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14th October 2013

Dear Sir

Maldon District Council Consultation on Draft Local Development Plan (Revised Preferred Policies) Document – Representations on behalf of NHS Property Services Ltd

We write on behalf of NHS Property Services Ltd (NHSPS) in response to the consultation on the Draft Local Plan (Revised Preferred Policies) Document, dated 27th August 2013, and enclose for your attention a set of representations on the draft objectives, policies and explanatory text of the draft Local Development Plan (LDP).

Please note that the Essex Local Area Team of NHSPS incorporates the former estates division of NHS North Essex, which ceased operating as a cluster of Primary Care Trusts (PCTs) on 31st March 2013.

NHSPS is responsible for advising the National Commissioning Board, known as NHS England (NHSE) and local Clinical Commissioning Groups (CCGs) on all NHS estate related matters, including on the capacity of the existing NHS Estate to accommodate the increased healthcare infrastructure and funding needs arising from planned and unplanned growth.

With the above in mind, and to assist the co-ordination of the NHS statutory role and funding of future development programmes in the context of impacts arising from planned growth, it is necessary to ensure that a suitable strategic and local planning policy framework is in place to inform subsequent health strategies and investment in connection with development control decisions.

Therefore, the LDP's emerging policies should take account of the realistic availability of NHS resources, as well as opportunities for development-led private investment to contribute to the provision of necessary related social infrastructure, including healthcare. To achieve this aim, NHSPS is seeking recognition of a number of material considerations relevant to planning for healthcare to be developed through this plan making exercise.

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These representations therefore seek to secure a development plan policy context to enable planned growth to be delivered in a more sustainable way.

In addition to the specific comments on the draft LDP policies and supporting text, we set out below general comments on the proposed level of growth within the District and the likely impact of development on the provision of health care facilities and services.

Planned Growth in Maldon District and Healthcare Capacity Implications

Identifying the Population Increase Arising from Proposed Growth in Maldon

The level of growth proposed for Maldon District, set out within draft LDP Policy S2, has been used to inform the population calculations in Table 1 below.

Growth Area	No. Dwellings	Population Arising¹
Existing Commitments (including suitable sites identified in the SHLAA)	400	960
New Garden Suburb at Maldon	1,710	4,104
S2(a) – South of Maldon (South of Limebrook Way)	1,140	2,736
S2(b) – South of Maldon (Wycke Hill North)	450	1,080
S2(c) – South of Maldon (Wycke Hill South)	120	288
New Garden Suburb at Heybridge	900	2,160
S2(d) – North of Heybridge	800	1,920
S2(e) - North of Heybridge (Land to the North of Holloway Road)	100	240
Maldon and Heybridge Strategic Allocations	220	528
S2(f) – South of Maldon (Park Drive)	120	288
S2(g) – Heybridge Swifts	100	240
Burnham-on-Crouch Strategic Allocations	450	1,080
S2(h) – West of Burnham-on-Crouch	180	432
S2(i) – North of Burnham-on-Crouch (West)	180	432
S2(j) – North of Burnham-on-Crouch (East)	90	216
Rural Allocations	420	1,008
North Fambridge	75	180
Other Villages	345	828
Windfall Allowance	330	792
Total	4,430	10,632

Notes:

1. Calculated using the Maldon District average household size of 2.4 taken from Census 2011 Table “Rooms, bedrooms and central heating, local authorities in England and Wales”.

Healthcare Context for Maldon District

Existing provision of GP services is at 8 main GP practices across the District (2 of which have branch surgeries). The baseline position of these surgeries and their existing patient list sizes and floorspace capacity are set out in Table 1, attached as **Appendix 1** to these representations.

There is currently a patient list size capacity deficit of **-8,816** and a floorspace and funding deficit of **-796m²** and **£2,524,000**, respectively, associated with the capital cost required to bring existing floorspace provision up to a standard suitable to manage natural population growth.

Healthcare Infrastructure and Funding Requirements Arising from Planned Growth

Table 3 (*attached as **Appendix 2*** to these representations) summarises the healthcare infrastructure and funding requirements arising from the District-wide proposed level of growth, once the additional staffing and floorspace requirements arising are factored in, including an estimate of the costs for providing new floorspace and/ or related facilities.

