

BRENTWOOD – WILLIAM HUNTER WAY

ASSETS OF COMMUNITY VALUE

ADVICE

1. I have been asked to provide advice as to a lawful approach to considering whether provision for disabled parking which is currently made within the William Hunter Way car park (“the Car Park”) which is within a greater parcel of land the subject of a substantial redevelopment scheme, may be an Asset of Community Value (“ACV”) for the purposes of the provisions in the Localism Act 2011.
2. The site is a sensitive one, in terms of the redevelopment potential I have described above, and I have been asked to consider in particular whether members may take into account:
 - a. firstly that alternative (and broadly equivalent) disabled parking would be provided pursuant to the redevelopment scheme (albeit not in precisely the same place);
 - b. secondly that disabled parking, by its nature, is an asset normally used only by a numerically very small section of the community.
3. In my view there is no closed list of factors that are capable of being relevant to whether land or a building amounts to an Asset of Community Value. The legislation has deliberately been drawn in a broad way. I set out the main elements of the legislative scheme and applicable caselaw below.

Analysis

The statutory provisions

4. The relevant statutory provisions are contained in Chapter 3 of Part 5 of the Localism Act 2011 and The Assets of Community Value (England) Regulations 2012 S.I. 2012 No. 2421 (“the Regulations”). They came into force on 21 September 2012 and accordingly are relatively untested. In October 2012 the government issued a non-statutory guidance note in relation to the provisions. That non-statutory guidance does not assist with the present issue.

A summary of the provisions

5. In CR/2013/0010 Judge NJ Warren (the President and lead judge in dealing with ACV applications) summarised the effect of the provisions in this way:

“The Localism Act 2011 requires local authorities to keep a list of assets (meaning buildings or other land) which are of community value. Once an asset is placed on the list it will usually remain there for five years. The effect of listing is that, generally speaking an owner intending to sell the asset must give notice to the local authority. A community interest group then has six weeks in which to ask to be treated as a potential bidder. If it does so, the sale cannot take place for six months. The theory is that this period known as “the moratorium” will allow the community group to come up with an alternative proposal – although, at the end of the moratorium, it is entirely up to the owner whether a sale goes through, to whom and for how much. There are arrangements for the local authority to pay compensation to an owner who loses money in consequence of the asset being listed.”

The provisions in a little more detail

6. S.87 of the Act makes provision for the maintenance of a list of ACVs, and provides power for the Regulations to be made.

7. The essential statutory test for an ACV is set out in s.88. It is for the local authority to judge whether the criteria are met (subject to any challenge by way of judicial review). S.88 provides, in full:

“(1) For the purposes of this Chapter but subject to regulations under subsection (3), a building or other land in a local authority's area is land of community value if in the opinion of the authority— (a) an actual current use of the building or other land that is not an ancillary use furthers the social wellbeing or social interests of the local community, and (b) it is realistic to think that there can continue to be non-ancillary use of the building or other land which will further (whether or not in the same way) the social wellbeing or social interests of the local community.

(2) For the purposes of this Chapter but subject to regulations under subsection (3), a building or other land in a local authority's area that is not land of community value as a result of subsection (1) is land of community value if in the opinion of the local authority— (a) there is a time in the recent past when an actual use of the building or other land that was not an ancillary use furthered the social wellbeing or interests of the local community, and (b) it is realistic to think that there is a time in the next five years when there could be non-ancillary use of the building or other land that would further (whether or not in the same way as before) the social wellbeing or social interests of the local

community

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

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

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

- (a) the owner of any estate or interest in any of the land or in other land;
- (b) any occupier of any of the land or of other land;
- (c) the nature of any estate or interest in any of the land or in other land;
- (d) any use to which any of the land or other land has been, is being or could be put;
- (e) statutory provisions, or things done under statutory provisions, that have effect (or do not have effect) in relation to— (i) any of the land or other land, or (ii) any of the matters within paragraphs (a) to (d);
- (f) any price, or value for any purpose, of any of the land or other land.

