
40. On 1<sup>st</sup> August the Group provided information that they believed the Public House opened around the time or just before the Town Hall Cottagers in Pinkneys Road were built in 1881 and provided a link of an extract of the Census records and Kellys Directory which has a Landlord listed as long ago as 1883. <https://pubwiki.co.uk/Berkshire/PinkneysGreen/WaggonHorses.shtml>. In contrast the Registered Valuer and author of the Planning Viability report states the belief the building is believed to date from the interwar years (page 4 of the report).
41. The public house has been closed for just over 20 months and using the evidence supplied in the Planning Viability Report it is reasonable to consider the pub was built in the interwar years and has been used as such for approximately 90-100 years. I am mindful of the cases referred to in paragraph 37 of this report and I am of the belief that length of time the public house has been closed is relatively short. I am therefore of the opinion that it is reasonable to determine that there was an actual use of the land within the recent past.
42. Now I must determine whether the actual use that took place on the Land was not an ancillary use and was a use that furthered the social wellbeing or interests of the local community.

#### **Non an ancillary use that furthered the social wellbeing or interests of the local community**

43. Mr Hing put forward that despite the identification/listing of the property as an ACV in 2015, the 'local community' did not in the subsequent years collectively come out and support/frequent this ACV to a degree that would support a viable business and continued pub operation and relies on the viability report prepared for the recent planning application. He has asked for consideration of the extent to which the pub really did further the social wellbeing and interest of the 'local community', rather than just the individuals that drank there. I am mindful that the public house was required to close during the Covid-19 Pandemic and then opened on reduced hours after that. Nevertheless, the legal test in section 88(2)(a) does not require the decision maker to place measure the extent of a nominated asset in comparison to the income it generates. The decision maker does need to be satisfied that an actual use existed, and that use was not an ancillary use, and it was a use that



furthered the social wellbeing or interests of the local community. The viability of the use continuing will be considered in respect of Section 88(2) (b) of the test.

44. The Group have provided the following reasons as to how in their view the Land has furthered the social wellbeing and interests of the local community and why the Land should be listed as an Asset of Community Value:
- i) The pub is described as a community pub, which has been popular for so many years, for a place to meet, enhancing peoples mental and social wellbeing. The pub was known for the quality of its “real ale” and was recognised for this by the local branch of CAMRA and the pub also appeared in the “Good Beer” guide on several occasions. Free wifi is available for customers to use. There are good transport links available to/from the pub, with a bus stop less than a minutes’ walk from the pub and there is ample parking across from the pub which is available for anyone in the community to use, including people using the pub.
  - ii) Events were held at the pub including Live music events, open mic night, and regular quiz nights. The pub used to hold a weekly “meat” raffle every Sunday which was very popular with the locals and also ran a popular weekly Lottery “Bonus” ball event.
  - iii) The Pub Manager used to run a coach to the Rebellion Brewery for their “open” nights which was very well supported as beer and food vouchers were provided free of charge for the regulars that drank in the pub.
  - iv) The pub used to have two Ladies darts teams and two crib card teams in the local league. The local choir group used to meet at the pub after rehearsals and always put on a charity performance at Christmas.
  - v) The pub had a diverse clientele depending on the time of day. It was popular with retired people, walkers and ramblers given the vicinity of the many great walks nearby on National Trust land by the “Thicket”, during the lunchtime/early afternoon, “white van” man tradesman workers early evenings and then various drinkers during the evening. Many families with children also used the pub on the weekends and early evenings in the summer.
  - vi) The beer garden attached to the pub is said to have been very popular and used and enjoyed by local people, especially young families as the garden is very secure and safe. This garden was utilised during Covid-19 as the pub hired the local scout tent so that people could still drink outside as per the guidelines at the time.
  - vii) The pub provided a children’s play area for local families and meeting spaces for local community groups and charities to use, and charity events were held to raise money for a cancer sufferer.
  - viii) Major sporting events such as International Football and Rugby matches were well supported by the community who often brought their own food with them to share amongst everyone.
45. In his submission, Mr Hing did not object that the types of activities which the Group had put forward, had not taken place. His comment was that they were not profitable.
46. The Boundary Arms has an account on Facebook where a quick look through the public posts on the social media platform supports information regarding the activities that took place on the Land. There are posts advertising music events, open mic nights, the meat raffle and a performance by the local choir at the pub. There is also a post supporting the pubs ladies darts team. There are videos of well attended music events held at the pub and photographs showing a busy public house. There are photograph advertising the beer garden area.

