

## Assets of Community Value under the Localism Act - Blighting of development or boosting the local community

Christopher Cant

This government appears unable to make up its mind as to whether it really wishes to encourage house building. The erratic and haphazard introduction of CIL in parts but not all of the country should be enough for the industry to cope with at present. However, just when efforts have been made to curb the use of applications to register village greens as a means of preventing development so the government has introduced another weapon to be used against developers. Part V of the Localism Act 2011 contains provisions under the general heading "Community empowerment". Chapter 3 of that Part provides a regime whereby nominations can be made for the listing by the local authority of "Assets of Community Value" ("ACV"). This regime seems to me to have at its heart a good idea which very occasionally can produce good results for communities, However, the idea has not then being subjected to serious and hard analysis as to the consequences that will flow from its operation. It does not help that the statutory provisions are rather general in formulation and can at times operate in an unintended manner. In consequence the resulting actual benefits for local communities are likely to be outweighed by the deterrence of development and the stifling of sales. It is hard to believe that local authorities welcome either the increased administrative burden imposed by the regime or the serious risk of having to pay compensation for something which is not of the authority's making.

1. General concept – the motivation for introducing this new regime was the belief that community assets such as village halls were being lost to the community because the community could not respond swiftly enough when there was a decision to sell. The answer adopted in appropriate cases was to compel a pause during which groups acting on behalf of the community can organise a competitive bid for the asset. To achieve this certain community bodies may nominate an asset for listing by the local authority. Once listed the regime imposes a moratorium when there is an intention to dispose of the listed asset but does not compel a sale to any such community group. No control is imposed over the terms of the proposed sale or to whom the disposal is made or as to the use to which the asset is put. The operation of the regime merely for a period holds up the making of the disposal. It does not, therefore, impose statutory pre-emption rights such as under the Landlord and Tenant Act 1985 when the landlord of a block of flats wants to sell a material interest. There has been one well publicised purchase of a pub in South London by a community group but in general this listing regime seems to generate a great deal of concern and expense but not a lot of new community amenities.

2. Assets of Community Value – the regime applies to vacant land and to buildings which satisfy certain qualifying criteria. The criteria are specified in general terms and a number of the important phrases are undefined. The official guidance indicates that this is deliberate and the intention is that this leaves each local authority free to adopt its own definition. Such an approach is objectionable as a matter of principle. However, if it is to be adopted then there should be a requirement that each local authority publishes its definition of such phrases. Some authorities have

helpfully set out on their website not just a summary of the regime but how they interpret some of the phrases. One such is Thanet DC.

Further uncertainty arises because the criteria are not absolute. The test is not whether the criteria have been satisfied on an objective basis but whether the local authority considers that they have been satisfied.

There are certain types of land and buildings which will be excluded from the listing regime (see section 4 below).

3. Qualifying criteria – there is a two stage approach to applying the criteria.

3.1 Actual user – the first stage is to determine whether two conditions have been satisfied. These are:-

(i) the land or building is currently being actually used to further the social wellbeing or social interest of the local community (“community benefit”) and this use is not an ancillary use;

(ii) it is realistic to think that there can continue to be user of the land or building which is not ancillary which will further community benefit. This future use for community benefit is not limited to the current use and so an entirely different community use can be proposed.

There is no definition of social wellbeing so it is left to each local authority to decide what it considers falls within the phrase. Village halls very obviously fall within the scope of the phrase. However, this is not limited to non-profit making uses. Currently pubs have been a very popular subject for nomination. Perhaps surprisingly football stadiums such as Old Trafford have been listed. Village stores are another commercial user which lends itself to listing.

In the event that there is no current actual user then the process moves on to the second stage.

3.2 User in the recent past – if the first stage does not result in the land or building being treated as an ACV then it has to be determined whether the next two conditions have been satisfied. These are:-

(i) there was a time in the recent past when an actual use furthered community benefit which was not an ancillary use;

(ii) it is realistic to think that there is a time in the next five years when there could be user of the land or building which is not ancillary which will further community benefit. As with the second condition of the first stage this future use for community benefit is not limited to the past use.

No express guidance is given as to what constitutes the recent past. Thanet DC has stated that it is the last five years. In the official guidance it is suggested that if there has been user of the land for purposes such as use by the Ministry of Defence for live ammunition practice the period could be ten to twenty. This sheds little light on the type of cases which will normally arise. It is no surprise that the risk of listing will discourage developers or even ordinary sales.

4. Excluded land and buildings – three categories of land and building will be excluded from the operation of the listing regime in accordance with Schedule 1 to the Assets of Community Value (England) Regulations 2012 (“the 2012 Regulations”). The principal exclusion relates to residences. The other two are caravan sites and land held by a statutory undertaking for its operations.

The residence exclusion covers not just homes but includes hotels, houses in multiple occupation and holiday dwellings. The exclusion of a residence extends to the land connected with it. The extent of the land excluded does not require an elaborate investigation of what constitutes the house’s curtilage. Instead it will cover all land which with the residence is in single ownership provided that any part can be reached from every other part. If a road, canal, river or railway splits the land then this will not prevent the requirements being satisfied if but for that intervention such access would be possible.

Importantly it does not cover vacant land with planning permission for the construction of a residence or even land with an uncompleted dwelling in the course of construction. What is not clear is what happens if a dwelling is built on listed land. Should it then be removed from the listing or does it have to remain?

A building which is only partly used as a residence will still be listed if it otherwise qualifies for listing. This is intended to cover shops or pubs with living accommodation but the scope of this limitation on the residence exclusion could be unexpectedly wide. A home with part exclusively used for commercial or professional purposes would take the building outside the residence exclusion. Its operation could depend on what constitutes a single building which has been a vexed question for purposes such as rating and sewers. This provision could operate in a harsh and unexpected manner.

