

Decision Maker: Michael Lawther - Monitoring Officer and City Solicitor

Date of Decision: 1 December 2017

Subject: Review of decision to list the Wind in the Willow Children's Nursery at West Lodge, Locksway Road, Portsmouth as an Asset of Community Value

Report by: Kieran Laven, Assistant Solicitor - Planning & Highways

Wards affected: Milton Ward

Key decision: No

Full Council decision: No

1. Purpose of report

To make a recommendation to the Monitoring Officer in relation to his decision on whether to uphold or reverse the decision to list the Nursery at West Lodge, Locksway Road, Portsmouth ("the Nursery") as an Asset of Community Value ("ACV").

2. Recommendations

It is recommended that the decision to list the Nursery at West Lodge, Locksway Road, Portsmouth as an Asset of Community Value is upheld.

3. Background

The decision to list the Nursery as an ACV was issued on 18 August 2017 ("the Decision Letter"). The request for a review of that decision was sent to the Council on 6 October 2017, meaning that the deadline for determination is 1 December 2017.

The Nursery is owned by NHS Property Services Limited ("the Owner"). The Nursery is occupied by Wind in the Willows (Portsmouth) Limited, a company limited by shares. The nomination was made by persons using or associated with the Nursery who have formed an unincorporated body ("the Nominator") and the lead nominator is a director and shareholder of the Wind in the Willows (Portsmouth) Limited

The Owner was informed of their right to request an oral hearing by 3 November 2017, and no such request was received. The Owner and the Nominator were invited to make any further written representations by 17 November 2017. Only the Nominator submitted written representations by that date.

I attach the nomination form, the Council's policy on ACV listing, the report, the Decision Letter, the request for a review and the nominator's written representations.

4. Reasons for recommendations

4.1. Law

The law on ACV listing is contained in Part 5, Chapter 3 of the Localism Act 2011 ("the Act"), as well as the Assets of Community Value (England) Regulations 2012 ("the Reg's"). The pertinent provisions are attached to this report.

The listing review request raises concerns in relation to the eligibility of the nominator (see Reg 5 of the Reg's), the community value of the land (see s.88 of the Act), the furthering of social wellbeing and social interests (see s.88 of the Act again) and failure to meet the Council's 'Policy for defining social interests/well-being'.

4.2. The nomination form

Section 1A of the nomination form states that the name of the organisation is 'Wind in the Willows Portsmouth', and gives the Nursery as the organisation's address. Crucially to this review, the tick-box list at page 1 indicates that the Nominator is a "company limited by guarantee which does not distribute any surplus it makes to its members". This is an error; the Nominator does not purport to be, in substance as I shall refer below, a company limited by guarantee. It is more appropriately identified as "an unincorporated body whose members include at least 21 individuals, and which does not distribute any surplus it makes to its members". This is discussed further under Ground 1 of the Owner's representations.

At sections 1B and 1C the nomination form confirms that the Nominator does not distribute any surplus. The Nominator refers to itself as the 'Wind in the Willows Community Preservation Society' and references that it is "supported by" 21 signatories. That list of signatories was provided to the Council. The local connection requirement is explained by reference to the services and membership of the Nursery.

Section 2 of the nomination form describes the Nursery, cites the Owner and identifies "Wind in the Willows Portsmouth" as the Tenant. Section 3 provides a statement of reasons explaining why the asset should be listed as an Asset of Community Value and that its continued use is realistic.

4.3. The report

The Report is dated July 2017 and recommended that the Nursery be listed as an ACV. The report describes the community setting of the Nursery at length, with particular regard to community demand for nursery places. The comments of residents are summarised, all of which supported listing of the Nursery, and the decision-maker notes at 5.1 the Owner's solicitor's 'no comment without prejudice to a review or appeal' response.

Social interest and wellbeing flowing from the Nursery are considered at section 7 of the report and makes reference to s.88 of the Act. The decision-maker clearly gave significant consideration to the statutory and definitional concepts in issue by reference to a number of sources. 7.6 holds that "It is demonstrable that a facility of this nature, assisting in the development of a community's children, and able to provide care to them during periods in which their parents/guardians are unavailable, does promote the well-being of an area and those living in it."

