In the matter of the Localism Act 2011

Re Saffron Walden Community Hospital, Saffron Walden

REVIEW OF DECISION TO LIST LAND AS AN ASSET OF COMMUNITY VALUE

1. Background

1.1. Saffron Walden Town Council ("SWTC") nominated Saffron Walden Community Hospital ("the Land") for inclusion in the list of assets of community value ("the List") maintained by Uttlesford District Council ("UDC").

1.2. On 19 February 2013 the cabinet of UDC resolved to include the Land in the List.

1.3. On 1 August 2013 (within 8 weeks of being notified that the land had been placed on the List) the owner wrote to UDC requesting a review under s.92 Localism Act 2011 ("the Act").

1.4. I was appointed by the Chief Executive of UDC to conduct the review. I confirm that I did not take any part in the decision to include the Land in the List.

1.5. For the purposes of the review the owner was represented by Mrs O'Leary of Lawson Planning Partnership Ltd. UDC was represented by Roger Harborough Director of Public Services.

1.6. The owner's representative requested an oral hearing which took place on 3 October 2013

2. Relevant Legislation

2.1. s.87 of the Act requires local authorities to maintain a list of land in its area that is land of community value.

2.2. s.88 of the Act defines land of community value. There are 2 circumstances in which land falls within that section.

2.3. Firstly under s. 88 (1) land is of community value if in the opinion of the authority an actual use of the land (not being an ancillary use) furthers the social wellbeing or social interests of the local community and it is realistic to think that there can continue to be non-ancillary use of the land which will further the social wellbeing or social interests of the local community.

2.4. Alternatively under s.88 (2) land is of community value if in the opinion of the authority there has been a time in the recent past when an actual use of the land (not being an ancillary use) furthered the social wellbeing or social interests of the local community and it is realistic to think that there is a time in the next 5 years when there could be an actual use (not being an ancillary use) of the land which would further the social wellbeing or social interests of the local community

2.5. s.89 of the Act provides that land may only be included in the List pursuant to a community nomination or a nomination made in accordance with regulations. “Community nomination” includes a nomination by a parish council.

2.6. s.90 of the Act deals with the procedure for dealing with community nominations. It provides that where a community nomination is received the authority MUST (emphasis added) accept the nomination if the land is in its area and is of community value.

2.7. The contents of a community nomination are set out in regulation 6 of the Regulations. It requires a description of the nominated land including its proposed boundaries; a statement of all the information which the nominator holds with regard to ownership; the reasons why it is said that the land is of community value and evidence that the nominator is entitled to make the nomination.

2.8. Regulation 8 of the Regulations requires the local authority to give notice to a land owner (and others) that it is considering listing land which has been nominated.

2.9. s.91 of the Act requires the local authority to give notice to a land owner (and others) that land has been included in the list of assets of community value.

2.10. Certain disposals of land are exempt from the requirements of the Act. A list of such disposals is contained in Schedule 3 of the Regulations.

2.11. The statutory procedure for dealing with a review is contained in Schedule 2 of the Regulations. UDC's procedures for conducting reviews are consistent with these regulations.

3. The Issues to be Determined

3.1. Did the nomination of the land by SWTC comply with the requirements of the Regulations?

3.2. If not what effect does that have upon the decision to list the Land?

3.3. Was notice of the consideration of the nomination given in accordance with the Regulations?

3.4. If not what effect does that have upon the decision to list the Land?

3.5. Was notice that the Land had been included in the list given in accordance with the Act?

3.6. If not what effect does that have upon the decision to list the Land?

3.7. Does the use of the Land fall within the definition of land of community value?

3.8. If so is it realistic to think that there can continue to be a non-ancillary use of the Land which will further the social wellbeing or social interests of the community?

3.9. If the answers to 3.7 and 3.8 are in the negative has there been a time in the recent past when there has been an actual use of the land (not being an ancillary use) which furthered the social wellbeing or social interests of the local community?

