



Assets of Community Value

Free market interference or preservation of social wellbeing

February 2012

Background

The ministerial foreword to last year's DCLG consultation stated,

“when important local amenities and buildings – such as community centres, old town halls, village shops or pubs – come up for sale, communities will have extra time to prepare a bid to take them over, making it easier to keep much-loved assets in public use and part of local life”.

During the passage through Parliament the Localism Bill's provisions on assets of community value were much commented upon. The relevant provisions of the Act have now come into force, but these merely provide the framework.

Last year's consultation¹ was then followed by a Policy Statement on 12 September setting out the way forward. The Department has recently confirmed that they are currently finalising draft regulations which are to be placed before Parliament in April.

We understand that CLG does not propose to consult publicly on the draft regulations as they have already consulted on the principles: **“the regulations will broadly follow the position outlined in the policy statement”**. The changes to the Bill discussed in the policy statement were debated and introduced at the Lords stage before the Bill was passed. This note considers the provisions in the Localism Act and the Policy Statement.

'Snapshot'

The basic premise of the legislation is that there will be a moratorium on an owner's sale of a listed community asset within England and Wales, so that an owner cannot dispose of the asset until certain conditions have been met. This will provide local community groups with a specified time frame in which, firstly to notify an intention to bid for the asset, and secondly to produce a “business plan” and to raise funds to purchase the asset on the open market. If a bid is not forthcoming from the community group within the relevant period (or fails), the owner's sale can then take place within a defined window. The provisions do not require the owner of a listed asset to sell his property to the community group.

This note considers the proposals in two parts, firstly the process of nomination and listing, and secondly the consequences of listing. Before considering aspects of these proposals in more detail we provide a summary overview immediately below.

Part 1: Process of nomination

Summary - the processes of nomination of assets as being of community value

The new regime for nomination will operate as follows:

1. Local authorities (**LAs**) will be required to maintain a list of assets of community value. Whether or not a building or land is of community value will be determined by the LA in accordance with Regulations.

¹ Proposal Strategies A Community Right To Buy – Assets of Community Value 4 February 2011, DCLG

2. Land will be included in the list in response to a community nomination or (if the regulations allow) by other prescribed persons or bodies.
3. If a nomination is received, the authority must consider it and then accept it if it is determined that the relevant land is in the authority's area and of community value.
4. Notice of the authority's decision must be given and there will be a right for owners to challenge by way of internal LA review and then by way of appeal to a First-tier tribunal.
5. As well as a list of successful nominations the LA will have to maintain a list of unsuccessful community nominations (with reasons). An unsuccessful community nomination must remain on the list for five years and may be removed, (but need not be) after 5 years.
6. If an asset is successfully nominated then it is to be removed from the List after a period of five years from nomination, unless removed from the List earlier in accordance with Regulations. It may be that the list of successful and unsuccessful nominations is maintained as one list.

In more detail ...

Before looking at the mechanics of the process whereby a community asset is listed it is important to bear these points in mind:

- **"Assets"** refers to land, buildings and structures – it does not include services.
- **Owners** are those who own the freehold of an asset or a lease which when granted had a term of at least 25 years. Where there are a chain of leases the Owner for the purposes of the Assets of Community Value regime, is the qualifying leasehold owner most distant from the freehold owner.

What is Community Value?

The assessment of whether a particular "building or other land" is of community value is a discretionary decision for the LA; it will have to take into account all relevant matters when making its decision. If in the opinion of the LA the land meets the following criteria it is intended that it should qualify for listing as an asset:

- its main actual current use furthers the social well being **or** social interests of the local community, or a use in the recent past has done so; **and**

- that use is not an ancillary one; **and**
- for land in current community use it is realistic to think that there will continue to be a main use which furthers social wellbeing or social interests, **OR** for land in community use in the recent past it is realistic to think that there will be community use within the next 5 years (in either case, whether or not that use is exactly the same as the present or past); **and**
- it does not fall within one of the exemptions which may be contained in the regulations (not yet made).