Table 4 (*attached as **Appendix 3*** to these representations) sets out the healthcare infrastructure and funding requirements arising from the individual growth locations, once the additional staffing and floorspace requirements arising are factored in, including an estimate of the costs of providing new floorspace and/ or related facilities.

As shown in Table 3, the population arising from the proposed growth set out in the draft LDP would require provision for an additional **6.06 GPs** across the District and developer funding of **£1,454,400**.

Provision of the additional healthcare facilities and services would need to be consistent with current NHS procurement guidelines that favour larger surgery formats, which are more cost effective and efficient to run. This may, therefore, warrant the reconfiguration, refurbishment, re-equipping and expansion of existing surgeries to build in further capacity, in preference to new surgery provision.

Specific Representations to Preferred LDP Policies and Supporting Text

NHSPS is generally supportive of the Draft Local Plan (Revised Preferred Policies) Document and acknowledges the amendments that have been made following the submission of its representations to the previous draft of the LDP. However, further amendments, outlined below, are required to secure a development plan policy context to enable planned growth to be delivered in a more sustainable way.

Policy S6: Burnham-on-Crouch Strategic Growth

NHSPS welcomes the acknowledgement that residential development in this area would need to address the associated healthcare infrastructure and funding implications arising. However, it is requested that the policy is amended to ensure flexibility with regard to the most appropriate means of mitigating the impact of development proposals.

Therefore, it is requested that requirement 8) of Policy S6 is amended as follows:

“(8) ~~Contribution~~ Adequate provision is made for enhanced medical provision in co-operation with the relevant health bodies.”

Policy E3: Community Facilities and Services

NHSPS supports the Council's intention to "*retain and enhance provision of community services and facilities within the District*" and welcomes the requirement for new development to "*contribute towards the provision of community facilities where an increased need will arise*". However, the remainder of the policy requirements may need further clarification with respect to healthcare related development proposals.

The policy requires the submission of details relating to the viability of providing healthcare services and the marketing of facilities for viable and appropriate alternative community service based uses. This would appear to require the NHS to seek approval from the Council for its own strategy and programmes before planning permission would be granted for the change of use or redevelopment of facilities. In this way, the Council would be acting as a health authority as well as a local planning authority by requiring justification in terms of patient and visitor needs.

It is noted that the policy makes provision for development proposals that would "*help to improve provision of, and accessibility to, community services and facilities in a local area*" and that this includes "*the relocation, co-location, modernisation and expansion of existing services*". However, it is unclear whether such proposals would still be required to submit viability and marketing justification evidence.

Therefore, it is requested that the policy is amended to clarify that proposals that would help to improve provision of, and accessibility to, community services and facilities would not be required to include viability and marketing justification evidence. This would ensure that the Council is not acting outside its legitimate role as planning authority and taking over responsibilities that are held by the health authority.

With regard to assets of community value, NHSPS wishes to draw the Council attention to the decision made by Uttlesford District Council in a recent review of the decision to list Saffron Walden Community Hospital as an asset of community value. The review concluded that healthcare facilities do not fall within the definition of land of community value as they do not further the social wellbeing or social interests of the local community. A copy of this decision is *attached as Appendix 4* to these representations.

In light of this recent decision, it is requested that the policy clarifies that healthcare facilities would not be included in the Council's list of assets of community value.

Policy H6: Provision for Travellers

NHSPS supports the recognition within paragraph 5.50 that proposals for new Traveller sites would need to "*avoid placing undue pressure on local infrastructure and services*". However, it is considered that the specific Policy text should be amended to ensure appropriate translation of this objective into the Policy.

In order for the Policy to be fully effective in this regard, it is recommended that item a) should be amended as follows:

"The following criteria will also be applied in assessing development proposals for new Travellers'

and Travelling Showpeople provision:

a) Appropriate in scale to the nearest settlement, having regard to factors such as the existing quantum of development, and the availability and capacity of infrastructure, services and facilities;”.

Policy I1: Infrastructure and Services

NHSPS supports the recognition of NHS plans and programmes for the future commissioning of healthcare facilities and services to meet the needs of Maldon District. In addition to The Commissioning Plan 2013/14 produced by Mid Essex Clinical Commissioning Group, the Council should also be aware of the Primary Care Strategy currently being drafted by the NHS England Local Area Team for Essex. This document will establish appropriate commissioning and expenditure priorities across Essex, including within Maldon District.

