



**Partnership and Place
Overview and Scrutiny Committee**
3 October 2013

**Report from the Assistant Director of
Policy**

Wards Affected:
ALL

**Localism Act – ‘Assets of Community Value’ and ‘Community
Right to Challenge’**

1.0 Summary

- 1.1 This report provides an overview of the ‘Asset of Community Value’ process and ‘Community Right to Challenge’ which were put in place under the Localism Act 2011 and the response to it in Brent.

2.0 Recommendations

Members are asked to:

- 2.1 note the requirement of the Localism Act 2011 and the ‘Assets of Community Value’ Regulations 2012 on ‘assets of community value’ summarised in this report and the nominations to list community assets received in Brent so far.
- 2.2 note the requirements of the Localism Act 2011 and the statutory guidance on ‘Community Right to Challenge’ summarised in this report and the response in Brent so far.

3.0 Detailed Considerations – Assets of Community Value

Assets of Community Value

- 3.1 The Localism Act 2011 and the ‘Assets of Community Value’ Regulations 2012 introduce some rights for communities in relation to assets of community value. Certain community groups can nominate certain local public or privately owned buildings or land for inclusion on a list of community assets and, where those assets are put up for disposal, a right to submit a bid to purchase them. The council is obliged to maintain a list of community assets, manage the process for considering nominations and meet the associated regulations.
- 3.2 The central government stated aim is to encourage more community-focused, locally-led action by providing an important tool to help communities looking to take over and run local assets. The idea is that communities have the opportunity to nominate assets of community value to be included on the a

list, so that if at a point in the future the asset is put up for sale, there is more time for the community to raise finance and prepare to bid for the asset.

Eligible organisations

- 3.3 Only particular types of voluntary and community body with a 'local connection' are eligible to nominate properties to be included on the list. A 'local connection' means that the body's activities are wholly or partly concerned with Brent or with a neighbouring borough, and for some bodies that any surplus it makes is wholly or partly applied for the benefit of Brent or a neighbouring borough. The particular types of organisation that are eligible are:
1. Unincorporated groups - Membership of at least 21 local people who appear on the electoral roll within the local authority or a neighbouring local authority.
 2. Neighbourhood forums - Only one forum per area
 3. Community interest groups with one or more of the following structures:
 - a charity
 - a community interest company
 - a company limited by guarantee which does not distribute any surplus it makes to its members
 - an industrial and provident society which does not distribute any surplus it makes to its members.

Eligible land or buildings

- 3.4 The Council must include the land in the List of Assets of Community Value where, in the opinion of the Council, either
- (i) An actual current use of the building or other land (which is not ancillary use) furthers the social wellbeing or social interests of the local community and
 - (ii) 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.
- Or
- (i) There is a time in the recent past when an actual use of the building or other land (that was not an ancillary use of the building or other land) furthered the social wellbeing or social interests of the local community and
 - (ii) It is realistic to think there is a time in the next five years when there could be non-ancillary use of the building or other land that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community

- 3.5 Only certain land or buildings may be listed as assets of community value and not all disposals of that asset will be covered by the regulations and be subject to the moratorium on sale. Residential and statutory operational land is exempt from being listed as an asset. Some disposals of a listed asset are exempt from the process e.g. where the asset is to be used as a school or an Academy for 16 to 19 year olds, or for health service provision and certain other prescribed disposals. In these cases the assets may still be nominated for listing but a disposal of the listed asset for these purposes or in these circumstances will not trigger the 'assets of community value' process.

Asset listing

- 3.6 Each nominated asset is considered to see whether it meets the criteria for acceptance under the Localism Act 2011 and Assets of Community Value Regulations 2012. A decision on whether to list the asset is made within eight weeks of receiving a completed nomination form available through the council's website. The nominator and owner of the asset will be advised of the outcome. Depending

on the decision, the asset will then be entered on to either the list of assets of community value or a list of unsuccessful nominations. Assets remain on the lists for a period of five years.

- 3.7 Once an asset is listed, the owner cannot dispose of it other than to a community interest group, without the community having six months to put together a bid to buy the asset. Where an owner of land that is listed wishes to dispose of it, subject to any exemption, s/he must notify the Council. The details of the proposed disposal are entered on the List of Assets of Community Value and community interest groups are entitled to register an intention to bid within a six week period. If no intention to bid is received then the owner can proceed to sell. If notice is received then the sale cannot proceed for a six month period, other than to a community interest group. After that six month period the owner is free to dispose of the asset within an 18 month window. The asset is removed from the list if it is sold under this process.
- 3.8 The owner of the asset does not have to sell it to the community and can appeal against a decision to list the asset. Owners are entitled to claim compensation from the council if the listing of an asset results in the owner incurring a loss. The compensation is determined and payable by the council but owners have a right of appeal.