(6) In this section— “legislation” means— (a) an Act, or (b) a Measure or Act of the National Assembly for Wales; “social interests” includes (in particular) each of the following— (a) cultural

interests; (b) recreational interests; (c) sporting interests; “statutory provision” means a provision of— (a) legislation, or (b) an instrument made under legislation.” (Emphasis supplied)

8. By s.89(1)(a) an application may be made by way of a community nomination. Such a nomination can be made *“by a person that is a voluntary of community body with a local connection”* as defined by the Regulations.
9. By s.90 – which deals with the procedure once a community nomination is made – the authority must accept the nomination if the land is in their area and is *“of community value”* (i.e. is adjudged by the authority to meet the criteria in s.88. If they refuse the nomination they must provide written reasons: s.90(6). S.90(2) provides that an authority *“must consider”* a nomination they receive.
10. By s.92 a landowner has the right to ask the authority to review any decision to include his land on the list, and to receive a reasoned decision on that review. By regulation 11 of the Regulations a landowner is expressly given a further right of appeal. No such right attaches to a failed bid to establish an ACV.
11. By s.93 the authority is obliged to maintain a list of land that has been subject to unsuccessful community nominations. Land nominated must remain on the list for at least 5 years together with the statement of reasons for not including the land as an ACV. After five years land may be removed from that list. The explanatory note attached to the Act does not explain (or even hint at) the purpose of that list.
12. By s.95 and the following provisions a procedure is set up for informing prospective sellers of ACV land/buildings of the interest of a community interest group in being a bidder in the sale. A sale of an ACV, unless made exempt by the Regulations, may not be

made until the three conditions set out in s.95 are met: s.95(1). Application of the conditions can effectively lead to around 6 months of delay in the sale by virtue of Condition B (s.95(3), (6)) unless the sale is made to a community group (with whom a disposal may be entered into at any time within the protected period): Regulation 13(1).

The Regulations

13. In dealing with the statutory construction of the provisions and in particular s.90(2) it is interesting to note some of the provisions in the Regulations which although they may not apply directly to the construction of the statute may indicate the general kind of application procedure that was envisaged when the Act was passed.
14. Regulation 3 provides for the regulations to specify land which is deemed not to be of community value and therefore cannot be listed. Schedule 1 sets out those cases. It would have been open to the legislature to include car parks on that list, but they did not. Accordingly, a car park is not ruled out in principle on that basis.
15. Regulation 6 provides for the contents of community nominations which are required amongst other things to set out the nominator's reasons for thinking the authority should conclude that the land is of community value. The procedure for a landowner to seek review and appeal in relation to a listing and any related compensation decision is also set down in the regulations.
16. By regulation 7 any application must be determined within 8 weeks of receipt of the nomination.
17. By regulation 8 an authority considering an application by community nomination must take all practical steps to give notice to the local parish council,

the owners of sufficient interests in the land, and occupiers of the land.

18. By regulation 13(2) and paragraph 4 of schedule 3 of the Regulations disposals made in pursuance of a legally enforcement option to buy or right of pre-emption entered into before the land was listed can be exempt from the moratorium provisions of the scheme.

Application of the provisions

19. I have referred above to the breadth of the statutory test. An established list of local facilities that are capable of being ACV's is emerging which includes shops, pubs, libraries, community halls, sports facilities, town halls, greens, churches and schools. It is worth noting that the editors of Planning Resource also included car parks within that list in an article dated 28.6.13.
20. Beyond that, there are certainly examples of car parks being considered to be ACV's by the relevant local authorities. Examples exist in Stroud (Long Street Car Park, Hill Road Car Park, Water Street Car Park, Castle Street Car Park); Rushcliffe (Health Centre Car Park, Walkers Yard Car Park); West Somerset (Exmoor House Car Park, Guildhall Car Park, Lion Stables Car Park); Tameside (Market Place).
21. On the other hand, other authorities have taken a stricter approach. Lichfield DC refused to list a car park at Bird Street.
22. There is no reported caselaw I am aware of beyond the level of the First-Tier Tribunal (General Regulatory Chamber) ("FTT") which deals specifically with this issue.
23. In CR/2013/0010 an overflow car park which was physically separated from the grounds of Oxford United

Football Club was included in the registration by OCC and their decision was upheld in the FTT. In paragraphs 17-19 the FTT set out the reasons why the overflow car park could properly be considered to be within the ACV designation, rejecting the argument that ACV designation could only properly be applied to simple schemes such as individual pubs, bowls clubs or shops.