47. There have been many appeal decisions relating to public houses and the use of the public house which is non-ancillary and which furthers the social wellbeing or social interests of the local community. In, the case of Admiral Taverns -v- Cheshire West and Chester Council CR/2016/0022 in paragraph of 8 of Judge Christopher Hughes' states "The Appellant recognises that the test must be applied on a case-by-case basis to the facts of each nomination. It is clear from the information before me that the premises have been used by local people as part of their social lives, meeting others in a convivial atmosphere for food and drink and furthermore holding some social events, notably quiz nights. I am satisfied that while in the most recent period the business has not thrived as it might, it has been used for the social wellbeing of the community." This decision was affirmed on appeal to the Upper Tribunal [2018] UKUT 15 (AAC). Additionally, I am mindful of the decisions which confirm that meeting and socialising at public houses furthers social wellbeing such as Kicking Horse-v- Camden LBC CR/2015/0012 and Adams-v- Ashfield DC CR/2017/0010 where evidence in the latter case showing that the public house provided a meeting place for members of the local community encouraging social interaction through its pool team and live entertainment was sufficient to meet the statutory requirement.
49. The activities and events listed in the nomination form and evident on the pub's Facebook social media page demonstrate that the premises have been used by local people for meeting others in a convivial atmosphere. I am satisfied that there was an actual use of the Land in the recent past that was a non-ancillary uses of the Land and the use furthered the social wellbeing and interests of the local community.

#### **Future Community Use within the next 5 Years**

50. I must now determine whether it is realistic to think that there is a time in the next five years when there could be non-ancillary use of the Land that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community.
51. The test does not require the likely future use of the relevant building to be determined but rather to determine whether future community use is one of a number of realistic options for the building. In *General Conference of the New Church v Bristol CC* supra Judge Lane at para. 26 stated the test is not whether such future use is wholly unrealistic but whether it is realistic to think that there could be such a relevant non ancillary use in the next five years. In *Evenden Estates v Brighton and Hove City Council* Judge Lane stated "that what is "realistic" may admit a number of possibilities, none of which needs to be the most likely outcome". This approach was repeated by Judge Lane in *Gibson v Babergh DC136* who added that the possibility must not be "fanciful" (para. 18).
52. I have considered the recent planning application submitted to the Local Planning Authority by Mr Hing for the construction of 2no. semi-detached dwellings following the demolition of the existing buildings under planning reference 23/01049/FULL. The application was validated on 28 April 2023 and was withdrawn by Mr Hing on 7 June 2023. As this planning application did not result in a grant of permission, the number of possible outcomes for the pub has not been restricted to the carrying out of development changing the use of the pub to residential in accordance with a planning permission.
53. It is acknowledged that Mr Hing is considering submitting a revised planning application in relation to the land however no details as to the proposed development has been provided. Mr Hing in his submission requested details in relation to the nomination and listing of the Land in 2015 with the view that it "will help inform a re-submission of a planning application". I am of the opinion that it is

realistic to think that Mr Hing may submit a further planning application; this may be for a sole residential use or, he may submit an application in which the proposed development would include a community use. In either such case the Local Planning Authority will determine any such application on its planning merits and could refuse or grant any such application.

54. No information has been provided to suggest that Mr Hing has attempted to sell the Land. It is stated in the nomination form that the Group have approached Mr Hing to see if he was willing to work with them and find a way of re-opening the pub. The Group proposed 3 main options – (i) to rent the pub from him (ii) for him to lease the pub to the community or (iii) for Mr Hing to sell the pub to the community once a price was negotiated and agreed.
55. Separately, the previous Bar Manager approached Mr Hing with a business plan proposing how she could take over and grow the pub either via Mr Hing renting or leasing it to her. Evidence of the previous Bar Manager’s business plan has not been submitted with the nomination and Mr Hing did not provide any comment in respect of it.
56. The Group have not provided a business plan of its own with the nomination. The absence of such “a fully worked-out business case” did not prevent the appeal failing in *Moat v North Lincolnshire DC174* in respect of the Dolphin pub in Althorpe. I am mindful that although a business plan is not essential some evidence is necessary to show that the prospect of future community use is more than “mere speculation” Para. 29 *Fernwick Limited v Mid Suffolk DC CR/2015/0024*. The Group confirmed in its nomination form that they are considering working with the Plunkett Foundation and provided a draft Constitution based on a model drafted by the Plunkett Foundation. The Plunkett Foundation is a national charity with a vision is of creating resilient, thriving and inclusive rural communities throughout the UK. They support people in rural areas to set up and run a wide range of businesses which are genuinely owned by local communities, whereby members have equal and democratic control. The Group’s website <https://www.savetheboundaryarms.co.uk/> states that they are currently working the Plunkett Foundation and have plans for fundraising and marketing their campaign. They have also launched a survey on that website which states the responses will drive its business plan, moving forward. For these reasons I am of the opinion that the prospect of future community use is more than “mere speculation” and there is an interest by persons to continue to operate the Public House.
57. Mr Hing has raised the fact that in that the Land has previously been listed as an Asset of Community Value and despite identifying it as an Asset of Community Value the community did not choose, for whatever reason, to pursue a purchase under the provisions of the Localism Act when the property came up for sale less than a year later in 2016. The failure by any community interest group to take up a real opportunity to acquire the asset is a material factor but is not conclusive.
58. The Land was previously nominated when the Council shared services with Woking Borough Council. The Council does not hold the papers in relation to the previous nomination and Mr Hing’s comments in relation to this point were provided close to the statutory decision deadline. I am therefore unable to comment on the circumstances regarding the previous listing in the report and the lack of interest by a community interest group when a notice to dispose the land was served of the Council in 2016. I believe the circumstances are different now than when the Land was sold in 2016. In 2016 the Land was sold with an operating as a public house and potentially no threat the community value the Land provided would be lost on a sale. In fact the Pub continued to operate for a number of years. At the time of this nomination the public house is closed and there is a threat that the community use of the Land will be lost. Considering this alongside the fact that the Group and the previous bar manager