Brent's approach

- 3.9 Prior to its introduction, there was a general consensus that the assets of community value process might prove very effective in rural areas or small towns where, for example, the community were keen to save and maintain local services such as post offices or local amenities such as pubs. There was scepticism about how the process might work in more complex urban areas, especially in London, not least because high property values might well mean that community groups would struggle to raise the necessary funds to complete a purchase, even if they were successful in triggering a moratorium. There is concern that either community groups will be unwilling to take the risk involved in nominating an asset or that, where they do, the result will simply be to delay a sale rather than to reach an alternative outcome for the community. In recognition of this, central government has been offering financial support to assist community groups, although this does not extend to assistance with purchase, and the Greater London Authority has also been offering similar help.
- 3.10 Under the Localism Act 2011, the council has received two nominations to list assets of community value. The first was a nomination by Friends of Kensal Rise Library in respect of the former Kensal Rise Library building. The building was listed as an asset of community value. The second is a nomination by Northwest Two Residents Association in relation to the land and buildings at 110 Walm Lane (including the Queensbury Pub). The nomination was declined.

4.0 Detailed Considerations - Community Right to Challenge

The community right to challenge

- 4.1 The Localism Act 2011 introduced legislation that enables community groups and other relevant bodies to submit an expression of interest in relation to providing Council services. The local authority must consider the expression of interest in accordance with sections 81, 83 and 84 of the Localism Act 2011 and a set of regulations set out in the Community Right to Challenge (expressions of interest and excluded services)(England) Regulations 2012 and Community Right to Challenge (fire and rescue authorities and rejection of expressions of interest)(England) Regulations 2012 and accompanying Guidance on the Community Right to Challenge from the Secretary of State.

- 4.2 The Government's stated intention for the 'community right to challenge' legislation is to encourage the provision of public services by a diverse range of organisations and increase competition, innovation and value for money through the challenge process. The expectation is that expressions of interest from local community groups or employees will be forthcoming for services currently provided directly by the local authority hence triggering a competitive market testing process. The 'community right to challenge' does not automatically provide groups with the right to provide a service, it enables them to express an interest. However if the expression of interest meets the criteria set out within the act and the guidance it can trigger the requirement for the council to run an open competitive tendering process for these services.

Relevant bodies

- 4.3 The relevant groups and bodies who can submit an expression of interest to provide council services are set out within the Act 2011 as follows:
- (a) A voluntary or community body
 - (b) A body of persons or a trust which is established for charitable purposes only;
 - (c) A parish council
 - (d) Two or more employees of the relevant authority
 - (e) Any other person or body specified by the Secretary of State in regulations
- 4.4 The Secretary of State's Guidance on the 'community right to challenge' provides further details on how an employee led expressions of interest could be made. Also the Guidance states that whilst only relevant bodies are eligible to submit expressions of interest, they may do so in partnership with other relevant bodies and/or non relevant bodies but in such circumstances, certain information must be provided in the expression of interest in respect of all partners.

Relevant services

- 4.5 The community right to challenge only applies to the provision of services and applies to all "relevant services", which are services provided by or on behalf of the authority in the exercise of its functions. Services which are excluded from the 'community right to challenge' in secondary legislation are as follows:
- (i) Until 1 April 2014, a relevant service commissioned in conjunction with one or more health services by a relevant authority or by a Primary Care Trust, NHS Trust or NHS foundation trust under a partnership arrangement or by a relevant authority and an NHS body or a Strategic Health Authority, acting jointly.
 - (ii) Until 1 April 2014, a relevant service commissioned by an NHS body on behalf of a relevant authority.
 - (iii) A relevant service commissioned or provided by a relevant authority in respect of a named person with complex individual health or social care needs.

Expression of interest requirements

- 4.6 The expression of interest must be submitted to the local authority by the relevant body in writing. The information which must be set out in an expression of interest is set out below.
- (i) Where the relevant body submitting the expression of interest proposes to deliver the relevant service as part of a consortium or to use a sub-contractor for delivery of any part of the relevant service, the information in paragraphs (ii) and (iii) below must be given in respect of each member of the consortium and each sub-contractor as appropriate.
 - (ii) It must include information about the group submitting the expression including their financial resources.

