



The use of restrictive covenants in the pub industry  
and their impact on local communities  
**Consultation**



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## The consultation process and how to respond

### Scope of the consultation

<b>Topic of this consultation:</b>	The use of restrictive covenants in the pub industry and their impact on local communities
<b>Scope of this consultation:</b>	This document aims to establish an evidence base regarding the use of restrictive covenants which prevent pubs from being used as such once they are sold and the impact that this has on local communities. The consultation will be used by the Government to help assess whether further action needs to be undertaken.
<b>Geographical scope:</b>	England
<b>Impact Assessment:</b>	This consultation does not propose any Government action at this stage. Rather, it seeks to build up an accurate and up to date picture of the use of restrictive covenants in the pub industry. The consultation also seeks views on a range of potential options for action which, should it be concluded that a significant problem exists, may be considered. Should the Government wish to take forward any of these options, a detailed consultation and impact assessment will be produced at that stage.

### Basic information

<b>To:</b>	This consultation is aimed at local communities, local authorities and those organisations involving in the pub and brewing industry.
<b>Body/bodies responsible for the consultation:</b>	This consultation is being run by the Big Society Strategy Division within the Department for Communities and Local Government (DCLG).
<b>Duration:</b>	This consultation will run for 12 weeks, from <b>2 August 2011 to 5pm on 25 October 2011</b>
<b>Enquiries:</b>	For enquiries, please contact the following: restrictivecovenants@communities.gsi.gov.uk 0303 444 2011

<b>How to respond:</b>	<p>By email to: <a href="mailto:restrictivecovenants@communities.gsi.gov.uk">restrictivecovenants@communities.gsi.gov.uk</a></p> <p>On the DCLG website: <a href="http://www.communities.gov.uk/publications/communities/pubrestrictivecovenants">http://www.communities.gov.uk/publications/communities/pubrestrictivecovenants</a></p> <p>Or by post to:  Restrictive Covenants Consultation Team  Department for Communities and Local Government  5/C5 Eland House  Bressenden Place  London  SW1E 5DU</p>
<b>Additional ways to become involved:</b>	The Department will hold a consultation round table event for pub industry stakeholders during the consultation process. Details of this will be published on the DCLG website.
<b>After the consultation:</b>	A summary of the responses to the consultation along with plans for any further Government action will be published on the Department's website within three months of the end of the consultation period.
<b>Compliance with the Code of Practice on Consultation:</b>	This consultation complies with the Code of Practice on Consultation.

## Background

<b>Getting to this stage:</b>	The Government's decision to consult on this issue came initially as a result of petitions by a number of local authorities under the Sustainable Communities Act 2007. The authorities were concerned that community pubs that had closed down were being legally prevented from re-opening with new owners, thereby depriving the community of an important local resource. As the local council could not currently prevent the owner of an establishment placing a covenant on a pub that restricted same purpose use, they submitted a formal proposal requesting the Secretary of State's assistance. This consultation is the Government's response to those concerns.
<b>Previous engagement:</b>	The Department for Communities and Local Government has not consulted on this issue previously.

## Additional copies

1. This consultation paper, complete with electronic response form, is available on the Department for Communities and Local Government website at [www.communities.gov.uk](http://www.communities.gov.uk). You may request a hard copy of this consultation paper from the address given above.

## Confidentiality and data protection

2. Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are, primarily, the Freedom of Information Act 2000, the Data Protection Act 1998 and the Environmental Information Regulations 2004).
3. If you want the information that you provide to be treated as confidential, please be aware that, under the Freedom of Information Act 2000, there is a statutory code of practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the department.
4. DCLG will process your personal data in accordance with the Data Protection Act 1998 and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties. Individual responses will not be acknowledged unless specifically requested.
5. Your opinions are valuable to us. Thank you for taking the time to read this document and respond.