Section 8 of the report demonstrates the high level of demand in Portsmouth for nurseries of this kind and underscores the harm that would be caused through the loss of nursery provision.

Section 9 addresses the Council's policy for assessing social interests and social well-being. Following on from section 8, the report highlights that the quality of an asset as "essential to the special character of the area" must be construed through the impact of its loss upon the community, primarily in the damage that would be done if children were not to have nursery places. Specific reference is made to the fact that nursery places free parents to work, and the high level of demand is repeated. Consideration is also given to the events that the children of the Nursery participate in and opportunities to engage with local people outside of the Nursery's membership and the world more broadly, all to the developmental benefit of the children.

The section concludes that it is reasonable to believe that the Nursery could continue to be used as such in light of high demand. Section 10 gives brief consideration to the ability of the Nominator to purchase the asset in light of the Council's policy to do so, but rightly concludes that a business case is not required at this stage.

Section 11, 'Conclusions', begins by acknowledging the Owner's abstention from comment. Consideration is given to the Council's own policy on whether the Nursery is "essential to the special character of the area". It is concluded that it is essential by virtue of the impact of a loss of nursery places upon the community. I would go further to read explicitly that the area has a special family character that would be compromised without the Nursery's continued presence.

At 11.6, the decision-maker considered whether the Nursery furthers the social wellbeing or social interests of the local community under s.88 of the Act. It concludes that the social wellbeing or social interests of the local community are furthered by the operation of a community nursery. The report then opines that the Nursery is neither a recreational nor sporting facility. I must disagree with

that conclusion on the basis that so many of the Nursery's activities appear to be based on play, which is to my mind a quintessential example of recreation. Further, albeit as being subordinate to the purpose of placing children in proper care, the report references at 11.7 the opportunity for parents to meet one another at the nursery and form social bonds from the contacts afforded by its existence. I would therefore hold that the Nursery is a recreational facility. I do agree for the reasons already stated with the report's finding that the Nursery is essential to the special character of the area.

4.4. Decision letters

The letter sent to the Owner was brief, informing them of the decision and outlining the reasons for accepting the nomination. The Owner was directed to the report on the Council's website for more detailed reasoning.

A letter in substantially the same form was sent to the Nominator.

4.5. Owner's request for review and representations made to the review

The 4 grounds ("Grounds") that the Owner has submitted through its solicitor in a letter dated 6 October 2017. I shall consider these in turn:

Ground 1: Eligibility of group

The Owner asserts that the Nominator was ineligible as it consisted of the Wind in the Willows (Portsmouth) Limited, which is a company limited by shares rather than guarantee, contrary to Regulation 5 of the Reg's. The effect, according to the Owner, is that the "the nomination was ineligible for consideration".

The Owner further asserts that the Council's Decision Letter appends a different nomination form, listing the Nominator as "an unincorporated body whose members include at least 21 individuals, and which does not distribute any surplus it makes to its members".

The Owner is correct to highlight that the original nomination form lists the Nominator as a company limited by guarantee (apparently confusing a company limited by shares with a company limited by guarantee). The nomination was later amended in this regard to show that the Nominator was an unincorporated body.

However, it is clear from reading section 1C of the nomination that the members of the Wind in the Willows Preservation Society were alive to the requirement of at least 21 signatories. 1B also indicates that they have had regard to the requirement not to distribute any surplus.

The spirit of the Act and the context of the Nominator should be considered. This is the approach that the First-tier Tribunal took in *Mendoza Ltd v London Borough of Camden* [2016] UKFTT CR/2015/0015 (GRC) in rejecting the submission that the established legal test for the identification of an

unincorporated *association* (typically a workers' union) should be the same for an unincorporated *body*:

"19. If the legislature had intended to confine a voluntary or community body to those bodies which are unincorporated associations, it would have done so. There is no sound reason for transporting in the 2012 Regulations the requirement for there to be an unincorporated, of the kind described by Lawton LJ in the *Burrell* case. Although, of course, an unincorporated body *may* be an unincorporated association, in the sense that its members have mutual duties and obligations stemming from contract, there is no case for confining the expression 'unincorporated body' in that way ...