This means that for an asset which already furthers social well-being or social interest, it must be realistic that it will continue to do so; and for one which did so in the recent past, it must be realistic to think that there will be community use again within the next five years. During debate the parliamentary under-secretary of state for DCLG noted that the reference to potential use is to allow community groups to develop options for future use of such buildings. In debate it was also noted that the definition covers only social interest and well-being, not economic considerations. **"Social interests"** are defined to include cultural, recreational and sporting interests. The Policy Statement clarified that the meaning of 'recent past' will be left to the LA to determine; the reason given is that the meaning might be viewed differently in different circumstances.

Exclusions from listing

The Policy statement acknowledges that some categories of land should be excluded on policy grounds and the examples it gives are operational land used for transport infrastructure and related purposes by specified bodies with statutory powers. The Policy statement also indicates that residential premises would be excluded. However any living quarters which are an integral part of a pub or shop would be eligible for listing. The consultation which preceded the Policy statement had also suggested that trust ports, ancient monuments, statutory allotments, and school playing fields would not automatically be excluded. In summary it is not yet clear what the exclusions will be. Regulations which have not yet been made will set these out in more detail.

Application for listing as an asset: who can make it?

The Act's provisions require the LA to maintain a list of land in its area that is land of community value (**the List**). The consequences of land being included on the List are considered further below, but first we set out who might be eligible to make a nomination. Land can only be included on the List if an application is made for it to go onto the List.

The Act provides for two different types of applications firstly, 'community nominations', and secondly 'other nominations'.

'Community nominations'

There are eligibility criteria for making nominations. The following will be eligible to make a 'community nomination':

- parish council in respect of land (in England) in the parish council's area
- community council in respect of land (in Wales) in the community council's area
- a person that is a 'voluntary body' or 'community body' with a 'local connection'.

The Act provides that regulations will be made to specify the criteria which a 'voluntary body' and a 'community body' will need to meet. The original Consultation also envisaged that **neighbourhood forums** would be eligible to make a community nomination. Regulations will set out what conditions will have to be met by a person that is a 'voluntary body' or 'community body' to meet the 'local connection' test.

Various suggestions were made in the original Consultation document about how 'local connection' might be assessed. The summary of responses to the Consultation indicated that there would be broad support across all sectors for the relevant group or individuals to be 'based' within existing local authority or parish boundaries or within specified proximity of the asset. The Policy statement also envisages that a local voluntary or community body will be defined as a body which may be incorporated or unincorporated, must not be run primarily for profit, and must have a primary purpose concerned with the local authority's area, (or the neighbourhood in which the asset is situated where this is in more than one local authority's area).

'Other nominations'

No further details are contained in the Act on who will be entitled to make a nomination which is not a 'community nomination'. The Policy statement does not provide any clarification on this point either. However, the Act does contain provision for further detail to be set out in regulations on who will be eligible to make 'other nominations' and the form and content of these. The summary of responses to the Consultation showed that a small number of respondents were opposed to the possibility that national or sub-national specialist interest groups whose objectives cover a local area, or who have an interest in the nature of the asset should be able to nominate an asset.

One could envisage circumstances in which a body with a particular mandate such as conservation could have an interest in nominating an asset where this has particular heritage significance in addition to community value. Whether bodies with particular mandates will be able to make a nomination will depend on the final regulations.

Consideration by LA of the nomination

Once an application has been made to the LA it must consider the application. The nomination must be accepted and the asset must be included on the List where the land nominated is in the LA's area and is of community value. Whether or not an asset has this community value will be a matter to be determined in the opinion of the LA. If a nomination is successful and the asset is included on the list it will be registered as a local land charge. If a nomination is not successful the LA must provide written reasons for this.