- (iii) It must include evidence of the group's capability to provide or assist in providing the relevant service.
- (iv) There is also a requirement to provide information about the service that is the subject of interest sufficient to identify it and the geographical area to which the expression of interest relates.
- (v) Information about the outcomes to be achieved by the relevant body making the submission also required. In particular the submission needs to show (a) How the provision or assistance will promote or improve the social, economic or environmental well-being of the relevant authority's area; and (b) How it will meet the needs of the users of the relevant service.
- (vi) Where the group making the expression of interest consists of employees of the relevant authority, details of how that group proposes to engage other employees of the relevant authority who are affected by the expression of interest.

4.7 The grounds on which an expression of interest can be rejected are as follows:

1. The expression of interest does not comply with any of the requirements of the Localism Act 2011 or in regulations.
2. The relevant body provides information in the expression of interest which in the opinion of the council is in a material particular inadequate or inaccurate.
3. The relevant authority considers, based on the information in the expression of interest, that the relevant body or, where applicable-
 - a. Any member of the consortium of which it is a part; or
 - b. Any sub-contractor referred to in the expression of interest is not suitable to provide or assist in providing the relevant service.
4. The expression relates to a service where a decision, evidenced in writing, has been taken by the relevant authority to stop providing that service.
5. The expression of interest relates to a relevant service-
 - a. Provided, in whole or in part, by or on behalf of the relevant authority to persons who are also in receipt of a service provided or arranged by an NHS body which integrated with the relevant service; and
 - b. The continued integration of such services is, in the opinion of the local authority, critical to the well-being of those persons.
6. The relevant service is already the subject of a procurement exercise.
7. The local authority and a third party have entered into negotiations for provision of the service, which negotiations are at least in part conducted in writing.
8. The local authority has published its intention to consider the provision of the relevant service by a body that two or more specified employees of that authority propose to establish.
9. The local authority considers that the expression of interest is frivolous or vexatious.
10. The local authority considers that acceptance of the expression of interest is likely to lead to contravention of an enactment or other rule of law or a breach of statutory duty.

Period between an expression of interest being accepted and a procurement exercise starting.

4.8 Local authorities must specify periods between an expression of interest being accepted in a particular matter and a procurement exercise starting. Depending on local circumstances, this aims to allow relevant bodies the time they need to prepare to complete in the procurement exercise. In specifying these periods, local authorities should have regard to:

- (a) The need to provide employees of the local authority, and other relevant bodies, with a fair, reasonable and realisable opportunity to bid in the procurement exercise for the service;

- (b) The nature, scale and complexity of the service being procured (eg it may take relevant bodies longer to prepare to bid for larger, complex services than smaller more straightforward ones); and
- (c) The timescales for any existing commissioning cycle relevant to the service being provided, or any other relevant authority processes, which may include Executive decision making and budget setting processes.

4.9 The Guidance of the Secretary of State states the following: “The relevant authority may well have a contract with a third party to provide that service. It is for the relevant authority to set the period between accepting an expression of interest and starting a procurement exercise”. The local authority will need to take into account its contractual obligations and commissioning cycle. The Guidance adds the following: “It would be undesirable if an expression of interest was accepted and there was a lengthy period before a procurement exercise could be started”.

The procurement exercise

4.10 When a local authority accepts one or more expressions of interest for a relevant service, it must carry out a procurement exercise for the service. The procurement exercise must be appropriate having regard to the value and nature of the contract that may be awarded as a result of the exercise. Local authorities will need to comply with procurement law, including the Public Procurement Regulations 2006. Where the Public Procurement Regulations do not apply, it is for the local authority to decide how to procure the service.

4.11 Local authorities must consider how both expressions of interest and procurement exercises triggered by one or more expressions of interest being accepted would promote or improve the economic, social or environmental well-being of the authority’s area. This must be consistent with the law applying to the awarding of contracts. The Secretary of State’s Guidance suggests that local authorities may include social clauses in contracts provided they comply with the relevant requirements, which are explained in the European Commission’s publication “Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement”. The Guidance also states that local authorities should have regard to the DCLG’s Code of Recommended Practice on publishing new contracts and tenders information as part of the government’s transparency agenda.

Brent's approach

4.12 In April 2013 Executive agreed to put in place the processes and procedures to be compliant with provisions under the act with respect to the ‘community right to challenge’. Bidding windows during which local groups could submit expressions of interest to the Council under the ‘community right to challenge’ were agreed. Authority was delegated to Directors of relevant service areas to be responsible for assessing the expressions of interest against the criteria within the statutory guidance relating to the ‘community right to challenge’ and deciding whether to accept or reject the expressions of interest. Officers have set up a specific web page regarding the Council’s ‘community right to challenge’ arrangements on the Council’s website setting out the guidance for submitting an expression of interest, necessary documentation and any additional information required.