Policy I2: Health and Wellbeing

NHSPS supports the policy requirement for residential development proposals to undertake a Health Impact Assessment that evaluates the demands placed on the capacity of health services and facilities arising from development.

However, in order to take account of the scale of development at which impacts on healthcare infrastructure and funding are likely to occur, it is requested that the policy threshold is increased from 30 to 50 residential units.

In addition, given the NHS’ experience of the greater draw on healthcare services that arises from developments of older persons’ accommodation and Class C2 uses comprising residential, nursing and care home developments, it is requested that for all development of this nature the submission of a Health Impact Assessment should be required.

Therefore, the policy should be amended as follows:

“All residential development of ~~30~~ 50 dwellings or more, and Class C2 developments comprising residential, nursing and care home developments will be required to undertake a Health Impact Assessment that measures wider impact upon healthy living and the demands that are placed upon the capacity of health services and facilities arising from the development.”

NHSPS welcomes the Council’s intention to liaise with the NHS on Health Impact Assessment related matters (as outlined in paragraph 8.26. However, in light of its advisory role to both NHSE and the Mid Essex CCG, NHS Property Services Ltd should be cited as the appropriate NHS body to be consulted on such matters. NHSPS would seek to confirm appropriate consultation arrangements through any revision to the Council’s Statement of Community Involvement.

In light of the above, it is requested that the final sentence of paragraph 8.26 is amended as follows:

“The District Council will liaise with NHS Property Services Ltd ~~the Mid Essex CCG~~ and other relevant bodies where necessary to ensure Health Impact Assessments meet appropriate health related aims and objectives.”

With regard to the policy text concerning the delivery of a new Community Hospital, the following minor amendment to the policy text are requested to ensure that the policy accurately reflects the current position relating to these proposals:

“The Council will support proposals which enable the delivery of a new Community Hospital or a similar healthcare facility which will be capable of providing ~~provide~~ primary, secondary care and intermediate care services with the aim of improving the health and wellbeing of the District’s residents.”

Similarly, it is requested that the following minor amendment is made to the third sentence of paragraph 8.27:

“As such, the existing St Peter’s Hospital in Maldon is becoming increasingly unsuitable as ~~no longer able to provide~~ an adequate setting for delivering modern, flexible and accessible healthcare services.”

Infrastructure Delivery Plan Schedule Update (IDP, June 2013)

It is requested that the Council’s IDP is amended to reflect the additional healthcare infrastructure and funding requirements arising from planned growth at the respective new garden suburbs and strategic allocations, as set out in Table 4 at **Appendix 3** to these representations.

Conclusions and Recommendations

While NHSPS is generally supportive of the current draft of the Local Development Plan, recommendations are made for amendments to certain policies that would help deliver the necessary health care infrastructure and funding, to ensure that the effects of planned growth in the District are effectively mitigated and the needs of the NHS are met, in compliance with NPPF policy.

NHSPS welcomes the opportunity to contribute to the formulation of local planning policy, and looks forward to working with the Council to comprehensively plan (and provide) for the future healthcare infrastructure and funding needs within the District, and thereby ensure that sustainable development is achieved.

Yours sincerely

Lawson Planning Partnership Ltd
Consultant to NHS Property Services Ltd

Cc: NHSPS

Encl.

Maldon District Council Consultation on Local Development Plan Revised Preferred Policies Document – Representations on behalf of NHS Property Services Ltd

Appendix 1

Table 2: Maldon Existing Patient List Size and Floor space Capacity with Costs to bring GP Surgeries up to Required Standards to Meet Natural Growth in the District