have actively tried to engage with Mr Hing before the submission of its nomination to re-open the pub and continue the use of the public house, I believe at this current time there is a more than whimsical interest by the Group and the Bar Manager to securing the Land to bring it back into use. Whilst a failure to show interest in purchasing the Land back in 2016 raises questions, I think in the current circumstances, with two parties interest to continue to operate the public house (one with a business plan and the other creating one built on a community survey) I do not think it is detrimental to whether there is a realistic prospect that within the next 5 years the Land could be used to further the social wellbeing and interests of the community.

59. The viability of the public house being run as a profitable business has been raised to question by Mr Hing as to whether it would be 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. Mr Hing has made reference to the findings in the Planning Viability Report which was submitted with the planning application 23/01049/FULL and included with the Group's nomination form. The author of the report considers the exterior of the property to be in fair condition albeit there are areas of wear and tear. Internally the accommodation is tired, dirty dated and in need of refurbishment. There is evidence of water ingress to the single storey side extension. The interior is in poor decorative repair and condition, has been poorly maintained including in terms of cleaning and as a result the accommodation and trade inventory is tired, dated and in need of significant improvement. The author of the viability report considers that comprehensive and substantial investment is required to enable a full refurbishment to bring it up to modern standards of amenity.
60. Accounts included within that report show that the profitability of the pub over the preceding 6 years of operation has declined. I am mindful of the fact the pub ceased operating temporarily from March 2020 – July 2020 and thereafter opened on restricted hours (the number of hours it opened for is unconfirmed) and this will have contributed to the decline in profitability. Paragraph 8 of the report states the analysis of Fair Maintainable Trade and Fair Maintainable Operating Profit clearly demonstrates that the costs of investment in the property and the business would not achieve a reasonable financial return commensurate to the business risk involved. It is the view of the author of the viability report and of Mr Hing, that the Land either as is or with new investment, cannot sustain its current public house use and is effectively unviable.
61. The Group have drawn attention to paragraph 6 of the report which states, "We have provided detailed accounts showing that the profitability over the last 6 years is sufficient to provide even a reasonable return". Having read the document as a whole, I am minded to consider the overall conclusion of the report is that continuing to run the public house would not be financially viable for a business.
62. In respect on the issue of viability I am mindful of the decision in Reed v Shropshire CC supra where the judge accepted the evidence of the owner that the business had dwindled and no-one wanted to buy it but the argument on behalf of the Council was that there was more than one possible realistic outcome and one of these possibilities was that in the next five years its use as a pub might resume. This was accepted and the appeal failed and the pub remained on the list of Assets of Community Value.
63. In Curtis Sloane Limited v Bassetlaw DC170 Judge Lane stated that there was "no reliable evidence to show that the pub was in permanent decline at the time of its closure" and set a requirement that strong evidence on this point would be needed to succeed. This position occurred again in Worthy

Developments v Forest of Dean DC supra which concerned another closed pub, the Rising Sun at Woodcroft. The owners provided evidence that in the last five years the pub had only been open at the most for eighteen months and that this indicated that there was no realistic prospect that the use could be resumed in the next five years. With regard to such evidence Judge Warren stated that “I accept these demonstrate that there are obstacles. It is important, however, not to confuse commercial viability with what altruism and community effort can achieve.” (para. 21). Notwithstanding the financial problems the judge considered that this did not demonstrate that the proposals of the “Save Our Sun” committee were not realistic. Strong backing within the community is a factor that 170 CR/2015/0021 at para 21 75 should be taken into account when deciding whether there is a realistic prospect of future community use. Judge Lane dismissed an appeal on the basis that the wine bar/restaurant was a community use and with an injection of £100,000 it could start up again (Crostone v Amber Valley BC173).