20. The *Concise Oxford Dictionary* defines a 'body' as '3. An organised group of people with a common function.' That organisation and common function may arise from a contractual relationship. *But, equally, they can, I consider, arise less formally, as a result of a number of individuals coming together to further a matter of common interest.*" [emphasis added]

The Council does appear to have been presented at all material times with a group of individuals acting for a common goal. It is not surprising that such an informal group of persons have not taken professional advice on the preparation of the nomination and seemingly misdirected themselves on the nature of their corporate identity. Therefore, I would take the view that it was open to the Council to consider the nomination on the basis that, being presented with a nomination form with a list of 21 local signatures, the Nominator consisted of at least 21 persons within the qualifying criteria as an unincorporated body.

Consequently, I cannot support the view that the Owner's interests were prejudiced as the rejection of the nomination would not have precluded rectification and resubmission of an nomination; in this instance, the same outcome would have been reached.

The Owner asserts that "it was reasonable to conclude that the original nomination was bound to fail by reason of being ineligible for consideration." I have to respectfully disagree with that assertion on the basis of the answers in 1B and 1C of the nomination that should have put the Owner's solicitor on notice that they could be dealing with an unincorporated body. The Council (and no doubt the Owner's solicitor) was aware of the bar on limited companies and has dealt with the nomination on the basis that this was a misunderstanding by an unsophisticated nominator. Against this backdrop, it is somewhat disingenuous of the Owner's solicitors to "confirm that NHS Property Services does not intend to comment at this stage" and thereby acquiesce in what it later purports to be a defect that should cause the nomination to be rejected. It is reasonable for the Council to conclude that the point should have been taken up-front and that the Owner's failure to do so did not materially affect the decision to list.

Ground 2: Community value limited by short length of existence

The Owner contends secondly that the Nursery is "a very recent development", having commenced in 2015, and therefore should not have been listed as an ACV.

The final sentence in Ground 2 itself concedes that time alone is not a determinative factor that could undermine a listing decision. The Localism Act 2011 does not stipulate any minimum length of time for community use to be established. Further, any suggestion that the use in excess of 2 years and 5 months is "a very recent development" seems at best overly enthusiastic, if not wholly unarguable; to an independently -minded observer, this must surely be a substantial amount of time. s.88(1)(a) of the Act calls for "an actual current use" and that use as a nursery was assessed in terms of the social wellbeing and social interests of the local community.

Ground 3: Current use does not further (i) the social wellbeing or (ii) the social interests of the local community

The Owner contends that the benefit flowing from the Nursery accrues to private individuals, rather than the legislative requirement of "the community". The Owner cites a case in which a language school was held not to be an ACV due to it being characterised by a "private use rather than a community use".

The Owner correctly highlights that there is no definition of "social wellbeing" in law, and highlights that "it falls to individual authorities to reach their own conclusions on this contextual question". Indeed, the decision-maker was at pains to explain its research and rationale before coming to the conclusion that the Nursery is an ACV.

The Owner contends that the activities of the Nursery do not extend beyond the "day-to-day" operations of a private nursery business, and therefore no community use can flow from it. The following paragraph of Ground 3 concedes that the parents of such children are a part of the community (even, seemingly, without regard to the children themselves), but, as in Ground 2, offers no real justification or quantification as to why this would militate against a decision to list. The Council is asked to in the nomination to acknowledge the various aspects of community benefit from the Nursery that are anchored to the given geographical location, and this is what the Council has done.

In terms of the social interests that the Nursery furthers, the nomination presents and the report notes ample activities that encourage children to engage with the world beyond their homes. To my mind, these activities clearly fall within the cultural and recreational benefit of the children, who are an important section of any community in their own right. Being minors, they are necessarily represented through their parents, who also share in the benefits to their children. The Nursery causes people with children of the same age to come to the same place, promoting social bonds in much the same way that chance encounters in the oft-cited examples of post-offices and public houses would. The fact that such premises exist primarily to generate a private profit is not a bar to listing.

The report suggests at 7.3 that it would be legitimate to hold that the definition of social wellbeing is wider still. In this regard, it should be noted that the government funds childcare places at the Nursery in pursuance of national policy on social care. The social benefits to the community of such nursery places are that it releases parents to perform other functions in the community beyond the home, which is referenced at paras 7.6 and 9.4. That benefit is of particular social value to women who might otherwise be discouraged from seeking employment or other opportunities, given the disproportionate childcare burden borne by women. In this sense, the Nursery furthers equality of opportunity in the community.