There are no statutory provisions for those nominating an asset to challenge the LA's decision if its decision is not to list the asset. The only way for a voluntary or community body to challenge the LA's decision would therefore be by way of judicial review.

Review of decision to include an asset on the List

The Act allows owners to require the LA to review their decision to include an asset on their List. Pending the outcome of any review the asset will remain on the LA's List and be registered as a local land charge.

An owner will initially have a specified period from the date of receipt of notification of inclusion on the List in which to request an internal LA review of the decision. The time period will be specified in regulations yet to be made, but the Policy statement indicates that the period is likely to be 28 days to make an application for a review, with six weeks estimated for the completion of the review by the LA.

The Policy statement also suggests that the owner will be able to present a case for removing the asset from the list based on whatever evidence they consider appropriate. This is expected to include: eligibility of the asset (i.e. its community value), eligibility of the body which nominated it, any new information following the application, and any irrelevant or improper matter which the LA might have taken into account in reaching its original decision.

The Policy statement envisages that the review will be undertaken by an independent person not involved in the original decision, that the owner will have the right to request an oral hearing with representation, and a right of appeal to an independent First-tier tribunal if the owner is unsatisfied with the outcome of the internal review.

Notice of listing

A notice of inclusion on or removal from the List must be given by the LA to the:

- owner
- occupier
- if the asset was listed as a result of a community nomination, the person/body which made the nomination
- any person(s) specified by regulations.

Any notice must provide an explanation including in particular the consequences of inclusion on the List and the right to ask for a review in the case of a successful nomination, and reasons in relation to an unsuccessful nomination.

Part 2: Consequences of inclusion on the list of assets of community value

Summary - moratorium on disposal of listed assets

If a listed asset is to be disposed by the asset owner, it may not do so until:

1. It has first notified the LA of this intention. This date starts the timetable.
2. A period of 6 weeks has passed without a qualifying 'community interest group' giving notification that it is interested to purchase the asset (**Interim Moratorium**).
3. If a notification is received in the Interim Moratorium period, a six month period has passed from the date that notification was received (**Full Moratorium**).
4. During the Full Moratorium disposal may take place only to the community interest group (at a price agreed between the parties). For public authority owned assets, this could be at less than market value, up to an under-value of £2m if in furtherance of local social, economic and environmental wellbeing. Unless it is to a community interest group, the asset may not be disposed of during this period unless the disposal is 'exempt' or does not qualify as a 'relevant disposal'.
5. If a bid has not been received during the Full Moratorium period, or if it is not accepted, then for the remainder of an 18 month period starting with the initial notice given by the owner (**Protected period**), the owner can dispose of the listed asset on the open market. The owner will therefore have 12 months in which to dispose of the asset freely, before the moratorium process restarts.

In more detail ...

Before looking at the mechanics of the process for disposal of an asset of community value, it is important to bear these principles in mind:

- **"Relevant Disposal"** will be the sale of the freehold, or grant or assignment of a lease originally granted for 25 years or more, but only where the disposal will give the new owner vacant possession. A relevant disposal occurs when it 'takes place', but if pursuant to a binding agreement to dispose it occurs on exchange of the binding agreement.

- Only a **"Community interest group"** can bid. The qualifying criteria will be defined in the Regulations, but the Policy statement envisages that the following will qualify: parish council, a body with 'local connection' but which is constituted either as a company limited by guarantee, an industrial and provident society, a community interest company, or a registered charity including a Charitable Incorporated Organisation.

Exempt disposals

Regulations will set out which disposals are exempt. The Policy statement indicates that the following disposals may be exempt:

- all transfers other than for value (gifts)
- transfers between family members or trustees
- disposals by personal representatives
- business transfers of a going concern where the intention is to continue the asset's existing use
- disposals made as a result of binding or pre-existing arrangements, e.g. transfer in pursuance of court order, disposals in pursuance of a compulsory purchase order
- transfer between connected companies
- disposals pursuant to other legislative provisions
- transfer of assets by publicly owned bodies for the purpose of ongoing service delivery.