Premises	List Size (01.07. 2013)	No. GPs (WTE) ¹	Capacity ²	Spare Capacity ³	Existing Floor space (GIA, m ²)	Current Provision of Floor space per GP (WTE) (m ²) ⁴	Floor space Capacity (m ²) ⁵	Capital Required to Meet Standards (£) ⁶
Longfield Medical Centre, Princes Rd, Maldon, CM9 5DF	14,486	7.25	12,688	-1,798	587	80.97	-283	£566,000
Longfield Medical Centre Branch Surgery, Bentalls Complex, Heybridge, CM9 4TU ⁷	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Blackwater Medical Centre, Princes Rd, Maldon, CM9 5NY	14,532	6.7	11,725	-2,807	360	53.73	-444	£888,000
Blackwater Medical Centre Branch Surgery, Goldring House, Rowan Drive, Heybridge, CM9 4BW ⁷	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Burnham Surgery, Foundry Lane, Burnham-on-Crouch, CM0 8BL	9,507	4.75	8,313	-1,194	423	89.05	-147	£294,000
William Fisher Medical Centre, High St, Southminster, CM0 7AY	5,921	3	5,250	-671	246	82	-114	£228,000
Tillingham Medical Centre, 61 South St, Tillingham, CM0 7TH	2,716	1	1,750	-966	193	193	73	£146,000
Tollesbury Surgery, 25 High Street, Tollesbury, CM9 8RG	3,922	2	3,500	-422	199	99.5	-41	£82,000
Maylandsea Medical Centre, Imperial Avenue, Maylandsea, CM3 6BY	1,711	1	1,750	39	276	276	156	£312,000
Trinity Medical Centre, 1 The Drive, Maylandsea, CM3 6AA	2,747	1	1,750	-997	124	124	4	£8,000
Total	55,542	26.7	46,725	-8,816	2,408	43.96	-796	£2,524,000

Notes

1. Number of whole time equivalent GPs based at the practice.
2. Capacity based on optimum list size of 1,750 patients per whole time equivalent GP.
3. Based on current list size.
4. Existing floor space divided by number of whole time equivalent GPs.

5. The floor space shortfall/ surplus against the required provision of 120m² per GP.
6. The cost of providing the floor space required to meet the standard of 120m² per GP.
7. Branch surgery - no additional capacity is provided by branch surgeries.

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Appendix 2

Table 3: Capital Cost Calculation for the Provision of Additional Health Services Arising from the Proposed Growth in Maldon

Premises	List Size (01.01. 2012)	No. GPs (WTE) ¹	Capacity ²	Spare Capacity ³	Additional Population Growth (4,430 homes) ⁴	Additional GPs Required to Meet Growth ⁵	Additional Floor Area Per GP to Meet Growth (m ²) ⁶	Capital Required to Create Additional Floorspace (£) ⁷
Longfield medical Centre, Princes Rd, Maldon, CM9 5DF	14,486	7.25	12,688	-1,798	1,329	0.76	91.2	£182,400
Longfield Medical Centre Branch Surgery, Bentalls Complex, Heybridge, CM9 4TU ⁸	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Blackwater Medical, Princes Rd, Maldon, CM9 5NY	14,532	6.7	11,725	-2,807	1,329	0.76	91.2	£182,400
Blackwater Medical Centre Branch Surgery, Goldring House, Rowan Drive, Heybridge, CM9 4BW ⁸	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Burnham Surgery, Foundry Lane, Burnham-on-Crouch, CM0 8BL	9,507	4.75	8,313	-1,194	1,329	0.76	91.2	£182,400
William Fisher Medical Centre, High St, Southminster, CM0 7AY	5,921	3	5,250	-671	1,329	0.76	91.2	£182,400
Tillingham Medical Centre, 61 South St, Tillingham, CM0 7TH	2,716	1	1,750	-966	1,329	0.76	91.2	£182,400
Tollesbury Surgery, 25 High Street, Tollesbury, CM9 8RG	3,922	2	3,500	-422	1,329	0.76	91.2	£182,400
Maylandsea Medical Centre, Imperial Avenue, Maylandsea, CM3 6BY	1,711	1	1,750	39	1,290 ⁹	0.74	88.8	£177,600
Trinity Medical Centre, 1 The Drive, Maylandsea	2,747	1	1,750	-997	1,329	0.76	91.2	£182,400
Total	55,542	26.7	46,725	-8,816	10,632	6.06	727.2	£1,454,400

Notes:

1. Number of whole time equivalent GPs based at the practices.
2. Capacity based on 1,750 patients per whole time equivalent GP.
3. Based on current list size.
4. Taken from Table 1 in main letter.
5. Additional growth divided by the average list size.
6. Based on 120m² floorspace per GP x additional GPs required to meet growth.

7. Based on a standard m² cost multiplier for primary healthcare facilities from the SPONs Architects and Builders Price Book (2010) adjusted for professional fees and fit out budget (£2,000/ m²) rounded to nearest £. The figure would be BCIS indexed for inflation.