4.13 For 2013/14, the bidding window was open between 24th June and 23rd August 2013 and communicated with the sector via CVS Brent and community directory contacts. A list of services due to be the subject of contracting processes in the following financial year was published in conjunction with the bidding window. Executive have agreed an annual bidding window for subsequent years expected to run between 1st April and 31st May. Therefore, the next annual bidding window for the financial year 2014/15 will take place between 1 April 2014 and 31 May 2014.

- 4.14 Discussions with the voluntary sector and CVS Brent have indicated concerns that the local voluntary sector will still find it difficult to compete with larger, national charities or private sector organisations in any such procurement process. Large, multi-authority or lengthy contracts already entered into will not be immediately affected and, as increasingly local authorities look to shared service options to deliver the necessary financial savings, the scope for local organisations to compete could be limited.
- 4.15 The Corporate Procurement Team and the Strategy, Partnerships & Improvement Department ("SP&I") of the Council have conducted a number of workshops with the voluntary sector outlining the council's procurement processes and requirements, including the provisions within the Localism Act 2011. The voluntary sector in Brent is keen to be an effective provider of local services and have identified a number of steps that would assist them. The most significant of these is adequate prior knowledge of the council's commissioning and procurement intentions. The annual two month bidding window for expressions of interest and a list of the council's future commissioning intentions will be beneficial in providing clarity and transparency for the local voluntary and community sector. This would enable them to be better prepared, able to form consortium to bid where necessary and improve the quality of the bids submitted. The other main barrier experienced is in relation to financial assessments with many groups holding insufficient reserves to be considered viable as contractors. SP&I are working with CVS Brent to develop capacity building and support programmes for the voluntary sector which will address these issues.

Expressions of interest

- 4.16 Brent Council has only received one expression of interest to date which was from Brent Tenants Rights Group (now known as Advice 4 Renters) in relation to the Council's Tenancy Relations Service, which is a small function within the Council's Housing Needs Service. This expression of interest was received in November 2012. After careful consideration of the expression's compliance with the statutory requirements of the Localism Act 2011 and relevant regulations, a letter was sent on 18 March 2013 notifying Brent Tenants Rights Group of the decision of the Director of Regeneration and Major Projects on behalf of the Council that their expression of interest has been accepted and that a procurement exercise in relation to the Council's Tenancy Relations Service will commence by no later than 30 September 2013. No expressions of interest were received during the first annual bidding window of June to August 2013. Any further expressions of interest will need to be submitted in the next annual bidding window which will be the two month period of April – May 2014.

5.0 Conclusion

The processes and procedures have been put in place to meet the requirements under the Localism Act 2011 and associated statutory guidance for both the assets of community value process and the 'community right to challenge'. Members are asked to note the requirements and what has happened in Brent since they were brought in.

6.0 Financial Implications

There are no financial implications arising directly from this report.

7.0 Legal Implications

'Community Right to Challenge'

- 7.1 The statutory requirements of the 'Community Right to Challenge' on Councils are set out in sections 81 to 86 of the Localism Act 2011 and two sets of regulations, namely - (1) 'Community right to challenge' (expressions of interest and excluded services)(England) Regulations 2012 and (2) 'Community right to challenge' (fire and rescue authorities and rejection of expressions of interest)(England) Regulations 2012. Furthermore, the Secretary of State for Communities and Local Government issued Statutory Guidance on the 'Community Right to Challenge' in June 2012. The content of the legislation and Statutory Guidance and the Council's statutory duties in relation to the

'Community Right to Challenge' has been summarised in section 3 of this report above. Failure to administer the 'Community Right to Challenge' in accordance with the legislation will leave the Council open to challenge for being in breach of its statutory duties under the Localism Act 2011.

- 7.2 Officers will seek legal advice as and where appropriate to ensure that the Council does not breach the domestic and EU law in relation to procurement and employment when dealing with expressions of interest under the 'Community Right to Challenge' and any subsequent procurement exercises that may take place following consideration and acceptance of expressions of interest.

Assets of Community Value

- 7.3 The legal provisions governing the listing of assets of community value are set out in the Localism Act 2011 and in the Assets of Community Value Regulations and an outline of the provisions is set out in this report.

8.0 Diversity Implications

- 8.1 There are no diversity implications arising directly from this report.

Assets of Community Value

- 8.2 In so far as equalities issues arise these are considered as individual nominations are considered and decided upon.