Moratorium

The date on which the LA receives the owner's notice of an intention to dispose of a listed community asset will trigger the moratorium rules and will start the timetable.

The first part of the moratorium commences on the date that the LA receives the owner's notification of an intention to dispose. An interim 6 week moratorium then commences. This provides the window of opportunity for a qualifying 'community interest group' to express an interest (in writing) in purchasing the asset. If none do so in this period, the owner is free to sell their asset on the open market.

If a community interest group does express an intention to bid during these six weeks, then a full moratorium period runs (again from the date that the LA received the owner's notification of an intention to dispose). During this six month period the asset owner may not dispose of the asset unless the disposal is exempt or it is a permitted sale (see further below). The six month period is intended to give the community interest group time to put together its bid to purchase the asset at open market value. If the asset is owned by a public authority the disposal price could be at less than market value; up to an under-value of £2m if in furtherance of local social, economic and environmental wellbeing.

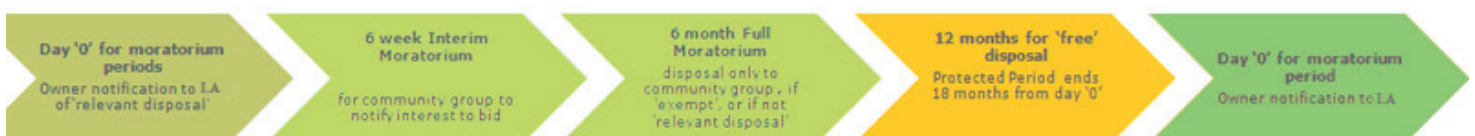
If a bid has not been received (or is not accepted) in the six month period the asset owner is again free to sell to whomever they choose at whatever price they choose, and no further moratorium can be triggered for a protected period (18 months from the date that the LA received the owner's notification of an intention to dispose). The owner will therefore have 12 months in which to dispose of the asset freely. After the protected period has passed, the moratorium process will need to be gone through again and each of the relevant conditions satisfied before a sale can take place. **The diagram below summarises the moratorium and disposal process.**

Permitted sale

The Policy statement clarifies that where there is a community interest group that wishes to purchase the asset and a price is agreed between the owner and the group, the sale should be able to take place at any time within the 6 month Full Moratorium period. This would effectively offer the group a right of first offer.

Notice provisions

The LA must notify an asset's inclusion on its list of community assets to a number of people (see heading above 'Notice of listing').



In addition the LA is under a duty to publicise notice of an owner's intention to make a relevant disposal. The list entry for the asset must record whether a notice of an intention to dispose has been received by the LA and the date of receipt, together with the end dates for the initial and full moratorium periods, and the end of the protected period which apply in respect of the relevant notice.

If inclusion of the relevant asset on the list is as a result of a community nomination then the LA is under a duty to notify the person/ body that made the application of the receipt of the owner's notice and the applicable time periods as described above.

Enforcement and compensation

The Act provides a power to make regulations on enforcement. The Consultation sought views principally on two options: provision that non-compliant transfers would be voidable and imposition of a compensation payment (or other remedies) by a court or tribunal.

The Consultation envisaged that a qualifying community interest group would be able to lodge a claim for the sale to be deemed voidable in a civil court within 6 months from the sale. The Consultation envisages that the claim would be made against both the original owner and the subsequent owner(s). The Consultation also envisaged a requirement that the community interest group make efforts to reach agreement with the owners.

Views were also sought on imposition of appropriate sanctions by the courts on previous and current owners including compensation (or an order setting aside the sale if appropriate), together with a right of appeal.

The responses to the Consultation supported the need for an enforcement regime, but the views differed on whether the sanction of avoidable transfer would be proportionate.

The Policy statement confirms that the Regulations will provide for compensation payable to landowners (other than public authorities) in appropriate circumstances, and that a claim would have to be made within 90 days after the Interim Moratorium or Full Moratorium (whichever applied).