8. Branch surgery – no additional capacity is provided by branch surgeries.

9. Taking existing capacity for 39 additional patients into account.

Maldon District Council Consultation on Local Development Plan Revised Preferred Policies Document 2013 – Representations on behalf of NHS Property Services Ltd

Appendix 3

Table 4: Healthcare Infrastructure and Funding Requirements for Individual Growth Areas

Growth Area	No. Houses¹	Population Arising²	Additional GPs Required to Meet Growth³	Additional Floor Area Required to Meet Growth (m²)⁴	Capital Required to Create Additional Floorspace (£)⁵
Existing Commitments (including suitable sites identified in the SHLAA) ⁶	400	960	0.55	66	£132,000
New Garden Suburb at Maldon ⁶	1,710	4,104	2.35	282	£564,000
New Garden Suburb at Heybridge ⁶	900	2,160	1.23	148.1	£296,229
Maldon and Heybridge Strategic Allocations ⁶	220	528	0.30	36.2	£72,411
Burnham-on-Crouch Strategic Allocations ⁶	450	1,080	0.62	74.4	£148,800
Rural Allocations ⁷	420	1,008	0.55	66.4	£132,891
Windfall Allowance ⁶	330	792	0.45	54.3	£108,617
Total	4,430	10,632	6.05	727.4	£1,454,948

Notes:

1. Taken from draft LDP Policy S2.
2. Calculated using the Maldon District average household size of 2.4 taken from Census 2011 Table “*Rooms, bedrooms and central heating, local authorities in England and Wales*”.
3. Additional growth divided by the average list size of 1,750 patients per GP.
4. Based on 120m² floorspace per GP x additional GPs required to meet growth.
5. Based on standard m² cost multiplier for primary healthcare facilities in the East Anglia Region from the BCIS Q1 2013 Price Index, adjusted for professional fees, fit out and contingencies budget (£2,000/ m²), rounded to nearest £ The figure would be BCIS indexed for inflation.
6. Catchment surgeries do not have capacity to accommodate planned growth.
7. GP requirements takes into account existing capacity at Maylandsea Medical Centre.

In the matter of the Localism Act 2011

Re Saffron Walden Community Hospital, Saffron Walden

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

1. Background

- 1.1. Saffron Walden Town Council (“SWTC”) nominated Saffron Walden Community Hospital (“the Land”) for inclusion in the list of assets of community value (“the List”) maintained by Uttlesford District Council (“UDC”).
- 1.2. On 19 February 2013 the cabinet of UDC resolved to include the Land in the List.
- 1.3. On 1 August 2013 (within 8 weeks of being notified that the land had been placed on the List) the owner wrote to UDC requesting a review under s.92 Localism Act 2011 (“the Act”).
- 1.4. I was appointed by the Chief Executive of UDC to conduct the review. I confirm that I did not take any part in the decision to include the Land in the List.
- 1.5. For the purposes of the review the owner was represented by Mrs O’Leary of Lawson Planning Partnership Ltd. UDC was represented by Roger Harborough Director of Public Services.
- 1.6. The owner’s representative requested an oral hearing which took place on 3 October 2013

2. Relevant Legislation

- 2.1. s.87 of the Act requires local authorities to maintain a list of land in its area that is land of community value.
- 2.2. s.88 of the Act defines land of community value. There are 2 circumstances in which land falls within that section.

- 2.3. Firstly under s. 88 (1) land is of community value if in the opinion of the authority an actual use of the land (not being an ancillary use) furthers the social wellbeing or social interests of the local community and it is realistic to think that there can continue to be non-ancillary use of the land which will further the social wellbeing or social interests of the local community.
- 2.4. Alternatively under s.88 (2) land is of community value if in the opinion of the authority there has been a time in the recent past when an actual use of the land (not being an ancillary use) furthered the social wellbeing or social interests of the local community and it is realistic to think that there is a time in the next 5 years when there could be an actual use (not being an ancillary use) of the land which would further the social wellbeing or social interests of the local community
- 2.5. s.89 of the Act provides that land may only be included in the List pursuant to a community nomination or a nomination made in accordance with regulations. "Community nomination" includes a nomination by a parish council.
- 2.6. s.90 of the Act deals with the procedure for dealing with community nominations. It provides that where a community nomination is received the authority **MUST** (emphasis added) accept the nomination if the land is in its area and is of community value.
- 2.7. The contents of a community nomination are set out in regulation 6 of the Regulations. It requires a description of the nominated land including its proposed boundaries; a statement of all the information which the nominator holds with regard to ownership; the reasons why it is said that the land is of community value and evidence that the nominator is entitled to make the nomination.
- 2.8. Regulation 8 of the Regulations requires the local authority to give notice to a land owner (and others) that it is considering listing land which has been nominated.
- 2.9. s.91 of the Act requires the local authority to give notice to a land owner (and others) that land has been included in the list of assets of community value.

