

Assets of Community Value Review

Introduction

The ability of communities to nominate assets for inclusion on the Local Authorities Asset of Community Value register was brought into legal effect by the Localism Act 2011. Initially, it was promoted as the 'Community Right to Bid'.

Fuller information about the Asset of Community Value ('ACV') regime is appended to this review document. The Non-Statutory Guidance for Local Authorities attached at Annex 1 provides a useful technical explanation of the formal process, and the House of Commons summary at Annex 2 provides a recent overview and wider context. However, a brief summary is provided below, to introduce the different stages to provide context for the review and recommendations.

Process summary

The ACV regime gives communities the power to nominate local assets (land/property) for inclusion on a list, maintained by the Local Authority (district or unitary). Community nominations can be submitted by various constituted groups, explored by regulation and guidance, including local charities and parish councils, or by a non-constituted group of local people, where 21 or more local electors sign up to support a nomination. Local Authorities are not empowered to nominate assets themselves.

Local Authorities are expected to verify nominations and reach a determination on whether the nomination meets the statutory tests within an 8-week period. Within this period they are required to notify the asset owner, occupier of other parties with an ownership interest.

Assets can be nominated on the basis of either current use, or use in the recent past:

- a) an actual current use of the building or other land that is not an ancillary use that 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. (Section 88(1) Localism Act 2011)

Section 88(2) of the Act extends this definition to land which has furthered the social wellbeing or social interests of the local community in the recent past, and which it is realistic to consider will do so again during the next five years.

The determination should be based principally on the content of the community nomination. There is an onus on Local Authority to explore the case made, but it is also entitled to use other information it is privy to, for example content of a planning application, representations from assets owners.

The Asset owner is entitled to request a review of the Local Authority's initial determination. There is no right of review for the nominator, but the same nominator or another party can renominate. Beyond these stages, legal review may be sought through the First Tier Tribunal.

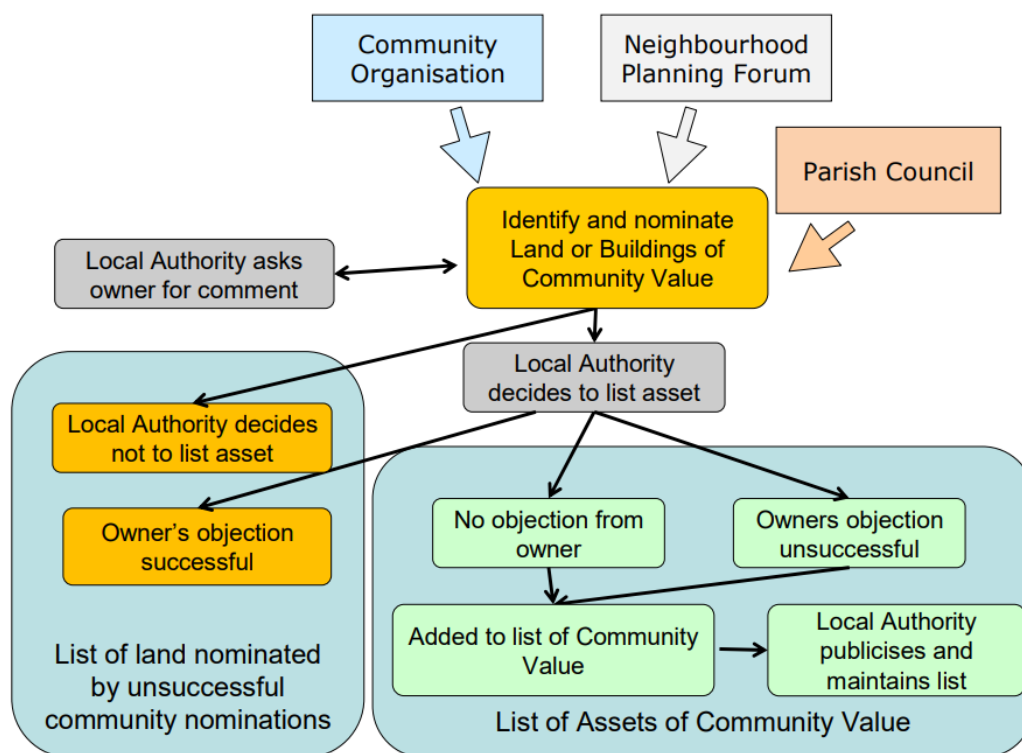


Diagram 1: Listed process, taken from the DCLG Non-Statutory Guidance for Local Authorities