## Help with queries

6. Questions about the policy issues raised in the document can be sent to the address given on page three.
7. A copy of the consultation criteria from the Code of Practice on Consultation is at Annex B. Are you satisfied that this consultation has followed these criteria? If not or you have any other observations about how we can improve the process please contact:

DCLG Consultation Co-ordinator  
Zone 8/J6  
Eland House  
Bressenden Place  
London  
SW1E 5DU

Or by email to: [consultationcoordinator@communities.gsi.gov.uk](mailto:consultationcoordinator@communities.gsi.gov.uk)

## Ministerial foreword

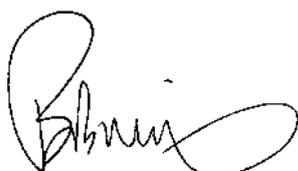
The local pub is a great British institution and it's not difficult to see why the diarist Samuel Pepys described them as 'the heart of England'. Our locals are so much more than places to grab a swift pint and packet of crisps. They are hubs of community life, as important to the local social scene as to the local economy. But just as the local pub is integral to the local community, so the local community is integral to the local pub and we should all be supporting our local.

Pubs, like many other businesses, are facing a challenging operating climate but throughout their rich and diverse history they have proved themselves to be resilient, enterprising and full of initiative. For example, many communities across the country are currently stepping in to bring their 'local' back from the brink and save them from closure. To support their efforts, the Government is giving them increased powers to get involved. We are introducing a new 'Right to Buy' so that communities will be able to save struggling businesses and, rather than seeing pubs empty or derelict, they can work with the industry to run them as community pubs so their town or village gets to keep its much loved watering hole.

The use of restrictive covenants that prevent a pub from being used as such once it is sold, has the potential to prevent communities from playing a positive role in the future of their local pubs. A covenant can also have a double whammy effect on communities, not only depriving them of a much cherished local asset, but also stopping them from ever using the building as a pub again.

This consultation seeks to establish a thorough evidence base regarding the use of restrictive covenants, and aims to find out what impact their use has had on local communities. We also want to seek views on a number of potential options for further action should it be required.

On behalf of the Department, I would like to thank you for taking the time to read through this consultation and we look forward to receiving your views.

A handwritten signature in black ink, appearing to read 'Bob Neill', with a large, stylized flourish at the end.

**Bob Neill – Community Pubs Minister**

# Section 1

## Introduction to restrictive covenants

### Definition of restrictive covenants

- 1.1 Restrictive covenants are placed on land or property to control their use. A restrictive covenant may be defined as “a promise by one person with another, for example, by a buyer of land with a seller, not to do certain things with the land<sup>1</sup>.” They may often take the form of a contractual arrangement, such as clause in a deed or lease, which limits what the new owner can do with the property and land.
- 1.2 Restrictive covenants also have the power to ‘run with the land’ meaning that it (and the restrictions it imposes) will still be in effect for subsequent buyers of the property or land.

### Potential uses of restrictive covenants

- 1.3 Restrictive covenants may be used for a range of purposes. One use has been to stop certain alterations of heritage buildings or land when they are sold, for example to maintain the architectural integrity and vistas of a building of historical interest when being converted to a new use. They can also be used to preserve the visual environment of an area, for example by requiring a new property owner to maintain a garden or not to erect satellite dishes or aerials. As such, restrictive covenants may be seen as a useful method of retaining standards of development and maintenance, as well as a way of preserving local character.
- 1.4 In a commercial setting, restrictive covenants have also been used as a method for land and property owners to protect their business where the owner retains other land or property in the area. In such cases an owner may sell a property with a restrictive covenant that prevents new owners from engaging in activities that might interfere with the original owner’s business interests. Although this use of restrictive covenants has proven to be most controversial, and is the focus of this consultation, their use may still hold advantages for communities, particularly in areas of low economic output.

<sup>1</sup> <http://www1.landregistry.gov.uk/FAQs/general>

### Example of a restrictive covenant in an area of low economic output

The owner of a petrol station and convenience store on the Fylde coast, applied to relocate to a larger site about quarter of a mile away, better located for serving a number of communities. The owner confirmed that any sale of the existing property would include a covenant against its current use. Although this potentially reduced competition, it did help to ensure the sustainability of the new convenience store for both the operator and neighbouring communities.