'Community Right to Challenge'

- 8.3 Officers carried out a partial predictive Equality Impact Assessment on the approach of putting in place a two month annual window for community groups to submit expressions under the 'community right to challenge'. At this stage, no adverse impacts are envisaged. However, where expressions of interest are accepted and procurement exercises are carried out, an equality impact assessment would need to be carried out in any event on a case by case basis. At the end of the first two month annual window, the process will be reviewed and the equality impacts will be considered and the process will be reviewed on an annual basis. As the 'Community Right to Challenge' concerns functions to potentially be carried out on behalf of the council, all expressions of interest must also be considered in relation to the Public Sector Equality Duty and due regard given in line with Brent's Equality Analysis guidance.

Public Sector Equality Duty

- 8.4 The Equality Act 2010 S149 sets out the public sector equality duty which requires the Council, when exercising its functions (including those as an employer) to have 'due regard' to the need to eliminate discrimination (both direct and indirect discrimination), harassment and victimization and other conduct prohibited under the Act, and to advance equality of opportunity and foster good relations between those who share a 'protected characteristic' and those who do not share that protected characteristic.
- 8.5 Direct discrimination occurs if, because of a protected characteristic, a local authority treats a person less favourably than it treats or would treat others. Indirect discrimination occurs if a local authority applies the same provision, criterion or practice to everyone, but it puts those in a certain protected group at a "particular disadvantage" when compared with persons who are not in that protected group. Even if a "particular disadvantage" arises, indirect discrimination does not arise if the provision, criterion or practice can be justified – i.e. if it is a proportionate means of achieving a legitimate aim.

- 8.6 The Council must pay due regard to any obvious risk of such discrimination arising in respect of the decision before them. At Brent, these matters are examined in the Equality Analysis.
- 8.7 A 'protected characteristic' is defined in the Act as:
- age;
 - disability;
 - gender reassignment;
 - pregnancy and maternity;
 - race;(including ethnic or national origins, colour or nationality) • religion or belief; • sex; • sexual orientation.
- 8.8 Marriage and civil partnership are also a protected characteristic for the purposes of the duty to eliminate discrimination.
- 8.9 Having due regard to the need to 'advance equality of opportunity' between those who share a protected characteristic and those who do not, includes having due regard to the need to remove or minimize disadvantages suffered by them. Due regard must also be had to the need to take steps to meet the needs of such persons where those needs are different from persons who do not have that characteristic, and encourage those who have a protected characteristic to participate in public life. The steps involved in meeting the needs of disabled persons include steps to take account of the persons' disabilities. Complying with the duty may involve treating some people better than others, as far as that is allowed by the discrimination law.
- 8.10 Due regard to the need to eliminate discrimination, advance equality, and foster good relations must form an integral part of the decision making process. The Council must consider the effect that implementing a particular policy will have in relation to equality before making a decision.
- 8.11 There is no prescribed manner in which the equality duty must be exercised. However, the council must have an adequate evidence base for its decision making. This can be achieved by gathering details and statistics on who uses the service. A careful consideration of this assessment is one of the key ways in which the Council can show "due regard" to the relevant matters. Where it is apparent from the analysis of the information that the proposals would have an adverse effect on equality then adjustments should be made to avoid that effect (mitigation).
- 8.12 The duty is not to achieve the objectives or take the steps set out in s.149. Rather, the duty on public authorities is to bring these important objectives relating to discrimination into consideration when carrying out its functions. "Due regard" means the regard that is appropriate in all the particular circumstances in which the authority is carrying out its functions.
- 8.13 There must be a proper regard for the goals set out in s.149. At the same time, the council must also pay regard to any countervailing factors, which it is proper and reasonable for them to consider. Budgetary pressures, economics and practical factors will often be important, which are brought together in the Equality Analysis form. The weight of these countervailing factors in the decision making process is a matter for the Council in the first instance.

9.0 Background Documents

The Localism Act

<http://www.legislation.gov.uk/ukpga/2011/20/contents>

'Community Right to Challenge' Executive Report, April 2013

'Community Right to Challenge' web page, Brent Council Website <http://www.brent.gov.uk/your-community/voluntary-sector-advice/community-right-to-challenge/>

Assets of Community Value web page, Brent Council Website <http://www.brent.gov.uk/your-community/voluntary-sector-advice/nominate-a-community-asset/>

The Assets of Community Value (England) Regulations 2012

<http://www.legislation.gov.uk/ukdsi/2012/9780111525791/contents>

Community Right to Bid non statutory advice note for local authorities

<https://www.gov.uk/government/publications/community-right-to-bid-non-statutory-advice-note-for-local-authorities>

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