3.10. If so is it realistic to think that there is a time in the next 5 years when there could be an actual use (not being an ancillary use) of the land which would further the social wellbeing or social interests of the local community?

4. Submissions on the part of the Owner

The owner's representative has made the following submissions:-

4.1. The nomination made by SWTC was defective in that it did not sufficiently identify the boundaries nor provide correct ownership details.

4.2. Notice of the consideration of the nomination by UDC was not given in accordance with the Regulations.

4.3. Notice that the Land had been listed was not given by UDC in accordance with the Regulations.

4.4. The current use of the Land does not further the social wellbeing or social interests of the local community.

4.5. "Social wellbeing" relates to the interaction and relationships with others within a community. Similarly "social interests" includes cultural, recreational and sporting interests. The Land is a health care facility and does not fall within the definition of social wellbeing or interests. For that reason the Land does not fall within the definition of land of community value and therefore it should not have been included in the list.

4.6. The decision to list was not consistent with other decisions on nominations made by SWTC a number of which were refused because "no correspondence with the owner has been submitted about purchasing the site. It is therefore not considered that it is realistic to think that in the next 5 years the land could further the social wellbeing or interests of the community". The owner's representative submitted that no such correspondence had been submitted regarding the Land and that listing should therefore have been refused for the same reason.

4.7. The reason that the owner held the Land was to facilitate the provision of health care generally. This may involve the disposal or part disposal of an asset in the interests of good estate management. Listing the Land would be inconsistent with that purpose and could frustrate the government's intentions with regard to health service provision.

5. Submissions made by the Director for Public Services

5.1. Mr Harborough acknowledged that the nomination by SWTC was defective in that it did not delineate the boundaries of the Land. He submitted that the requirement was directory only and that there was no prejudice suffered by the owner as the nomination clearly related to the

whole site the extent of which was well known to the owner, SWTC and UDC.

5.2. Mr Harborough acknowledged that the service of notices by UDC pre and post listing was not compliant with the legislation.

5.3. With regard to both pre and post listing notices Mr Harborough submitted that the requirements were directory only and that failure to comply with the legislation did not affect the validity of the listing. Further any challenge to the listing process should have been brought by way of judicial review and not a review under the Act.

5.4. "Social interests" by definition includes cultural interests, recreational interests and sporting interests.

5.5. The nomination by SWTC was on the basis that in the future the Land could provide accommodation for the voluntary sector, although there was no such occupation at the present time. There was no specific guidance as to what is meant by "social welfare" but the plain English guide to the Act cites buildings or amenities which play a vital role in community life and cites as examples community centres, libraries, swimming pools, village shops, markets or pubs.

5.6. Further paragraph 13 of Schedule 3 to the Regulations exempts disposals for the purpose of enabling continued health service provision on Land thus indicating the government's intention that land owned for health service provision could be capable of being listed.

5.7. Although of the nomination by SWTC was on the basis of possible future use the cabinet of UDC had been entitled to take a view that the Land did currently further the social wellbeing or social interests of the local community and the decision to list was therefore correctly taken.

5.8. The Land meets the tests set out in the Act and UDC were correct to add it to the list.

6. Determination

6.1. I find that the nomination by SWTC did not comply with regulation 6 of the Regulations to the extent that it failed to identify the boundaries of the Land only. I find that there is no evidence that the nomination was

defective for failing to provide correct ownership details. The requirement in regulation 6 is to give “all the information the nominator has” in that regard. There is no evidence that SWTC had any information regarding ownership other than that given in the nomination form.

6.2. I consider that the requirement to identify the boundaries of nominated land is mandatory and not merely directory. Land can only be listed based upon a nomination. Once listed the local authority have a statutory duty to record the entry on the Register of Local Land Charges and at HM Land Registry. These documents are available to the public including those interested in purchasing or taking a security over land. It is therefore essential that the public should be able to establish precisely from public records the full extent of the listing.