- 1.5 Similarly, leases in shopping precincts can also use covenants to help ensure a good tenant mix and the sustainability of individual businesses, providing local communities with a range of shops and services.
- 1.6 The issue of how pubs have been involved in the use of restrictive covenants is presented in more detail in Section 3.

## The removal of and limits to restrictive covenants

- 1.7 Powers do exist which can be used to remove or modify restrictive covenants. For example, the Upper Tribunal has power in certain circumstances, under Section 84 of the Law of Property Act 1925, to modify or discharge restrictive covenants where the original purpose of the covenant has, over time, become inappropriate.
- 1.8 Section 84 sets out a number of grounds for an application to the Upper Tribunal. This section affects people's property rights as interests in land are of value to people. The most commonly used is Section 84(1)(aa) which permits the Tribunal to act where the restrictive covenant impedes a reasonable use of land, provided that the covenant does not secure continuing practical benefits of substantial value or is contrary to the public interest, and where monetary compensation will be an adequate remedy. However, it should be noted that this process may prove time consuming, cumbersome and expensive, particularly for individuals and small community groups.
- 1.9 Until recently, land agreements between businesses benefited from special treatment under UK competition law and were excluded from Chapter 1 of the Competition Act 1998<sup>2</sup> ("the Act"). However, from 6 April 2011 the exclusion has been revoked<sup>3</sup> and land agreements which prevent, restrict or distort competition will now fall within the scope of the Act.

<sup>2</sup> See The Competition Act 1998 (Land Agreements Exclusion and Revocation) Order 2004 (SI 2004/1260) and, prior to that, the Competition Act 1998 (Land and Vertical Agreements Exclusion) Order 2000 (SI 2000/310)

<sup>3</sup> The exclusion has been revoked with effect from 6 April 2011, by virtue of the Competition Act 1998 (Land Agreements Exclusion Revocation) Order 2010 (SI 2010/1709).

1.10 The changes to the competition law have the potential to act as a restraint on the use of restrictive covenants. Possible effects may entail action by the Office of Fair Trading which has powers to investigate and take further action in particular cases.

# Section 2

## What we are consulting on

### The purpose of the consultation

- 2.1 The purpose of this consultation is to build an evidence base that assesses whether the use of restrictive covenants placed on pubs, and which prevent same purpose usage after sale, can have a negative impact on the well-being of local communities. In particular, the consultation seeks views as to the extent of the use of covenants as well as scoping potential ways of dealing with them.
- 2.2 The Government believes that, under certain circumstances, the use of restrictive covenants can lead to the closure of pubs, which local people consider to be important community assets. These circumstances may include, but are not limited to, a pub that is the last in a particular area or where there is little scope to develop alternatives. Given the ability of covenants to 'run with the land' (see paragraph 1.2) the use of restrictive covenants can risk not only closing an important community asset, but also removing the potential of it returning to that use in the future.

### Why consult?

- 2.3 The Government's decision to consult on this issue came initially as a result of three proposals by local authorities under the Sustainable Communities Act 2007.
- 2.4 Under this Act local authorities consulted communities and asked for their views on how the local area could be improved. Members of the public and others who attended consultation events in Darlington, Newcastle and Ryedale were concerned community pubs that had closed down were being legally prevented from re-opening with new owners, thereby depriving the community of an important local resource.
- 2.5 As the local councils could not prevent the owner of an establishment placing a covenant on a pub that restricts its re-use in the future, they submitted formal proposals requesting the Secretary of State's assistance. The proposal from Darlington Borough Council was supported by the local Campaign for Real Ale branch, who reiterated the particular concern about the use of restrictive covenants within the pub industry.