The effect of listing is to create a restriction on the legal title, which prevents the asset being sold immediately on the open market. Instead, the owner must inform the Local Authority, which commences a six-week moratorium, during which period a qualifying community group is able to express an interest in purchasing the asset. It is this part of the procedure that explains the alternative title for this power of ‘Community Right to Bid’.

Should such an interest be put forward, a full moratorium for the remainder of six months from the initial notice date is implemented, during which period the owner is only able to sell to a qualifying community group. It is crucial to note that the power only goes as far as to create this moratorium period – it does not oblige the asset owner to sell, nor to accept a community bid.

Should no qualifying group submit an interest in acquiring the asset during the interim moratorium, or the asset owner does not sell during the full six-month period, the owner is able to sell on the open market to any interested party thereafter, during the remainder of an 18-month period from the notification to Council. Once this period expires, they would have to re notify the Council, to re-run the moratorium period.

It should be noted that there are a number of exemptions to the above process, not limited to unusual circumstances. The sale of business premises as a going concern is likely to be one of the most common, particularly for public houses, but there are also exemptions around financial and personal circumstances, which may occur relatively frequently, given that nominated assets are often put forward where the continuity of service is threatened by other circumstances.

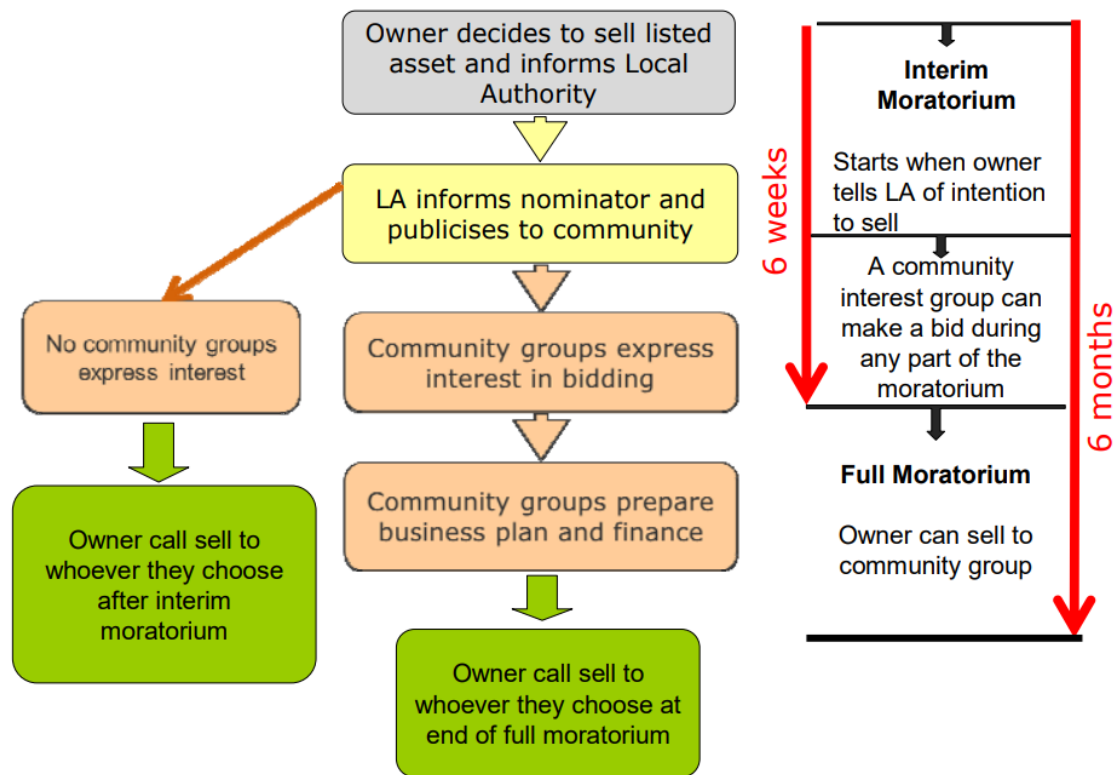


Diagram 2: Moratorium Arrangements, taken from DCLG Non-Statutory Advice for Local Authorities