6.3. For that reason UDC ought to have rejected the nomination as being defective. However the fact that it did not do so does not invalidate the listing. It is voidable rather than void. It would render the listing open to challenge by way of judicial review when the court would have a discretion to quash the decision to list the Land. However unless and until such an order was made the decision to list remains valid.

6.4. In accordance with Mr Harborough’s acknowledgements I find that UDC did not comply with regulation 8 of the Regulations prior to listing the Land nor did it comply with s.91 of the Act after the Land was listed.

6.5. In respect of both defects I find that the procedural irregularities do not have the effect of rendering the inclusion of the Land in the List void.

6.6. The question is whether the requirements to give notice are mandatory, so that in the absence of notice all that follows is void or merely directory which would render the decision to list voidable by way of judicial review. In reaching my decision I have had regard to case law and in particular the judgement of Millett LJ in Petch –v- Gurney 1994 in which he said “The question whether strict compliance with a statutory requirement is necessary has arisen again and again in the cases. The question is not whether the requirement should be complied with; of course it should: the question is what consequences should attend a failure to comply. The difficulty arises from the common practice of the legislature of stating that

something “shall” be done (which means that it “must” be done) without stating what are to be the consequences if it is not done. The Court has dealt with the problem by devising a distinction between those requirements which are said to be “mandatory” (or “imperative” or “obligatory”) and those which are said to be merely “directory” (a curious use of the word which in this context is taken as equivalent to “permissive”). Where the requirement is mandatory, it must be strictly complied with; failure to comply invalidates everything that follows. Where it is merely directory, it should still be complied with, and there may be sanctions for disobedience; but failure to comply does not invalidate what follows. The principles upon which this question should be decided are well established. The Court must attempt to discern the legislative intention. In Liverpool Borough Bank v Turner (1861), 30 L.J. Ch. 379 at p. 380 Lord Campbell C.J. said: “No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed”. In a well known passage of his judgment in Howard v Bodington (1877), 2 P.D. 203 at p. 211 Lord Penzance said: “I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look at the subject-matter; consider the importance of the provision that has been disregarded; and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory”.

6.7. The Regulations do not specify what consequences may follow a failure to give notice under regulation 8. I note however that neither the Act nor the Regulations make provision for the owner to make representations prior to a decision being taken to include land in the List. This is in contrast to the right to make representations in connection with a review contained in paragraph 8 Schedule 2 of the Regulations. Further there is no statutory

obligation upon local authorities to consider any representations made prior to listing (although I acknowledge that it may well be Wednesbury unreasonable to refuse to do so if representations are made).

6.8. Further there is no requirement in the Regulations for the notice to be served within a particular time. If the intention was to allow time for representations at that stage then presumably parliament would have provided that a property could not be included in the list for a specified period after the notice had been served.

6.9. I therefore take the view that the requirement of notice prior to listing is directory only and that where land is listed without notice having been given this does not have the effect of nullifying the listing.

6.10. With regard to the breach of s.91 of the Act the requirements of s.91 follow the listing. It follows therefore that in the absence of any provision in the Act to the contrary any defects occurring after the Land was correctly entered in the List cannot have the effect of retrospectively nullifying the listing.

6.11. The procedure for listing and following listing are separate. Providing the local authority correctly list land then the listing cannot be avoided by subsequent failures with regard to notices.

6.12. I also take notice of the fact that the Regulations presuppose that notice will not necessarily be given or received in all cases as regulation 21 (giving the consequences of non-compliance with the Act) makes provisions concerning disposals when the owner did not know that his land was listed.

6.13. Further there is no requirement in the legislation for the notice to be served within a particular time or to be served as soon as is reasonably practicable as is often the case. Instead the time within which an application for a review is to be made runs not from the date of listing but from the date notice of listing is given which suggests that a failure to notify promptly after listing can be rectified by late service of notice.

6.14. In this case despite the fact that there were shortcomings in the notices I find that the owner has not been prejudiced. It clearly knows that it has a right to seek a review of the decision as it did so within the time allowed by the Regulations.