4. Part-listed disposal - there are special provisions relating to what are called “part-listed disposals”. This covers land which is in part listed and in part not and which satisfies the same two conditions as need to be satisfied for land to be connected with a residence – single ownership and each part accessible from the remainder. Such a disposal will not be subject to the moratorium (discussed in section 5 below) so that there is no need for a pause before making the disposal. There is nothing to prevent an owner of a listed ACV purchasing an adjoining area of land which is not listed and then making a part-listed disposal. The application of this provision could be significant.

5. Moratorium – when listed there will be limitations on the timing of any sale. The owner will have to give notice of the intention to dispose of the listed ACV. In contrast to a section 5 notice by a landlord under the 1985 legislation there is no need to disclose the details of the proposed disposal. Such notice is published on the authority’s website. No disposal can take place for the period of six weeks from the giving of the notice. On the expiry of the six week period the disposal of the ACV can proceed unless before then a written request has been made by a community interest group to be treated as a potential bidder. If such a request is made then the moratorium continues until the expiry of a period of six months from the giving of the owner’s notice (and not the written request). This period is to enable a bid to be organised to be put forward by that group. The owner is not compelled to accept any such bid but must wait before making the proposed disposal. Once the six month period has expired the owner is free to dispose of the ACV until the expiry of the period of eighteen months from the giving of the owner’s notice.

Any disposal which infringes the listing regime will be ineffective (para. 21 of the 2012 Regulations). This is so even if registration at HM Land Registry has gone ahead. It is a strong deterrent and a source of concern. For example, it is predictable that some owner's and purchasers may wish to obtain a commitment to a sale and purchase ahead of a decision on a nomination to list an ACV. Conditional contracts will be the obvious answer but will that be an infringement and if it is will that matter if the contract can only proceed if the subject matter of the contract is not listed? It would seem not. A similar point arises if the ACV is listed and there is a desire to have a conditional contract. In such circumstances as the owner is not compelled to consider a bid from a community interest group can there be a genuine conditional contract or will it inevitably be an unconditional contract with a deferred completion. Will such a contract be an infringement of the listing regime or will it avoid being so because there is no disposal until completion takes place? With the 1985 Act amending legislation was required to cope with both unconditional and conditional contracts. Such a point should have been provided for in this regime.

Once listed the ACV remains on the list for five years. If it ceases to qualify as an ACV during that period then it is to be expected that it should be removed from the list although this is not spelt out in the regime. At the expiry of the five year period it will drop off the list but there is no restriction on a fresh nomination being made then.

6. Compensation - in a time of local government austerity local authorities must resent the entitlement to compensation included in the listing regime. An owner of a listed ACV will be entitled to claim a loss or expense in relation to the ACV "which would be likely not to have been incurred if the land had not been listed" (para. 14(2) of the 2012 Regulations). This will include a loss or expense "which is wholly caused" by the operation of the moratorium provisions (para. 14(3)). An owner of ACV may pay more interest as a result or make wasted payments such as service charge or rates. It will not, however, be limited only to loss arising due to the moratorium. Listing itself may result in a lower price and if so the reduction attributed to listing should be a loss triggering a compensation payment. No compensation is payable for loss or expense caused by a failed listing application yet such loss or expense will often occur.

Care will need to be taken as there are tight time limits. A claim must be made within thirteen weeks from the date that the loss or expense was incurred or (if appropriate) finished being incurred. When acting for an owner of an ACV the possibility that a claim may need to be made will have to be kept to the fore. Not only must the claim be made within the time limit but the supporting evidence must accompany it. This will impose stiff time pressures as such evidence is unlikely to be straightforward probably including a professional valuation and evidence on comparables. It is a concern that the amount of compensation payable is determined by the authority which has to paid it.

It will be interesting to see whether the risk of such compensation payments and the inability of local authorities to manage the risk regarding such payments will act as brake on the number of listed ACVs.

7. Planning – nothing is provided in the listing regime with regard to the planning position of a listed ACV. Listing does not impose any restrictions on the use of the listed land. However, it is a factor likely to be taken into account by the local planning authority when deciding whether or not to authorise a material change of use.

8. Procedure on applications, reviews and appeals – there is currently an informality regarding nominations for listing. It sits ill with the impact that listing can have. All that is required is a brief description in the required form stating why the body nominating the asset considers that it qualifies. This may be in manuscript and illegible. The hurdles to be overcome should be set higher with more being expected of the nominating body. What is proposed by way of future community use should be required to be set out with supporting evidence. Such a nomination will cause the owner expense and worry. There will be a need for carefully prepared grounds of objection with fine judgments being made over the extent of the evidence provided. The scope for argument over matters such as user and community benefit is very high. The owner's position is not improved by the absence of any restriction on the number of nominations that may be made in relation to the asset. Authorities should not accept vexatious nominations so as to prevent abuse.

There is more formality with the review that can be requested by the owner if the ACV is listed (see Schedule 2 of the 2012 Regulations). Care needs to be taken to ensure compliance with the eight week time limit as there is no provision for extensions. If the review does not result in the removal from listing then the owner may appeal to the First-Tier Tribunal.

9. Overview – there is a need for a careful balance between meeting the needs of a growing population and retaining what is good for local communities. There needs to be a review as to what is actually being achieved for local communities by this regime. The serious risk is that it will achieve little by way of preservation of community assets but will deter valuable developments and adversely and unnecessarily impact owners of land and buildings and the finances of local authorities. There is also a need to tighten up the operation of the regime so as to provide greater protection to owners and developers.

ChristopherCant©2014