## Office of Fair Trading report

- 2.6 Further impetus for Government action on the issue of restrictive covenants came as a result of the Office of Fair Trading's response to a super-complaint by the Campaign for Real Ale in October 2009. The super-complaint highlighted a range of anti-competitive concerns that the Campaign for Real Ale believed resulted from the actions of pub-owning companies. One of the issues raised was that of restrictive covenants.
- 2.7 The overall view of the Office of Fair Trading was that, at a macro-level, "any potential adverse effects on competition [as a result of the use of restrictive covenants] are not likely to be significant<sup>4</sup>."
- 2.8 However, the report did suggest that "in certain circumstances, the use of restrictive covenants on the sale of a pub has the potential to harm consumers<sup>5</sup>" and that "the sale of a pub outlet may restrict or distort competition in a particular area<sup>6</sup>." In particular, the Office of Fair Trading suggested that "restrictive covenants are most likely to give rise to anti-competitive effects where geographic markets are highly concentrated and localised, there are high barriers to entry and the number of suitable sites is limited<sup>7</sup>." The Government believes that the 'potential harm' to consumers is worthy of greater consideration and this has contributed to the decision to focus this consultation on the pubs industry.

## Localism and the Community Right to Buy

- 2.9 The use of restrictive covenants has the potential to have an impact on the Coalition Government's commitment to provide communities with new powers to help them bid to buy local facilities threatened with closure.
- 2.10 As part of our determination to shift power to local communities, the Government has introduced provisions for a 'Community Right to Buy' scheme as part of the Localism Bill, which was published in December 2010. The Community Right to Buy aims to give community organisations the opportunity to nominate land and buildings of importance to them and for the local authority to decide whether to list these as assets of community value. When a listed asset comes up for sale, community groups will then be given time to prepare a business case, secure funding and be ready to bid to buy the asset when it is disposed of on the open market. These facilities could include a village shop, a local pub, community centre or library.

<sup>4</sup> [http://www.offt.gov.uk/shared\\_offt/super-complaints/oft1137.pdf](http://www.offt.gov.uk/shared_offt/super-complaints/oft1137.pdf) Page 7

<sup>5</sup> [http://www.offt.gov.uk/shared\\_offt/super-complaints/oft1137.pdf](http://www.offt.gov.uk/shared_offt/super-complaints/oft1137.pdf) Page 70

<sup>6</sup> [http://www.offt.gov.uk/shared\\_offt/super-complaints/oft1137.pdf](http://www.offt.gov.uk/shared_offt/super-complaints/oft1137.pdf) Page 12

<sup>7</sup> [http://www.offt.gov.uk/shared\\_offt/super-complaints/oft1137.pdf](http://www.offt.gov.uk/shared_offt/super-complaints/oft1137.pdf) Page 12

- 2.11 The Government recognises there have been closures of numerous community facilities and assets that bring members of the community together and from which key community services are delivered. There may be many reasons why certain community buildings and facilities close. However, the Government wishes to promote the use of community ownership as a different way to make assets viable again, for example through the use of volunteers, access to charitable funding or community share investment, or through more enterprising types of service provision which would not be open to current private or public owners/operators.
- 2.12 The new Community Right to Buy provisions will not only help community groups to save facilities that are under threat, but it is intended they will also help drive behaviour change, so that existing owners of assets important to communities, including public bodies, see selling or transferring that asset to a community group as a viable and positive option.
- 2.13 The Government, therefore, believes that use of restrictive covenants also has the potential to deprive communities of the opportunity to take over or develop an asset which they consider to be of importance to them.
- 2.14 The Government held a specific consultation on the Community Right to Buy earlier this year<sup>8</sup> and will publish a response to the issues raised by the end of August 2011.

<sup>8</sup> <http://www.communities.gov.uk/documents/localgovernment/pdf/1835775.pdf>

# Section 3

## Pubs and restrictive covenants

### The use of restrictive covenants in the pub industry

- 3.1 Restrictive covenants within the pub and brewing industry have traditionally been used for a number of reasons, many of which are related to the idea of business protection and competitive advantage as outlined in paragraph 1.4.
- 3.2 Some examples of the reasons for the use of restrictive covenants include:
- where a landlord, who owns a number of pubs in a geographic area, believes that reducing the number of pubs will increase the viability of those pubs that remain
  - where, at a local level, a landlord may want to reduce opportunities for external competition gaining access to a particular market
  - where there is a desire to change the use of a pub, for example to residential or other commercial use.