The Policy statement suggests that this would apply to costs incurred as a result of complying with the procedural requirements of the scheme and that the system would be administered by the LA.

The Policy statement also indicates that the Regulations will provide a right for the owner(s) to request an internal review of the LA's decision on compensation and for a right of appeal from the LA review decision to the first-tier tribunal.

Comments

In practice there is no guarantee that an asset that is nominated will actually be included on the LA List. The LA must be satisfied that the criteria for listing are met. The application of this test by the LA includes a discretion, whose listing decision is not challengeable (except by way of judicial review). An LA is most likely to refuse to list an asset in circumstances where there is no realistic prospect of the asset's main use continuing to further social wellbeing or social interests or for such a use to come forward within the next five years.

It is likely that there will be a distinction between bodies which will be able to nominate an asset for listing and the type of body which will qualify to bid for an asset. In the debate on the provisions the parliamentary under-secretary of state for DCLG noted that, while conditions will be set out in regulations to demonstrate a local connection, the intention is that unincorporated "*groups that have recently been set up to help save an asset*" should be eligible to make a nomination. The eligibility criteria for the groups to bid for an asset are likely to be more rigorous and related to incorporation.

On the face of the Act the definition of community value as a use which furthers the social wellbeing OR social interests including cultural, recreational and sporting is very wide. The meaning of social interests led to much debate during the passage of the bill; the meaning of 'social well being' less so, despite this being an even wider definition. An unsuccessful amendment was tabled in the Lords which would have required the LA to have regard to a number of specified factors including relevant planning policies, the nominator's proposed use, the community support for the nomination and the availability of other assets locally that could serve the same purpose.

There is power on the face of the Act to make Regulations to set out matters which will not be of community value.

It has been indicated that automatic exclusion from listing might be based on: current ownership/occupation, nature of any interest in the land, current or potential future use, operation of statutory provisions or the value of any purpose. It is also intended to provide further detail on part listed land. However, this still leaves scope for capricious outcomes. The LA will have discretion to determine what furthers the social wellbeing in the particular area which might well be different in another area: **“what is valuable to communities in the Cotswolds will not necessarily be the same as what is valuable to communities in inner-city Manchester”**.

The procedure for listing an asset will involve a significant burden for LAs, in debate it was noted **“...that even on a conservative basis this will be a resource-hungry exercise for local authorities.”** The LA's obligation to inform the person who has nominated the asset of an owner's intended disposal will increase the administrative burden on LAs, which will be reliant on owners providing notice of an intended disposal to it, so that it can fulfil its notification obligations. Circumstances can be envisaged where originator of the community nomination does not become aware of an intended disposal (or only becomes aware of it very late in the day).

The definition of relevant disposal will cover option agreements (see relevant disposal above), however in the absence of further guidance in relation to these there are some problems of interpretation which it can be anticipated will create some problems in practice. It is not clear on the face of the legislation whether the owner would be obliged to notify the LA at the point at which the option is exchanged or at the point that it is exercised. However, it might be anticipated that in the spirit of the legislation - to provide a right of first offer for groups - it would be deemed to be prior to the date of exchange. A practical solution may be to adjust the length of any option period (or pre-emption agreement) so that this falls outside the definition of a relevant disposal, but if this is not a possibility then the potential penalties for non notification become very relevant.

Very little further information on further Regulations on enforcement and compensation has been published. It has been indicated that compensation will relate to the costs of listing and complying with the regime. However, no further clarification has yet been provided on whether the compensation provisions will take account of the decrease in the open market value which is the generally anticipated consequence of a listing as a community asset.

Finally, subject to any restrictions which might be imposed in Regulations, owners that do dispose of their asset to a community group would be well advised to secure a profit sharing mechanism, including on a subsequent disposal by the community group and any change of use.

Key Contacts

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