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

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

3. The Issues to be Determined

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

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

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

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

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

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

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

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

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

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

4. Submissions on the part of the Owner

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

- 4.1. The nomination made by SWTC was defective in that it did not sufficiently identify the boundaries nor provide correct ownership details.
- 4.2. Notice of the consideration of the nomination by UDC was not given in accordance with the Regulations.
- 4.3. Notice that the Land had been listed was not given by UDC in accordance with the Regulations.
- 4.4. The current use of the Land does not further the social wellbeing or social interests of the local community.
- 4.5. "Social wellbeing" relates to the interaction and relationships with others within a community. Similarly "social interests" includes cultural, recreational and sporting interests. The Land is a health care facility and does not fall within the definition of social wellbeing or interests. For that reason the Land does not fall within the definition of land of community value and therefore it should not have been included in the list.
- 4.6. The decision to list was not consistent with other decisions on nominations made by SWTC a number of which were refused because "no correspondence with the owner has been submitted about purchasing the site. It is therefore not considered that it is realistic to think that in the next 5 years the land could further the social wellbeing or interests of the community". The owner's representative submitted that no such correspondence had been submitted regarding the Land and that listing should therefore have been refused for the same reason.
- 4.7. The reason that the owner held the Land was to facilitate the provision of health care generally. This may involve the disposal or part disposal of an asset in the interests of good estate management. Listing the Land would be inconsistent with that purpose and could frustrate the government's intentions with regard to health service provision.

5. Submissions made by the Director for Public Services

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

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

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

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

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

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

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

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

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

6. Determination

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- 6.14. In this case despite the fact that there were shortcomings in the notices I find that the owner has not been prejudiced. It clearly knows that it has a right to seek a review of the decision as it did so within the time allowed by the Regulations.
- 6.15. In addition I take the view that a review is not the appropriate method to challenge any procedural shortcomings in the listing process. s.92 entitles the owner to ask for a review of the decision to include land in the list, not the process. If the process is said to be wanting the appropriate method of challenge is by way of judicial review. Where there are 2 methods of challenge it may well be appropriate to pursue both, e.g. by seeking permission for judicial review to quash the decision for procedural irregularities and applying for a review of the decision on the merits – see *Melton –v- UDC* 2009. I note that the time for applying for a judicial review has now lapsed but that does not mean that I may have regard to any possible procedural defects in reviewing the decision to list.
- 6.16. I turn now to the question as to whether the Land falls within the definition of land of community value. I find that it does not. Land of community value must further the social wellbeing or social interests of the local community.
- 6.17. “Social welfare is not defined. “Social interests” are defined as including cultural, recreational and sporting interests. The use of the word “including” clearly indicates that the list is not exhaustive. However I consider that the *eiusdem generis* principle clearly applies here. The examples given are primarily leisure activities and only similar activities could therefore fall within the definition of “social interests”
- 6.18. With regard to “social welfare” I am persuaded by the submission of the owner’s representative that this relates to interaction and relationships within the local community. This view is re-inforced by the quote from the plain English guide to the Act referred to in paragraph 5.5 above. The Land provides a health care facility. There is no evidence that the Land plays “a vital role in community life” nor is it similar to any of the categories of use referred to in that passage. In short there is no evidence of any

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

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

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

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

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

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

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

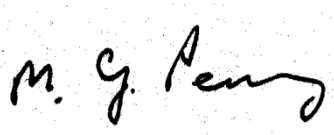
7. Conclusion

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

8. Appeal Rights

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

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

A handwritten signature in black ink, appearing to read "M. J. Perry". The signature is written in a cursive style and is centered within a large, light grey, dotted rectangular box.

Michael J. Perry LLB(Hons) Solicitor(Hons)

Assistant Chief Executive – Legal

3 October 2013