### Extent of use

- 3.3 According to the Campaign for Real Ale between 2004 and 2009 some “572 pubs were permanently lost through being sold with restrictive covenants.” The Office of Fair Trading, in their 2009 response to a Campaign for Real Ale super-complaint on the behaviour of pub-owning companies (pubcos), provided the following figures on the use of restrictive covenants by five of the United Kingdom’s pubcos. The Campaign for Real Ale produced the Table 1.1 to illustrate the issue. It should, however, be noted that a number of the companies mentioned in the table state that they no longer use restrictive covenants.

**Table 1.1: Pubs sold with restrictive covenants 2004-2009**

<b>Pub company</b>	<b>Total number of pubs sold</b>	<b>Number sold with restrictive covenants</b>	<b>Per cent</b>
Punch Taverns	3,000 <sup>9</sup>	150	5
Enterprise Inns	2,002	374	19
Greene King	221	11	5
Admiral Taverns	1,000 <sup>10</sup>	50	5
Marston's	426	1	0.2

- 3.4 On one level, it appears that restrictive covenants were not necessarily a widely used tool for the disposal of public houses by pub owning companies. This is likely to have contributed to the decision made by the Office of Fair Trading that restrictive covenants did not have any adverse impact on competition when viewed at scale.
- 3.5 However, the figures do not reveal the extent of the impact or 'potential harm' that these pub closures had on the local communities involved. It is possible that the loss of just one pub via the use of a covenant can have a detrimental effect on a range of people living in a community. For example, a closed pub can cause the loss of a major social hub, which is of particular importance to the wellbeing of communities in rural areas (where choice may be limited) or those with a large elderly population (where mobility may be limited). In addition to this a covenant can deny people the opportunity to express their views regarding the asset's viability.

<sup>9</sup> Punch Taverns stated that it has sold in excess of 3,000 pubs since 2004.

<sup>10</sup> Admiral Taverns stated that it has sold in excess of 1,000 pubs since 2004.

### Case Study: Morgan Inn, Malvern, Worcestershire

The Morgan Inn was situated in a residential area of Malvern. Owned by a national pub company, it was auctioned off in December 2008. The auction took place on the basis of a covenant being attached that forbade any future owner from operating the premises for the sale of alcoholic drinks. It could no longer be a pub, which it had been, serving the local community, for at least 150 years.

The covenant deterred any bids from potential pub operators at the auction. Therefore, the pub's use was extinguished permanently, regardless of any demand there might be from other potential operators, its commercial viability or its importance to the local community. The covenant also stopped interest from two local breweries seeking to own a pub in Malvern.

The new owner sought to convert the property into residential units. The subsequent planning application received a considerable number of objections from the local community, who wished to see it retained as a pub. However, the covenant ensured there was no likelihood of the pub being returned to the market and had the knock on effect of nullifying the Malvern Hills District Council Local Plan which expressly set out to protect such community amenities. The outcome was the local community were prevented from expressing a view on the pub's potential future use as a community facility.

At February 2011, over two years since the pub closed, only half the building had been developed, whilst the main body of the pub lies empty.

## Recent developments

3.6 In January 2010 the British Beer and Pub Association, in conjunction with the British Institute of Innkeepers and Federation of Licensed Victuallers Associations, produced the third revision to its Framework Code of Practice. This document "sets out the minimum standards and requirement that tenants/lessees should expect from a pub company, regarding the letting and operation of leased and tenanted tied pubs, which must be incorporated into individual company Codes of Practice<sup>11</sup>."