6.15. In addition I take the view that a review is not the appropriate method to challenge any procedural shortcomings in the listing process. s.92 entitles the owner to ask for a review of the decision to include land in the list, not the process. If the process is said to be wanting the appropriate method of challenge is by way of judicial review. Where there are 2 methods of challenge it may well be appropriate to pursue both, e.g. by seeking permission for judicial review to quash the decision for procedural irregularities and applying for a review of the decision on the merits – see Melton –v- UDC 2009. I note that the time for applying for a judicial review has now lapsed but that does not mean that I may have regard to any possible procedural defects in reviewing the decision to list.

6.16. I turn now to the question as to whether the Land falls within the definition of land of community value. I find that it does not. Land of community value must further the social wellbeing or social interests of the local community.

6.17. “Social welfare is not defined. “Social interests” are defined as including cultural, recreational and sporting interests. The use of the word “including” clearly indicates that the list is not exhaustive. However I consider that the ejusdem generis principle clearly applies here. The examples given are primarily leisure activities and only similar activities could therefore fall within the definition of “social interests”

6.18. With regard to “social welfare” I am persuaded by the submission of the owner’s representative that this relates to interaction and relationships within the local community. This view is re-inforced by the quote from the plain English guide to the Act referred to in paragraph 5.5 above. The Land provides a health care facility. There is no evidence that the Land plays “a vital role in community life” nor is it similar to any of the categories of use referred to in that passage. In short there is no evidence of any

social interaction taking place on the Land which could be construed as furthering the social wellbeing of the local community.

6.19. In those circumstances the question as to whether it is realistic to think that the Land could continue to be used to further the social wellbeing or interests of the local community does not arise as if a use does not exist it cannot continue.

6.20. There is no evidence to suggest that the Land has been used in the recent past for a purpose which could be said to further the social wellbeing or interests of the local community. Indeed the nomination by SWTC appears to be not on the basis that the Land is or has in the recent past been used for such a purpose (either fully or partly) but that there is reason to think that there could be such a use at a time in the future (although the nomination does not explain why SWTC consider that that time may come within the next 5 years).

6.21. However as I have found that the Land has not been used in the recent past for such purposes the question as to whether it is realistic to think that there could be a time when the Land may be so used in the next 5 years does not arise.

6.22. I have discounted the owner's representative's submission that listing the Land may in some way frustrate the purpose for which the Land is held or that it may frustrate the government's intention with regard to health service provision. I was informed that the Land is owned by a limited company which is wholly owned by the government. Insofar as it may be regarded as Crown Land s.105 of the Act clearly states that the provisions relating to assets of community value apply to the Crown. The impact that a listing may have upon an owner is not relevant to the decision to list. Listing depends entirely on whether land falls within the definition of land of community value. If it does then there is no discretion other than to list the land whatever the consequences may be.

6.23. Finally I accept the submission made by Mr Harborough that paragraph 13 of Schedule 3 to the Regulations clearly demonstrates that

land held for the purposes of health service provision may be listed if on the facts it falls within the definition of land of community value. However my finding is that the Land does not fall within that definition.

7. Conclusion

For the reasons set out above I conclude that the Land was incorrectly listed as an asset of community value. I therefore direct that it should be removed from the list and entered in the list of unsuccessful nominations maintained by UDC under s.93 of the Act. I further direct that the entries at HM Land Registry and on the Register of Local Land Charges shall be vacated.

8. Appeal Rights

Regulation 11 provides that an owner of listed land may appeal to the First Tier Tribunal against the council's decision on a listing review. Whilst the owner should take his own independent legal advice it is my understanding that any such appeal should be lodged within 28 days of the owner's representative receiving this decision notice.

There is no right of appeal for the nominating body or UDC although the decision may be reviewed by an application to the High Court for judicial review. Any party considering seeking a judicial review should take legal advice before doing so.

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