

The Assets of Community Value (England) Regulations 2012

1. Background

Following on from the 2010 election manifestos, the Government has sought to distribute power back through the country, and in particular to empower local communities. The Localism Act 2011 (“**2011 Act**”), which came into force 1 November 2011, introduced a variety of measures to achieve these aims. Chapter 3 of the 2011 Act introduced a concept of assets of community value (“**ACV**”) and the Assets of Community Value (England) Regulations 2012 (“**Regulations**”) provide more detail as to how ACVs will operate.

The Regulations were published with little more than a whisper. This is because Government did not propose to consult on them as they broadly follow the policy statement published in September 2011 which was the subject of consultation. The Regulations came into force on 21 September 2012.

The overriding aim is to protect local amenities and social spaces, giving local community groups a clear time period in which to bid for such properties, and to work up a formal offer with funding to purchase them before they are disposed of by their owner on the open market.

We set out below an overview of the proposed ACV system, followed by an analysis of the practical implications for owners of land and buildings designated as ACVs.

2. What land can be an ACV?

Land or a building will be considered to be of community value if:

“in the opinion of the authority

- (a) an actual current use ... 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 ... which will further (whether or not in the same way) the social wellbeing or social interests of the local community.¹”*

Land may also be considered to be an ACV if either there was a time in the recent past when the actual use of the land furthered the social wellbeing or social interests of the local community, or it is realistic to expect that in the next five years there could be such a use of the land. Social interests are said to include cultural, recreational and sporting activities.

¹ 2011 Act, s88(1)

In this context, land includes part of a building, part of any other structure and mines and minerals whether or not held with the surface².

Whilst the Government's policy statement of September 2011 suggested that village shops, community halls and public houses may be ACVs, the 2011 Act and the Regulations give no guidance as to the types of property likely to be listed as ACVs. Schedule 1 of the Regulations gives the following examples of land which may not be listed as ACVs; residential property (unless integral to a building such as a public house), land used by statutory undertakings and caravan sites.

3. Local authority lists of land of community value

Each local authority is to maintain a list of land of community value in its area. For the purposes of Chapter 3 of the 2011 Act, local authorities include district councils, county councils, London borough councils and the Common Council of the City of London³.

When an ACV is added to, or removed from, the list, the authority is required to give written notice to the owners, the occupier, the body which nominated the ACV and the parish council. Inclusion in the list is registrable as a local land charge.

The authority will also need to enter a restriction on the title of the ACV. The Regulations include an amendment to the Land Registration Rules 2003, inserting the type of restriction (Form QQ) which will be required. The wording of the restriction will be as follows:

"No transfer or lease is to be registered without a certificate signed by a conveyancer that the transfer or lease did not contravene section 95(1) of the Localism Act 2011."

The authority must apply for cancellation of the restriction as soon as practicable after an ACV is removed from the list.

The Regulations make no reference to notifying the mortgagee of an ACV when it is listed, but it must be the case that owners will need to notify their mortgagee(s) if a charged property becomes an ACV.

The authority must be informed by the owner where title to an ACV is registered for the first time.

4. Local community nominations

A local community interest group, such as a parish council, a community body with a local connection, a neighbourhood forum or a charity can apply for a building or land to be included in the list of ACVs.

² 2011 Act, s108

³ 2011 Act, s106(1)

The local authority must accept a nomination if the asset is in the authority's area, and it is of community value as described above. Written reasons must be given for any nomination that is unsuccessful. A separate list of unsuccessful nominations should also be maintained (with the authority having the option to remove reference to an unsuccessful nomination after five years). A decision on each nomination should be made within eight weeks.

5. Challenging a nomination

For the purposes of the 2011 Act and the obligations on the part of the owner of an ACV, the owner will be the freeholder of the ACV unless there is a "qualifying leasehold interest" in the ACV. This is a lease which, when granted, had at least twenty five years to run. If there is just one qualifying leasehold interest in the ACV, the owner will be the leaseholder. In the case of an ACV with more than one leasehold interest, the qualifying leaseholder will be the one most distant from the freeholder (in the number of intervening leasehold estates)⁴.