3.7 In relation to restrictive covenants, the Framework states that:

*"individual Pub Companies will make their policy on restrictive covenants clear<sup>12</sup>."*

<sup>11</sup> <http://www.camra.org.uk/media/attachments/314532/BBPA-Pub-Industry-Framework-Code-Jan-2010.pdf> Page 3

<sup>12</sup> <http://www.camra.org.uk/media/attachments/314532/BBPA-Pub-Industry-Framework-Code-Jan-2010.pdf> Page 10

- 3.8 In March 2010 the Business, Innovation and Skills Select Committee published its *Pub Companies: Follow-Up* report (following on from a 2009 report) which stated that pub closures “should be determined by the market and not by the imposition of restrictive covenants on particular pub properties. The pub companies may need to close some pubs, but they should not determine the fate of individual premises<sup>13</sup>.”
- 3.9 Following these events a number of the major pubcos and breweries (including some of those listed in Table 1.1) agreed to stop using restrictive covenants and formalised this policy within their Codes of Practice. For example the current Enterprise Inns Code of Practice states:
- “if we sell a pub, whether or not to the current lessee or tenant, we do not apply any restrictive covenants which would prevent the continuing and future use of the premises as a pub.”<sup>14</sup>*
- 3.10 A number of pubcos and breweries continue to choose to retain the right to use restrictive covenants, or at least do not rule out using them. However, those companies that do use covenants often state that their use is usually undertaken as a last resort.
- 3.11 One of the main arguments put forward by organisations in favour of the continued use of restrictive covenants is that many pubs are no longer financially viable. This is said to have been caused by a number of socio-economic changes that have occurred in Britain over the last 20 years which may have contributed to a decline in pub usage. These changes include, but are not limited to, demographics (including increasing populations which not do use alcohol), increased competition from the off trade, the introduction of the smoking ban, greater understanding of healthier lifestyles and the potentially negative effects of alcohol, and the increase of alternative leisure options and home entertainment.
- 3.12 Organisations in favour of restrictive covenants (including some pubcos and brewers) argue that closing one pub, in an ‘over-pubbed’ area, and selling it for alternative use by placing a restrictive covenant on it, could help to protect remaining local pubs in an area and increase their viability. The Government believes that this effect can and should be achieved through market forces or democratically-led through local authorities’ plans rather than be instigated by vested interests.

<sup>13</sup> <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmbis/138/138.pdf> p.6

<sup>14</sup> <http://www.enterpriseinns.com/Applicants/Documents/CodeofPractice.pdf> p.24

- 3.13 In addition, a number of the organisations that continue to operate policies that allow for the use of restrictive covenants are regional breweries rather than national pubcos. They have argued that, as opposed to pubcos, they support local industries including agricultural and brewing operations. As a result, some brewers have argued that the use of restrictive covenants could be viewed as a method of protecting important local trade, industry and employment which may suffer if too many pubs became unviable or were taken over by national pubcos.

### Case Study: Daniel Thwaites Plc

In the last two years Daniel Thwaites Plc has sold 46 public houses of which 10 had restrictive covenants attached. Restrictive covenants are usually imposed in locations that have a high density of licensed outlets and the property being sold is typically small, land locked with limited or no parking and with no potential to develop food as an alternative income stream. Thwaites use them to ensure:

- the viability of better located, larger public houses which have enhanced community and customer facilities, enabling Thwaites to invest in these sites
- the retained Tied Tenanted Estate is sustained in the long term, enabling it to continue to brew local beers which are sold in its Estate with their contribution to the local economy.

Most of the pubs that Thwaites have sold with a restrictive covenant have been brought back into sustainable economic use serving the local community, such as restaurants, plumber's merchants and offices.

#### Blackburn

The decision to sell with a restrictive covenant also helps to give Thwaites' licensees confidence in other local outlets. For example, the Sportsman public house, Blackburn, has 187 competitor outlets within a three mile radius, of which 34 are owned by Thwaites. Three other local pubs owned by Thwaites, The Oyster and Otter in Blackburn, The Traders in Mellor and the Millstone in Mellor – have benefited through increased investment resulting from the sale of the Sportsman.