For these reasons, the recipients of the social benefits flowing from a nursery are far wider in scope than those of individuals attending a language school for the purposes of acquiring another specific language in exchange for a fee. Indeed, the leading text on this area (Adamyk, 'Assets of Community Value: Law and Practice', 2017, p.104) relies on *Haddon Property Development Ltd v Cheshire East Council* [2016] UKFTT CR/2015/0017 (GRC) to opine that "If, for example, a toddler group is run in a local building, that group could benefit 'the local community' even if not many members of the local community are actually toddlers or the parents or relatives of toddlers". In any case it is legitimate that different local authorities will come to different views as to whether benefits accrue to individuals or the community when presented with different nominations on their own merits. The Council has assessed this application and is firmly of the opinion that a sufficient membership of the community benefits from the Nursery.

With regard to the criticism of the first question of para 11.6 of the report, I have to agree that the answer was not as full as it could have been, but its reasoning is clear from the preceding content - the community use is a benefit to the community's social interests and wellbeing. I also disagree with the author of the report that that the building is not of a recreational nature given that play is an inherent part of a nursery. That leads me to question why 11.6 did not consider the building as a cultural building, when to my mind the nomination makes it clear that cultural events in relation to Christmas and Harvest Festival are facilitated through the nursery. I would submit that the outcome would not have been materially different had these matters been taken into consideration; the nursery would still have been listed as an ACV and the report set out sufficient reasons to allow a reasonably informed bystander to understand why.

Ground 4: Nomination fails to meet the criteria set out in Portsmouth City Council's 'Policy for defining social interests/well-being'

Finally, but under 4 separate headings, the Owner contends that the Council did not have regard to its own policy.

4.1 *The extent to which the approval of the nominated site would enhance the social interests and social wellbeing of the local community because in its*

absence the local community would be deprived of land or a building that is essential to the special character of the local area, and provides:

- i. a place to meet and socialise, or
- ii. a place to shop, or
- iii. a recreational, sporting or cultural facility.

The Owner submits that the decision-maker misdirected themselves in finding that the Nursery was essential to the special character of the local area, and secondly that the Nursery does not fit into categories i., ii. or iii..

Under Ground 4.1, it is important to appreciate that the Council's policy is not intended to be prescriptive and provides a brief list of matters that the Council will have regard to *once it has received a nomination*. It does not purport to directly instruct Nominators on the requirements for the Council to validate a nomination for an ACV listing.

The decision-maker is best placed to make the decision as to what is "essential to the special character of the local area" and finds that the nursery is a "cornerstone". It is enough to identify that serious damage would be done to the special character of the area if the asset were to cease to be of community use, and the report makes it clear that the loss of the Nursery would be of serious detriment to the community. I am satisfied that the special character of the area as one amenable to families would be lost without the childcare that the Nursery provides.

The second line of argument can be answered by reference to the answers in Ground 3: People plainly do meet and socialise at the nursery to their cultural and recreational benefit, even if those people are children and their parents.

4.2 The definition of the extent of the local community will depend on the nature of the use and each case will be considered on its merits, with particular reference to the character and heritage of the local area, its community cohesion and its sense of belonging.

The Owner invites the Council to conclude that the "benefit arising is restricted to users of the weekday business service of the nursery", and not "the local community as a whole".

Again, for the reasons given in Ground 3, I do not understand why the Owner's narrow appreciation of "the community" should prevail, and in any case the benefits of childcare are wider than the Owner, in this instance, is willing to concede. The nursery states in its nomination that it is full with a waiting list, demonstrating ample community demand and support.

4.3 The City Council will have regard to the realistic prospect of the continued or resumed use of the asset within the next five years, and in particular and where it is a matter relevant to that use, the commercial viability of the proposal (including the ability to raise funds) and the sustainability of that use.

The Owner contends that the Nominator has failed to demonstrate that it has a reasonable prospect of continuing the use in the next 5 years.