The owner of an ACV is entitled to have the decision to list the land as an ACV reviewed by the local authority. In addition, it may appeal against the review decision to the First-Tier Tribunal.

6. Disposals of assets of community value

Once a building or land is added to the list, the owner will be subject to certain restrictions if he wishes to dispose of it. Should an owner wish to dispose of an ACV the following procedure would apply:

- a) the owner must notify the local authority in writing of his wish to dispose of the ACV (it does not appear that the owner is required to give full details of the proposed disposal) and the authority must amend the listing to indicate that it has received notice of the proposed disposal from the owner. The amended list must state the date of the notice and the dates for each of the moratorium and protected periods (as are described below). If the ACV was listed following a community nomination, the authority must give written notice of the proposed disposal to the body that made the nomination;
- b) a period of 6 weeks will run from the date the local authority receives the owner's notification ("**Interim Moratorium**");
- c) if during the Interim Moratorium a community interest group notifies the local authority that it is interested in purchasing the ACV, a 6-month period from the date of the group's notification will run ("**Full Moratorium**"). (The local authority is obliged to pass on the notification to the owner of the ACV);
- d) if no community interest group expresses an interest in purchasing the ACV during the Interim Moratorium, the owner may sell on the open market;

⁴ 2011 Act, s107(1)-(4)

- e) during the Full Moratorium, the owner may only dispose of the property to a community interest group at a price agreed between the parties. (For public authority assets this price may be up to £2m less than market value.) The only other types of disposal permitted during the Full Moratorium are (a) exempt disposals, and (b) disposals which do not qualify as relevant disposals. Both of these are outlined in further detail below;
- f) if the community interest group fails to submit a bid for the ACV during the Full Moratorium, the owner is entitled to dispose of the ACV on the open market at any time during the 18-month period which runs from the date of owner's notification to the local authority that it wished to dispose of the ACV (the "**Protected Period**"); and
- g) once the Protected Period comes to an end, the moratorium process restarts and the owner will need to notify the local authority of any intention to make a disposal.

Exempt disposals include disposals by way of a gift, disposals pursuant to a will or on intestacy, disposals of land as part of a going concern, any compulsory purchase order and disposals made pursuant to an option, nomination right, right of pre-emption or right of first refusal that was entered into before the building or land was added to the list of ACVs.

In addition, where only part of a property has been listed as an ACV, a disposal of the whole of the property will be exempt⁵ provided it is in the ownership of a single party and each part of the property can be accessed from the other parts of the property without having to cross land owned by a third party.

Relevant disposals comprise freehold disposals with vacant possession, the grant or assignment of a qualifying leasehold estate with vacant possession and any binding agreement to enter into such a disposal⁶. The grant of a charge over an ACV does not fall within the definition of relevant disposals.

A solicitor will need to give a certificate confirming that any disposal of an ACV complies with the provisions of the 2011 Act.

The local authority is required to remove land which has been the subject of a relevant disposal (other than an exempt disposal) from the list of ACVs⁷. If the community interest group has bought the ACV, the land should be removed from the list and the moratorium will no longer apply. However, it appears that another community interest group could subsequently apply to add the land to the list again.

⁵ 2011 Act, s95(5)(e) and Regulations, Schedule 3, para 11

⁶ 2011 Act, s96

⁷ Regulations, Regulation 2(b)

Without a disposal, ACVs remain on the list for five years, after which time they are to be removed and the restrictions on disposal lifted unless they are again nominated and added to the list by the local authority.

7. Compensation provisions

The Regulations provide for a system of compensation whereby the owner of an ACV may recover losses and expenses “which would be likely not to have been incurred if the land had not been listed”⁸. Claims may be made for costs incurred as a result of a period of delay in entering into an agreement to sell an ACV as a result of the disposal being prohibited by the Interim Moratorium or the Full Moratorium, alternatively legal expenses in successfully appealing a listing decision in the First-Tier Tribunal.

Any claim for compensation must be made within thirteen weeks of the date the loss or expense was incurred.