#### Oswaldtwistle

This former mill town has 29 public houses within a one mile radius, of which five are owned by Thwaites. The number of outlets needs to be in balance with the market potential for Thwaites to invest. Research indicated that all of these were being under-used, meaning that these outlets were uneconomic, irrespective of whether they were tied tenancies or freeholds.

3.14 Two of the three local authorities that wrote to the Government to request action on restrictive covenants under the Sustainable Communities Act 2007, referred specifically to the actions of large or national chain pubcos, rather than those operating a more local level.

### Questions

Q1: Do you believe that placing restrictive covenants on pubs that prevent same purpose use after sale can have a negative or harmful impact on local communities? If so, please provide detailed examples.

Q2: Do you believe that restrictive covenants are effective in ensuring the future viability of pubs in England?

Q3: Do you believe that there is any difference in terms of restrictive covenants imposed by national pubcos compared to more regional brewery companies?

# Section 4

## Options for change

- 4.1 As stated in Section 2, the Government believes that, under certain circumstances, the use of restrictive covenants, that prevent same purpose use after sale, can lead to the closure of pubs which local people consider to be important community assets. If this view is validated by public responses to Questions 1, 2 and 3 of the consultation then the Government will need to consider options to better support the retention of assets within and by the community.
- 4.2 There exist a number of potential options which could be used to either stop or limit the use of restrictive covenants that prevent same use after sale within the pub industry. These require varying degrees of Government action. From a practical perspective, however, the Coalition Government does not wish to use legislation unless absolutely necessary. Option 2 presents as a form of self regulation whereas Options 1, 3 and 4 would each require primary legislation following the working up of detailed proposals and further consultation.

### Option 1 – Using the list of community assets

- 4.3 Subject to the evidence base produced by this consultation, the Government considers that, while restrictive covenants can lead to the closure of pubs which are considered to be important community assets, this does not occur to a significant extent at a national level (as suggested in Section 3). As such, one option for change would be a system where local authorities and local people are able to decide on a case by case basis, when a pub is considered to be community asset, and to assess the impact on communities of any restrictive covenants on them.
- 4.4 Under the Community Right to Buy legislation which currently forms part of the Localism Bill, a local authority will be required to maintain a 'list of assets of community value.' When listed assets are put up for disposal, community groups are able to trigger a window of opportunity to prepare a bid to buy the asset. At the end of this period, the asset is then sold on the open market. Local authorities will have access to a list that provides demonstrable evidence of the community value of certain assets which can include pubs.
- 4.5 Under this scheme, if a pub which is on a list of community assets comes up for sale, and is either subject to an existing or new covenant, a local authority should be informed whether that covenant would prevent the asset from continuing to operate

in its present capacity. Where appropriate, a local authority would then be able to make a determination annulling the covenant, thereby preventing the seller from applying a covenant.

- 4.6 The advantage of using the list of community assets would be that it negates the need to impose blanket bans in favour of looking at each situation on its own merits. In addition, a restrictive covenant would only be queried where there has been a clear demonstration by the local community that the asset in question is of value to them in its present form. The list of community assets could also be used for restrictive covenants that apply to other community assets (such as local shops and community centres) in the same way.
- 4.7 Such a proposal would require more detailed consultation, including on how the process would work in detail, and how any legislation could be framed so as to be compatible with the European Convention on Human Rights, especially article 6 and article 1 of the First Protocol. This would entail consideration of procedural rights and appeals, and whether, and if so what, compensation would need to be payable in the event that covenants were annulled or prohibited. The issue of burdens on local authorities would also need to be considered as clearly some local authority effort would be required.