24. It is interesting to note in that decision that there was a local plan policy permitting the regeneration of an area including the overflow car park subject to the provision of replacement (and apparently equivalent) car parking.
25. Some guidance may be found in the NPPF which deals with the social role of planning and indicates the breadth of the social dimension. The social role of planning is identified as *“supporting strong, vibrant and healthy by . . . [providing] accessible local services that reflect the community’s needs and support its health, social and cultural well-being”*. At para [69] the NPPF recognizes the importance of facilitating social interaction and creating healthy, inclusive communities.
26. I have seen a plan of the car park which indicates that the blue badge designated area is a small proportion of the overall site and contained in a discrete area to the right of the car park access road.
27. In this case the evidence supplied to support the nomination suggests (I have assumed all of what is repeated below to be substantially accurate) that the current usage of the blue badge designated area of the car park is 90% - 95% all week. The application relies on the suggestion that the car park provides a uniquely safe parking facility segregated from the dangers of highway traffic, yet adjacent to the town centre. The Car Park thus, it is said, encourages disabled persons to visit and spend money in Brentwood, benefitting the local economy. It notes the particular vulnerability of disabled

people to being hit by passing traffic. It also notes the advantages of street level access car parking to the disabled population compared to multi-storey car parking.

28. In my view it would not be lawful to exclude from consideration an application for an ACV simply on the basis that it was limited to an identified section of the community (by definition). There is no such limitation in the statutory words and in my view there is no basis to imply one. As a matter of fact local shops, pubs, libraries, bowls clubs and so on will typically be accessed – when considered individually – by a limited section of the overall population.
29. However, in my view, the number of people who are likely to use a facility may lawfully be taken into account as one factor in deciding whether or not the land provides *“furthers the social wellbeing or social interests of the local community”*.
30. The extent to which the planning history and planning policy can be relevant to the ultimately statutory question is not settled. In the Oxford United F.C. case referred to above the President appeared to confirm that it is the present use of the land which is paramount in considering whether the land *“furthers the social wellbeing or social interests of the local community”*. Thus the prospect of alternative provision did not prevent the proper registration of the overflow car park.
31. It seems to me that each of the main matters mentioned in the nomination is also capable of being relevant to whether the statutory test is satisfied, and so should be taken into account by the members. It also follows that any further facts, which may tend to suggest the case submitted to the council (such as adequate existing alternative facilities, should they exist) are capable of being relevant to the determination. Similarly, if there is a robust contingency plan to ensure that

equally effective disabled parking provision is made for the duration of the redevelopment project then in my view that could lawfully be taken into account.

32. There is no closed list as to what is capable of being taken into account. So long as the fact goes towards whether or not the use of the land furthers the social interests of the local community, it may lawfully be taken into account. I would be glad to consider any particular further considerations which are identified.
33. My view is that, whilst a car park does not fit easily within the more conventional list of community assets which may now be regarded as established:
- a. The lack of any statutory exclusion of car parks;
 - b. The Oxford United F.C. case; and
 - c. The breadth of the statutory provisions, indicates that a car park which more easily permits a recognized element of the community to access the town centre is capable of being an asset which “*furthers*” both the social wellbeing and social interests of the local community.
34. It is important to remember that whilst the list of potentially relevant factor may be broad, the weight to be given to each factor is for the Council alone to decide, subject to the conventional rules of not according a perverse level of weight to a factor.
35. I also consider that the Council should give express consideration to s.149 of the Equality Act 2010 because, in my view, the creation and maintenance of the list of ACV’s is likely to be a ‘*function*’ for the purposes of that section. Section 149 does not impose any target as to what must be achieved – it does not specify an outcome. It requires particular consideration of factors identified in subsections (1), (3), (4) and (5).
36. In the event that the Council decides that the Car

Park should be registered I advise that consideration be given to whether the moratorium would apply in this case as a result of the development agreement the Council previously entered into in relation to the William Hunter Way site.

37. I would be glad to advise further as required.

WAYNE BEGLAN

CORNERSTONE BARRISTERS

21 OCTOBER 2014