8. Implications for the owners of potential ACVs

Listing at the discretion of the local authority

Nomination of a particular building or asset will not guarantee its inclusion in the list. This will ultimately be a matter of discretion for the local authority. The definition of community value is widely drafted in the 2011 Act to include any use which promotes social wellbeing or social interests. It remains to be seen how authorities will interpret this definition and the types of property that will become listed. The regime clearly seems to be aimed at protecting public houses, community shops and meeting places.

If an owner wishes to challenge an authority's decision to include a building in the list, it will need to go through an internal review procedure within the authority before it can take the matter to the First-Tier Tribunal. There will inevitably be costs and delays associated with this process. This could cause difficulties if the owner wishes to dispose of the property quickly. It is possible that an owner could seek to argue that the listing of his property as an ACV breaches his rights under the European Convention of Human Rights, in particular Article 1: Protection of Property. This point was raised in a number of responses to the Government's initial consultation on ACVs and a community right to buy. The Government's view was that the interference with a person's rights to deal with his property would be justified by the interests of the community.

Local authority role in moratorium process

At a time when local authority resources are limited and stretched, it is unclear how authorities will handle the additional administrative burden of maintaining the list of ACVs, conducting any necessary internal reviews, and acting as go-between in the disposal process.

⁸ Regulations, Regulation 14(2)

Future disposals free of ACV restrictions

It would appear that there is nothing to prevent community groups who have acquired an ACV from subsequently disposing of the same on the open market once the five-year listing of the land or building has passed. Owners who find their properties are listed as ACVs may wish to consider trying to secure a profit sharing mechanism if they are to sell their properties to a community group. This should provide them with some level of protection if the property is subsequently disposed of on the open market or is the subject of a change of use.

Reluctance to offer property for community uses

On a philanthropic level, there is a risk that landowners, who have in the past provided land or buildings for local community use on a voluntary basis, will be reluctant to do so. The listing of ACVs will be perceived by landowners as a hurdle to disposing of their assets whenever and to whomever they wish.

9. Implications for real estate transactions

How will ACV listings be disclosed?

The existence of an ACV will be revealed on local search results. Prospective purchasers may then wish to raise further enquiries of the seller regarding the application of the ACV regime. In particular, it will be important for a purchaser to understand when the listing was made, when the ACV will be removed from the list and whether the listing was challenged.

Impact for chargees of ACVs

The sale of an ACV by a lender will be exempt from the restrictions on disposal in the Regulations where such sale is either through the lender being in possession of the land or through the exercise of a power of sale. It appears that this is the case regardless of whether the charge over the ACV is entered into before or after the property is listed as an ACV.

The moratorium period

No owner of an ACV who has decided they wish to dispose of their property, is obliged to dispose of it to a community group, but the Interim Moratorium of six weeks, and the subsequent Full Moratorium of six months (if a community group expresses an interest to buy) must be allowed for before the owner can dispose of it. It will be the responsibility of community groups to monitor the list of ACVs in order to learn of any ACVs that are the subject of a proposed disposal. Community groups will only be notified by the authority of a proposed disposal of an ACV if they nominated that particular ACV to the list.

There will be practical and legal issues to consider if an owner wishes to dispose of a property of which only part has been listed as an ACV. Either the owner will need to divide up the property in order to dispose of that part which is not an ACV, alternatively treat the whole building as an ACV, and allow for the moratorium periods to pass before disposing of the building as a whole.

Disposals of an ACV without compliance with the Regulations

Regulation 21 of the Regulations makes it clear that the disposal of an ACV without complying with the regime and procedure contained in the Regulations will be ineffective, save where the owner making the disposal can demonstrate that it made all reasonable efforts to identify whether the land was listed, but was unaware that it was listed when the ACV was disposed of.

There is a risk that listing of an ACV may not be identified, particularly if a sale takes place as part of a larger corporate portfolio disposal. It will be important to ensure on such transactions that thorough real estate due diligence is carried out. The restriction on the title and local search results should provide sufficient information to highlight that the 2011 Act and the Regulations will need to be complied with. Any affected properties in the portfolio can only be disposed of once the moratorium periods have expired and therefore will need to be addressed separately.