## Option 2 – Encouraging more self regulation

- 4.8 An option which would not require any form of legislation would be for the Government to encourage the pub and brewing industry to voluntarily cease the use of restrictive covenants.
- 4.9 This option would continue a trend shown by organisations such as Punch Taverns, Enterprise Inns and Greene King which have already taken the decision to halt the use of covenants. Using this option could involve, for example, pushing for a stipulation that individual company codes of practice are not accredited by the British Beer and Pub Association (and associated organisations) without a commitment to not using restrictive covenants. However, while this might be an attractive option in that it does not raise the prospect of additional legislation, this consultation has already demonstrated that some organisations are actively interested in retaining the ability to use restrictive covenants and many consider it to be the industry's role to reduce the number of pubs in an 'over-pubbed' area rather than the market. As such a long-term, voluntary industry-wide cessation would appear difficult to achieve.

## Option 3 – Nationwide ban

- 4.10 Another option for change that would require primary legislation to enable the Government to impose a nationwide ban on the use of restrictive covenants on pubs that prevent continued same purpose use following a sale.
- 4.11 This option is likely to be popular with those organisations that consider restrictive covenants on pubs to be a national problem and one that does significant harm to communities.
- 4.12 However, it is an option that also has potential drawbacks. This option would be likely to attract significant opposition from those organisations looking to support continued use of covenants but who might be open to the idea of considering cases on an individual basis where there is tangible community interest.
- 4.13 Practically, the Coalition Government will only wish the use legislation as a last resort. Given the evidence presented in Section 3, it appears that the use of restrictive covenants on pubs is irregular and not particularly prevalent at a national level. As such, a blanket ban of this nature may be considered a centralist and heavy-handed way of dealing with an essentially localised problem. Furthermore, the costs and time associated with finding a suitable legislative vehicle for a ban are likely to provide significant barriers to successfully achieving this option.

## Option 4 – Local ban

- 4.14 A further option would be, as suggested by Darlington and Newcastle City Councils in their petitions, to provide local authorities with the ability to prohibit the use of restrictive covenants on establishments that fall under the scope of 'local services' as defined by the Sustainable Communities Act 2007. This would require primary legislation and would, effectively, provide local authorities with the ability to impose a local ban on restrictive covenants not only on pubs but also a range of other community assets that provide local services.
- 4.15 The Government believes that, as with Option 3, a blanket ban, even at the local level, could be viewed as a heavy-handed response to an issue which could be considered as not particularly prevalent. This option, while giving local authorities the ability to choose whether or not to stop covenants in their area wholesale, is also less targeted than Option 1, which deals with each case on its merits.

## Questions

- Q4. Do you believe that the Government should act to help prevent pubcos and/or breweries from using restrictive covenants on pubs that prevent same purpose use after they are sold?
- Q5. If so, do you have a preferred option for any change (or would you like to suggest an alternative method)?

# Annex A

## Summary of questions

### From Section 3

Questions
Q1: Do you believe that placing restrictive covenants on pubs that prevent same purpose use after sale can have a negative or harmful impact on local communities? If so, please provide detailed examples.
Q2: Do you believe that restrictive covenants are effective in ensuring the future viability of pubs in England?
Q3: Do you believe that there is any difference in terms of restrictive covenants imposed by national pubcos compared to more regional brewery companies?

### From Section 4

Questions
Q4. Do you believe that the Government should act to help prevent pubcos and/or breweries from using restrictive covenants on pubs that prevent same purpose use after they are sold?
Q5. If so, do you have a preferred option for any change (or would you like to suggest an alternative method)?

# Annex B

## Consultation criteria

The Government has a code of practice on consultations. The criteria below apply to all UK public consultations on the basis of a document in electronic or printed form, and will often be relevant to other sorts of consultation.

Though they have no legal force, and cannot prevail over statutory or other mandatory external requirements, the instructions below should otherwise generally be regarded as binding on UK departments and their agencies, unless ministers conclude that exceptional circumstances require a departure.

1. Formal consultation should take place at a stage when there is scope to influence the policy outcome
2. Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible
3. Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals
4. Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach
5. Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained
6. Consultation responses should be analysed carefully, and clear feedback should be provided to participants following the consultation
7. Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience

The full consultation code may be viewed at:

<http://www.bis.gov.uk/policies/better-regulation/consultation-guidance>