64. When considering whether future community use is a realistic possibility these provide an example of an alternative operating model which must be taken into account. As stated previously, the test does not require the likely future use of the relevant building to be determined but rather to determine whether future community use is one of a number of realistic options for the building. I am of the opinion that there are a number of realistic outcomes for the public house:

- (i) Mr Hing could continue to explore planning options and apply for planning permission to change the use to residential.
- (ii) Mr Hing may apply for planning permission with a mixed-use proposal where a community use could continue, whether or not it the same use as before.
- (iii) The vacant rooms upstairs could be utilised to provide additional income to support the running of the public house. This could be in the form of a rental as before or as a bed & breakfast option.
- (iv) The owner could sell the Land to a person/company with an interest in continuing to operate the public house.
- (v) A new business owner may use the upstairs rooms as their living accommodation to keep expenses down in the operation of the public house.
- (vi) The owner could engage with the Group to discuss a sale, lease or alternative business plant which would continue the community use of the Land.
- (vii) The owner could engage with the previous Bar Manager to discuss her business plan which would continue the community use of the Land.

65. I am therefore of the opinion that it is realistic to think that there is a time in the next five years when there could be non-ancillary use of the Land that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community.

### **Conclusion**

66. I am of the opinion that the Land consisting of the whole of the pub building, the pub back garden, the private parking area at the front of the pub and the pub cellar is land of community value within the definition of Section 88(2) of the Act and should be included in the Council’s List of Assets of Community Value.

Helena Rea – Chartered Legal Executive

On behalf of Royal Borough of Windsor and Maidenhead 03.08.2023

## Appendix

### Documents taken into consideration in the determination of the nomination

1. Department for Communities and Local Government
2. Nomination Form dated 8<sup>th</sup> June 2023
3. Form Assets of Community Value – Unincorporated Body Nomination Form (containing signatures of the Local Members)
4. The Council's Decision dated 26<sup>th</sup> July in respect of the nomination of the Jolly Gardeners
5. Initial Draft Constitution of the Friends of the Boundary Arms
6. The Boundary Arms – Full Highway Plan
7. The Boundary Arms – C 17 23 topographical plan
8. The Boundary Arms Planning Viability Report prepared by Deriaz Campsie dated 12 November 2022.
9. Letter from Colin Hing dated 27 July 2023
10. Emails from the Group providing requested additional information dated 9<sup>th</sup> June 2023, 1<sup>st</sup> and 2<sup>nd</sup> August 2023
11. Two Emails from Colin Hing providing addition information both sent 3<sup>rd</sup> August
12. HM Land Registry Title Number and Plan number BK386966

### Legislation and Government Guidance

1. Localism Act 2011
2. Assets of Community Value Regulation 2012
3. Community Right to Bid: non-statutory advice note for local authorities (October 2012)

### Cases Referenced

1. Admiral Taverns -v- Cheshire West and Chester Council CR/2016/0022 (was affirmed by appeal by Judge Levenson in Admiral Taverns Limited v Cheshire West and Chester Council and Farndon Parish Council [2018] UKUT 15 (AAC) (17 January 2018)
2. Kicking Horse Limited v Camden LBC CR/2015/0012
3. Wellington Pub Limited v Kensington & Chelsea BC CR/2015/0007
4. Sandhu v South Oxfordshire DC CR/2019/0008
5. Roffe v West Berkshire Council CR/2019/0010
6. Adams-v- Ashfield DC CR/2017/0010
7. New Church v Bristol City Council CR/2014/0013
8. Evenden Estates v Brighton and Hove City Council CR/2014/0015
9. Gibson v Babergh District Council CR/2014/0019
10. Moat v North Lincolnshire District Council CR/2014/0014
11. Fernwick Limited v Mid Suffolk DC CR/2015/0024
12. Reed v Shropshire CC CR/2015/0002
13. Curtis Sloane Limited v Bassetlaw District Council CR/2015/0021
14. Worthy Developments v Forest of Dean District Council CR/2015/0021
15. Crostone v Amber Valley Borough Council CR/2014/0010