Once more, the Owner misses the distinction between "assessing nominations" under the policy and accepting a nomination. The Council has no control over the nominations it receives, but it will assess the nominations it receives under the policy. The Council's interpretation of the nomination is that there is currently a viable business operating, that it has been operating for a significant amount of time and that demand for its services presently outstrips supply.

Further, it should be noted that future use of an ACV does not have to be limited to its current use (s.88(1)(b) of the Act), an even permits a recently ceased use to be resumed (s.88(2) of the Act), affording the Council a wide margin of appreciation in deciding whether or not to list. *Patel v London Borough of Hackney* [2013] UKFTT CR/2013/0005 (GRC) considered that the civil burden of proof is not appropriate in assessing future uses, and that the whole variety of potential future uses (3 were identified in that case) should be considered in tandem on the facts of the nomination. It also held that an owner's views are not given determinative weight. The Council's report made reference to perceived intentions of the Owner to redevelop the Nursery for residential purposes, which the Owner appears to confirm in an objection to a separate planning application (17/01926/FUL) at the Nursery. To use the statutory wording, "it is realistic to think" that the Owner may in the future make an application to redevelop the site, but this has not yet occurred. Even then, there are many, many different possible outcomes from the submission of virtually any planning application, including non-implementation of permission. The Council is not bound to assume the most likely outcome is the only "realistic" outcome. In the absence of any clear, overriding intention it is "realistic to think" that the current nursery use could continue.

Lastly, the Owner's concerns regarding the ability of the Nominator or the limited company which runs the Nursery to buy the property are premature - these are issues that the moratorium periods are designed to test.

4.6. Nominator's representations to the review

The Nominator submitted representations on 16 November 2017, sent by the lead nominator.

The Nominator appears to continue to conflate the limited company with the unincorporated body, making reference to the salary drawn by the owners/directors and consideration of conversion to a charitable status. The Representations are on letter-headed paper for Wind in the Willows (Portsmouth) Ltd. For the reasons already given, this is understandable in light of the lack of legal representation other professional advice received by the Nominator.

The Nominator reaffirms its claims as to the benefit that it brings about in the community and its plans to expand, especially in light of future potential residential development.

The Nominator expressly identifies the Nursery as "a place to meet and socialise" for parents, which supports the decision to list. It also expands on the interactions that parents are involved in, stating that it offers "professional and emphatic advice" on parenting. This supports the long-term development of a community.

Perhaps more fancifully, the Nominator suggests that the nursery is a 'place to shop'. The examples given are not to my mind essential to the special character of the area in the way that the benefits of socialising and childcare are; it does not constitute a key aspect of harm that would be done to the community were the Nursery lost.

The Nominator highlights its credentials as a "recreational, sporting and cultural facility". I am content that it serves recreational and cultural purposes, with some scope for physical or sporting activity appropriate to the age of the children.

4.7 Owner's further representations to the review

As noted above, the Owner was invited to request an oral hearing by 3 November 2017, to which the Council received no response. The Owner was also invited to make any further written representations by 17 November 2017. No such correspondence was received.

4.8 Other points to consider

4.8.1 Equality of Arms

A recurring point in this review is that the Owner and the Nominator do not enjoy equality of arms; the Nominator is an unincorporated body that is not professionally represented in this matter. The Owner is a pre-eminent public authority that has had the benefit of advice from a national firm of solicitors, and actively chose to abstain from commenting on the nomination before it was decided.

4.8.2 Formalisation of Nominator to make a bid

It would be prudent to highlight the following points arising in the instance that the listing is upheld per this recommendation: the 'Wind in the Willows Community Preservation Society' as an *unincorporated body* can only nominate the Nursery as an ACV, but *it cannot bid to purchase the Nursery under a moratorium*: To actually purchase the Nursery during the moratorium an entity must be a form of 'community interest group' with a local connection, which is either: i) a charity, or ii) a company limited by guarantee which does not distribute any surplus it makes to its members, or iii) a co-operative or community benefit society, or iv) a community interest company. Crucially, Wind in the Willows (Portsmouth) Limited as a *company limited by shares* cannot bid for the premises during the moratorium.