Community groups, if they have the resources, are of course able to seek to acquire community assets on the open market. Without the ACV regime, there is no defined ‘window of time’ for this, but there are plenty of examples of this happening – indeed a good number of case studies of community asset transfer fall into this category – from trailblazer community owned pubs to community halls. There is a risk that the implementation of a legal restriction disincentives friendly negotiation – a common refrain from asset owners is that the community have not opened discussion prior to nomination. The desired outcome of a community purchasing an asset may be more straightforwardly achieved through direct negotiation with the owner to purchase the asset without resort to ACV nomination.

There are various sources of funding that communities may be able to draw upon to seek to purchase community assets. Depending on the nature and future operation of the asset, there may be external grants, from the National Lottery, more local trusts and foundations and potentially the Council. For community assets that may be trading entities, community share offers are common. Currently there is a national grant offer under the Community Asset Transfer grant.

Communities may also seek to protect community assets through protecting the specific land use. Many neighbourhood plans include community facility policies which seek to provide additional certainty of protection to the Local Plan policy protecting such assets (Policy INF2).

Research

There is no comprehensive caseload management system to provide a ready overview of the approach across the three Councils served by the shared Legal Service, to understand caseload, or service delivery metrics. Each Council is required to publish a list of Assets of Community Value and of Unsuccessful Nominations. However, in absence of single source of data on historical listings, current listed and failed nominations there is limited local data to see the full picture over time. Annex 2a provides a picture of current listings across the three partner Councils currently using the same shared Legal service, with unsuccessful nominations at Annex 2b. Given the relatively low count of nominated assets within Cotswold District, using the wider evidence base across three Councils may offer some learning.

This data has been supplemented with qualitative data from a series of Internal Stakeholder Interviews, attached at Annex 4.

While there has been no review by central government, there is a body of experience from Local Authority practice and from legal challenges through the First Tier Tribunal and beyond. This has provided direction to the Council's procedures and decision-making and has also informed the recommendations of this review – see for example Annex 5.

Listings

Area	Total	Pubs	%	Open Spaces	%2	Other	%3
CDC only	13	5	38.5%	6	46.2%	2	15.4%
CDC, WODC, FODDC	37	15	40.5%	12	32.4%	10	27.0%

The proportion of public houses listed across Cotswold and across the three councils is reasonably consistent, and a high proportion of the whole. A time series view of the data would indicate similar. There is more variation in terms of nominated open spaces – with relatively few open spaces nominated in Forest of Dean, and variation around 'other'. A degree of variation across these different areas is hardly surprising – given the different localities, and the use of a 'catch-all' third category - the key learning point is the number of pubs and open spaces.

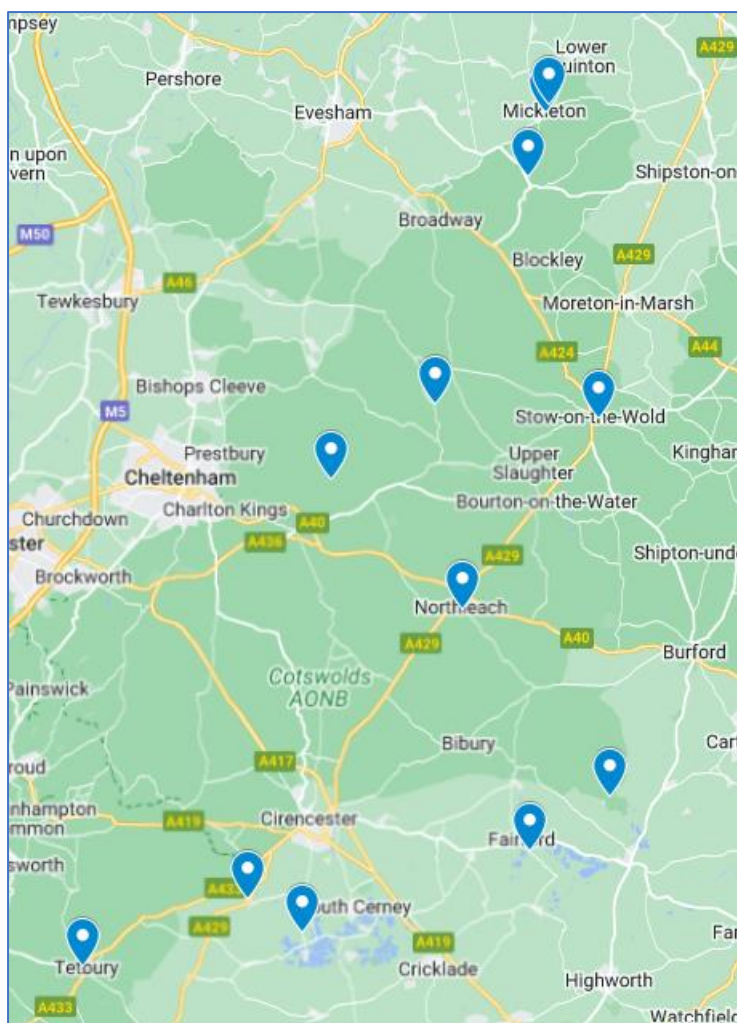


Diagram 3: Location of current listings

The map above plots the approximate locations of listed assets. Given the relatively low absolute number, the distribution is inevitably sparse. It does not suggest any particular concentration of activity.

Unsuccessful nominations

Area	Total	Pubs	%	Open Spaces	%2	Other	%3
CDC only	5	3	60.0%	0	0.0%	2	40.0%
CDC, WODC, FODDC	18	8	44.4%	1	5.6%	9	50.0%

Given the lower count for unsuccessful nominations, this data is less useful. Moreover, it does include repeat nominations data. Read with the listings data, there has been a wider range of asset types nominated in the other two Council areas, increasing the diversity of assets listed, but also the number that have been unsuccessful.

Process and practice

Each nomination will be for a specific asset, by a specific nominator. Often, it will be the sole nomination a given party makes, and perhaps the only asset that will be owned by a specific asset owner. This makes it incredibly difficult to compare cases – each nomination will be considered on its own merits, subject to the quality of the submission made by the community nominator, and any counter argument from the property owner. The function and stated community value of some assets will be clearer; the owner's circumstances and plans will vary. Parties other than the Council are unlikely to have had broader experience of the ACV regime to benchmark their experience. However, given the preponderance of nominations of pubs and open spaces, the Council should seek to ensure some consistency within these uses.

The current approach is to endeavour to provide equity of experience through following the formal process, and standardised approaches where there is a degree of discretion: for example, using a nomination form to try to elicit the same full picture from nominators. That said, given the complexity of circumstances, a one size fits all process would risk being dogmatic, at cost to quality of decision making. Feedback from Internal Stakeholders indicates that due to limited capacity it has been challenging to run a consistent process within a consistent timeframe.

At Cotswold to date there has only been one decision taken forward for internal review, no decisions that have gone forward to the First Tier Tribunal. Noting that only the Asset Owner has the legal recourse to Internal Review, there have been few repeat nominations. While this review has been prompted by concerns over one particular nomination, this would suggest that decisions are generally viewed, even by interested parties, to be robust.

When it comes to decision making, there are variations in practice across English Local Authorities. Some load the system a little differently, giving less opportunity to the Asset owner in the first instance, given their right to internal review. While this approach could be viewed positively by Community nominators, it has significant drawbacks. First, one of equity: Asset owners may be large corporate entities – for example so called 'pubcos' running a portfolio of public houses, but could equally be owner-operators of independent local businesses or indeed local charities or community organisations themselves without easy access to expert advice. Given that profile, it is right that the Council deals with an even hand, and protects its reputation as a fair decision maker. Recent case law finds that 'Under regulation 6(c), the nominator is required to provide its: "...reasons for thinking that the responsible authority should conclude that the land is of community value". [...] that does place an onus on the local authority to explore those reasons and to decide whether it has been provided with sufficient evidence of the community value to meet the requirements ...'(Waqas Shahid Ali, Samina Shahid Ali v Rother District Council).

Moreover, such an approach risks exhausting the first route of appeal quickly, increasing the risk of formal legal process – and costs - through the First Tier Tribunal.

There is also a wide range of different services which host this function across local authorities – Governance, Planning Policy, Communities, Legal Services, Property.

Member involvement.

While determination of ACV nominations is a Council responsibility, the regulations are largely silent on the role of elected members. While this may be a reflection on the level of prescription in process and decision making, it does not read that well across into other local authority functions, eg Planning, where the role of members is defined.

There is plenty of information on-line, for example through the MyCommunity website, CAMRA and of course the Council's own website which explains the process, (<https://www.cotswold.gov.uk/communities-and-leisure/support-for-communities/community-right-to-bid/>). Elected members, through their links with parish councils and local groups, will often signpost to the ACV power, or be approached by groups seeking advice of support on how to nominate. It would therefore be helpful to clearly delineate the ward councillor's role in this process – an objective borne out by conversation with internal stakeholders.

On at least two occasions – one at WODC and one at CDC – a nominated asset was owned by an elected Councillor. It is also likely that ward councillors, either personally or through their ward role will be acquainted with people involved with the nomination or the asset owner. This suggests two things: first, that such interests should be declared, especially in so far as they might have any bearing on decisions, and second, that ward councillors should be notified, to ensure that any such interests can be identified and recorded.

Noting that the Council is able to use its corporate intelligence in determining nominations, the ward member may well be aware of the broader context of nominations, for example planning applications, emerging neighbourhood plans, other community projects. Notifying the ward councillor presents an opportunity to draw on Council knowledge or activity unknown to the processing officer/officers.

Across Local Authorities, there is some divergence of practice in decision making. The regulations are not explicit about the process for the decision itself but require that the internal review is heard by an officer. This leads to a strong line of argument that the decision-maker in the first instance should also be an officer, rather than have member decisions that may be overturned on officer review. The requirement that the review is determined by an officer is arguably reflective of a view by the legislators that this should be a strict technical decision – a matter of judgement on a statutory test, and not a decision to reflect the policy of the Council. This is borne out by First Tier Tribunal Hearings.

An additional consideration is one of timely decision making. If the decision were taken by a Cabinet member or Cabinet, the decision would need to be appropriately published in advance and notified to Overview and Scrutiny, and often would need to be held back to the next agreed meeting, making it challenging to reach decision within the 8-week determination period. Practice at Cotswold is that the initial officer decision is in consultation with the appropriate Cabinet Member, providing an opportunity for input whilst recognising the direction provided by the legislation.

Recommendations

- a) Increase awareness and access to information for members: ACVs could be picked up through member inductions and the regular member briefing, backed up by information on the member's portal. Members' involvement will be intermittent, so it is important to provide an overview and ready-to-access information.
- b) Notify Ward Member, upon verification of a nomination, giving them the opportunity to provide further evidence to corroborate the nomination. See for example, Annex 6 - Historical decision criteria from WODC, dating back to 2020. The legislation and guidance is silent, but it is established that local authorities are entitled to make a determination based on their corporate knowledge, rather than being wholly reliant on the case presented/rebuffed by the nominator and asset owner. Ward members' local knowledge should round out the picture presented by the interested parties, and alert them to the possibility of contact from the nominator or asset owner.
- c) Retain officer decision, in consultation with the responsible Cabinet Member. As noted in the body of the review above, the process is geared towards an officer decision. Cabinet member consultation ensures a degree of political oversight, and a sounding board for decisions which, whilst confined to specific legal tests, will often require the exercise of judgement.
- d) Publish reports and decisions. Determinations are reached through a robust and systematic process, akin to other Council determinations which are published so proactive publication should have little or no impact on workload. Decisions are shared with interested parties already, but can be - and have been - requested through FOI. Although not required, this is recommended as good practice which will enhance transparency and trust.
- e) As covered above, CDC is required to administer this process without preference to either the owner or nominator. However, through its corporate priorities, CDC supports the retention of assets and services that underpin the wellbeing of residents. Trying to deliver on these two aspects through one service may leave CDC exposed to further review and legal challenge. The processing officer, with a duty to be equitable to the nominator and asset owner, is not well placed to provide more direction to the nominator to enhance their case. A recommendation therefore is to clearly differentiate the roles of CDC as impartial administrator of process and as animator of community action with an interest in the retention of important local services. The webpages could also direct to external support, such as the community capacity building provided by GRCC, and organisations such as CAMRA and Plunkett.

As an exception rather than a rule, some LAs have developed local guidance or policy to ensure consistency of judgement (see Annex 7, Wokingham Guidance). Given the deliberate omission of hard detail in the regulation (e.g. no definition of 'recent past') there is legal risk in trying to create local rules— but additional direction may be helpful. A compromise may be to signpost to external resources, such as CAMRA's advice to community nominations of pubs (annex CAMRA): such a resource provides direction and advice, while mitigating the risk of the authority giving challengeable advice.

- f) Verification. While the legislation does not clearly create a window for nominations to be verified, this is a common-sense necessity: processes cannot be triggered with inadequate information. However, the due diligence approach currently being used may be causing undue delay and work for community nominators. Nominators are asked to provide a copy of the land registry documentation, and confirm the land ownership, yet the Council as part of its process will be downloading the same documentation, to ensure the latest version is used. This may well be unnecessary duplication, but removing this requirement treads the line between processing and supporting nominations.
- g) Capacity. The statute gives the Local Authority an 8-week period to determine a nomination. The process should therefore be designed and, crucially, resourced to complete within that period. Any delays tend to create follow-up enquiries, and increase the risk of challenge to Council decisions, thereby increasing the workload. Similarly, efforts to catch up on earlier delays may mean that decision-makers have less notice of decisions. A new post has been established to deal with this work. This post should provide the capacity to deal with this work consistently and in a timely fashion.
- h) Case load management system. Up until recently, there has not been systematic caseload management across the Councils. Each Council is required to publish listed assets and unsuccessful nominations, but it appears there has not been a 'behind the scenes' case management system. A consequence of this is that currently expired listings remain on the webpage. A case management system would help to address this, and moreover could collect data to enable an overview of other issues, such as the processing time for individual nominations. Without access to such data, senior managers and elected members have limited information to understand the overall operation of the regime and are limited to reviewing case by case. As the challenge in this work area is complexity rather than volume, this could probably be managed simply through Excel, rather than requiring a specific caseload tool – depending on the resources that might be already in place in any receiving service. A key task for the new post will be to develop an effective system to manage existing listings and nominations.

Appendices and links

[Appendix 1 Community Right to Bid Non-Statutory guidance for Local Authorities](#)

[Appendix 2 House of Commons Library](#)

Appendix 3 Listing Data:

- a) [Listings](#)
- b) [Unsuccessful nominations](#)

[Appendix 4 Interviews with Internal Stakeholders](#)

[Appendix 5 Assets of Community Value Guide – review of Caselaw and practice, Christopher Cant](#)

[Appendix 6 -Historical decision criteria from WODC, to illustrate how Ward Member contributions might be used](#)

[Appendix 7 Wokingham Guidance](#)

Recent caselaw re public house listing

<https://www.localgovernmentlawyer.co.uk/property/313-property-features/55650-defending-decisions-on-assets-of-community-value>

<https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKFTT/GRC/2022/495.html&query=Waqas+Shahid+Ali.+Sami+na+Shahid+Ali+v+Rother+District+Council>