4.8.3 **Compensation**

Again, this heading considers the consequences of a decision to uphold the listing. Generally, a decision to list that is overturned by the First-tier Tribunal would invite a claim for compensation against the local authority where the Owner can prove loss or expense "which would be likely not to have been incurred if the land had not been listed". The (non-exhaustive) examples given in the Reg's are:

- 1) where a claim arises from any period of delay in entering into a binding agreement to sell the land; or,
- 2) a claim for reasonable expenses incurred in a successful appeal to the First-tier Tribunal against the local authority's decision
 - a) to list the land;
 - b) to refuse to pay compensation; or
 - c) with regard to the amount of compensation offered or paid.

Having consulted the most up-to-date textbook on this area of law, 'Assets of Community Value: Law and Practice' (Adamyk, 2017), there are no cases that directly consider the limits of compensation under the Act and the Reg's. However, the author is at pains to state that the jurisdiction could be wide. Further, it is not immediately clear whether or not the Owner could claim compensation as certain bodies subject to specific public sector audit statutes are unable to claim compensation. Nonetheless, the Monitoring Officer should be aware of a risk of a claim for compensation being made against the Council if he upholds the decision to list.

4.9 **Conclusion**

The nomination form provided an articulate explanation of the Nursery's setting in the community and the benefits that it provides to that community, as well as detailing its future viability. It is unfortunate that there is continued confusion by the Nominator regarding its legal personality, but sufficient details were presented to the Council to entitle it to conclude that an unincorporated body had made an application. The ACV legislation exists to empower local groups where possible, not to throw out their applications for want of professional presentation. I reject the suggestion that the Owner was prejudiced, given its status as a sophisticated public entity and the high-quality legal representation that it has enjoyed throughout the nomination process and this review process.

Although the Council's report recommending listing of the Nursery as an ACV could have been more detailed in places, it does consider the nomination under the statutory headings and Council policy to draw valid conclusions to support the listing. The Owner's grounds of complaint seek to challenge matters that are for the local authority to reach a view on, and I am satisfied that the Council's report reached reasonable decisions. I would therefore recommend that the decision to list the Nursery as an ACV is upheld.

5. **Equality impact assessment**

An equality impact assessment is not required as the recommendations do not have a disproportionate negative impact on any of the specific protected characteristics as described in the Equality Act 2010 for the following reasons:

The decision to list the Nursery as an ACV and this recommendation to uphold that decision would maintain the status quo in terms of use of the site as a nursery and therefore have no effect upon persons of protected characteristics. Even if a decision were taken to de-list the Nursery as an ACV, the loss of nursery places would not be an immediate or direct effect of that decision, as the following paragraph addresses.

The Owner owns the freehold to the Nursery and is landlord to the tenant private company that runs the Nursery. Therefore, the Council has no control over the future of the Nursery on this site and cannot be called to account for any future closure; any outcome will be the result of private negotiation between the landlord and tenant. The Owner may have to review equality impacts for its own purposes, but that is its own concern.

6. **Legal Comments**

This report was prepared by the Council's Planning and Highways Solicitor.

7. **Director of Finance's comments**

Finance were requested to provide comment on the matters addressed at 4.8.3, and they raised questions in relation to the eligibility of the Owner to claim compensation, as well as the value of such a claim. Finance were advised by the author in the following terms:

It is possible that NHS Property Services Ltd is excluded from claiming compensation but without specific submissions from them on their status it should not be assumed. In terms of the level of compensation that could be claimed, this has the potential to include (but not limited to): diminution in value resulting from the listing itself; loss of a willing buyer due to the moratorium period; decline in the market over the moratorium period; costs associated with maintaining the property for longer than desired due to the moratorium; legal expenses associated with appealing the listing decision. The Council would have to assess and scrutinise the methodology of any claim on its merits once it is received.

Signed by:

Appendices:

Background list of documents: Section 100D of the Local Government Act 1972

The following documents disclose facts or matters, which have been relied upon to a material extent by the author in preparing this report:

| Title of document | Location |
|--------------------------------------------------------------------|-----------------|
| Applicable parts of the Localism Act 2011 | |
| Applicable parts of the Assets of Community Value Regulations 2012 | |
| Nomination Form | |
| Report on nomination by Phil Dodshon, July 2017 | |
| Decision letters | |
| Review request from Owner | |
| Representations made by Nominator | |

The recommendation(s) set out above were approved/ approved as amended/ deferred/ rejected by on

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Signed by: