Appeal number: CR/2020/0007 V

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
COMMUNITY RIGHT TO BID

Decided at a CVP hearing on 1 February 2021

Between

EXETER ROYAL ACADEMY FOR THE DEAF

Appellant

-and-

EXETER CITY COUNCIL

First Respondent

-and-

NIGEL FITZHUGH
(as Chairman of St Leonard's Neighbourhood Association, an unincorporated body)

Second Respondent

Before:
Judge J Findlay

Appearances:

For the Appellant
Mr S Stemp, Counsel for the Appellant
Mr D Richardson, Instructing Solicitor for the Appellant
Dame A Pedder OBE, witness
Mr R May, witness
Mr A Rothwell observer

For the First Respondent
Ms K Olley, Counsel for the First Respondent
Ms A Hawley, Litigation Lawyer
Ms B Al-Khafaji, Director of Corporate Services

For the Second Respondent
Mr N Fitzhugh, Chairman of the St Leonard's Neighbourhood Association

Decision

1. The appeal is dismissed.

Mode of hearing

2. This has been a remote hearing on the Cloud Video Platform ("CVP") which has been consented to by the parties. The form of remote hearing was V: by CVP. A face to face hearing was not held because it was not practicable and all issues could be determined in a CVP hearing.

The Background

3. The Localism Act 2011 ("the Act") requires local authorities to keep a list of assets (meaning buildings or other land) which are of community value. Once an Asset of Community Value ("ACV") is placed on the list it will usually remain there for five years. The effect of listing is that, generally speaking an owner intending to sell the asset must give notice to the local authority. A community interest group then has six weeks in which to ask to be treated as a potential bidder. If it does so, the sale cannot take place for six months. The theory is that this period known as "the moratorium" will allow the community group to come up with an alternative proposal – although, at the end of the moratorium, it is entirely up to the owner whether a sale goes through, to whom and for how much. There are arrangements for the local authority to pay compensation to an owner who loses money in consequence of the asset being listed.

4. On 26 February 2020 the Second Respondent nominated Mount Radford Lawn ("the Land") as an ACV. The Exeter Royal Academy for the Deaf, the owner of the Land and the Appellant, was notified on 16 April 2020 and submitted objections to the listing on 21 April 2020. On 24 April 2020 the Respondent made the decision to list the Land as an ACV and it was included in the list on 7 May 2020. On 12 May 2020 the Appellant requested a review of the decision under regulation 10 of the Regulations and submitted submissions in support of that request on 8 June 2020.

5. The Second Respondent responded to those submissions on or around 19 June 2020 including comments made by those who had used the Land in the past. The Appellant responded to those submission on 22 June 2020.

6. The First Respondent responded to the Appellant's submission on 25 June 2020 and the Appellant responded further on 29 June 2020.

7. On 14 July the First Respondent made the decision to maintain the listing.

8. The First Respondent responded to the appeal on 21 September 2020 appending the minutes of the Planning Committee meeting that considered the application for planning permission for residential development on the Land and the officer report.

9. The Second Respondent responded and the Appellant responded to the First and Second Respondents on 5 November 2020.

10. It is agreed between the parties that as there is no current use of the Land and s.88(1) of the Act does not apply. It is agreed between the parties that the conditions of s. 88(2)(a) are

satisfied that there is a time in the recent past when an actual use of the Land that was not an ancillary use furthered the social wellbeing or interests of the local community.

11. Although the Appellant originally submitted that the conditions of regulation 6 of the Regulations were not satisfied, this matter has not been pursued and is not in issue.

12. The only issue between the parties to be determined is whether the conditions of s. 88(2)(b) of the Act are satisfied, namely whether it is realistic to think that there is a time in the next five years when there could be non-ancillary use of the Land that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community.

The Legal Framework

13. The relevant law is set out in the Localism Act 2011 ("the Act")

Section 87 List of assets of community value

(1)A local authority must maintain a list of land in its area that is land of community value.

(2)The list maintained under subsection (1) by a local authority is to be known as its list of assets of community value.

(3)Where land is included in a local authority's list of assets of community value, the entry for that land is to be removed from the list with effect from the end of the period of 5 years beginning with the date of that entry (unless the entry has been removed with effect from some earlier time in accordance with provision in regulations under subsection (5)).

(4)The appropriate authority may by order amend subsection (3) for the purpose of substituting, for the period specified in that subsection for the time being, some other period.

Section 88 Land of Community Value

(1) For the purposes of this Chapter but subject to regulations under subsection (3), a building or other land in a local authority's area is land of community value if in the opinion of the authority-

(a) an actual current use of the building or other land that is not an ancillary use furthers the social wellbeing or social interests of the local community, and

(b) it is realistic to think that there can continue to be non-ancillary use 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.

(2) For the purposes of this Chapter but subject to regulations under subsection (3), a building or other land in a local authority's area that is not land of community value as a result of subsection (1) is land of community value if in the opinion of the local authority-

(a) there is a time in the recent past when an actual use of the building or other land that was not an ancillary use furthered the social wellbeing or interests of the local community, and

(b) it is realistic to think that 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.

…

(6) In this section-

…

"social interests" includes (in particular) each of the following-

(a) cultural interests;

(b) recreational interests;

(c) sporting interests;

Appeal against listing review decision

11.—(1) An owner of listed land may appeal to the First-Tier Tribunal against the local authority's decision on a listing review in respect of the land.

(2) The owner referred to in paragraph (1) may be either the owner who requested the review, or a subsequent owner of part or the whole of the land.

Grounds of Appeal

14. The Appellant submits that it is not realistic to think there is a time in the next five years when there could be non-ancillary use of the land that would further the social wellbeing or social interests of the local community.

15. The Tribunal is not confined to the narrow grounds on which the administrative court would interfere with a public authority's decision in an application for judicial review. It is an ordinary appeal on fact and law to the First-tier Tribunal.

16. The relevant legal test for s88(2)(b) is whether there is sufficient evidence in support of the nomination to show that it is realistic to think that there is a time in the next five years when there could be non-ancillary use of the land that would further the social wellbeing or social interests of the local community.

17. There is no legal requirement for the nominating body or the council to produce a worked out business plan. However, it should not be assumed that the requirement of section 88(2)(b) will necessarily be met, merely by a Micawber-like hope that something will turn up. A fact-sensitive analysis is called for. It is also necessary to emphasise the fact that what is "realistic" may admit a number of possibilities, none of which needs to be the most likely outcome.

18. The question is not whether such a use is more likely than not to occur. Rather, the question is whether such a use is realistic, in the sense of not being "fanciful", even though that use might not be the most likely scenario. The current owner's intentions are relevant as part of considering the whole set of circumstances.

19. The scenario that, within the next five years, the land could be in non-ancillary uses that further the social wellbeing or social interests of the local community is fanciful, and is not realistic.

20. The Land is secured with a steel fence and a locked gate and has been closed and unused by the community since August 2018. When it was available and used by a local private school and a commercial language school, neither the Second Respondent, nor the residents of the area, nor the local primary school requested use of the Land. It was not used by the Second Respondent or the wider community when it was available for hire and use over many preceding years and there is no proper basis to conclude that it would be so used in the future.

21. It appears that it is only on presentation with the prospect of housing development on the Land that the Second Respondent became concerned with preserving the Land as community space.

22. As is noted by the Second Respondent were the land to be acquired by them and let for community purposes it "...would have to ensure that the playing field could" pay for itself", rather than running costs coming out of charitable funds, so any income received from use of the playing field would be set against ground maintenance, a caretaker, public liability insurance and a sinking fund for any unforeseen expenses that may occur, by way of example tree maintenance."

23. The evidence of fees for hiring of the land shows that the level of fee receipt actually achieved over a number of years was such that it is not realistic to think that the Land could pay for itself as would be required, given the likely levels of income against the costs concerned and further it appears that acquisition costs (and financing of the same) are omitted from the Second Respondent's list of costs that the income from the Land is required to cover, adding to the fee receipt required to be achieved. It is not realistic to think that the Land could be used as suggested.

24. The Appellant has no operational requirement to sell the Land, which is an asset held by the charity. There is no operational requirement to secure rental income from the Land. It is an asset which the Appellant can and will hold for as long as necessary until it is capable of being sold for a price which maximises the value of the asset in accordance with the Appellant's charitable purposes.

25. There is a national planning policy requirement that planning authorities be able to evidence a five-year supply of housing land. The First Respondent which is the planning authority for the area, can only show 2 years and 1 month of housing land supply. Accordingly, there is a substantial shortfall of land for housing in the area. Small sites, such as the Land, make an important contribution to delivery as national planning guidance recognises that they can often be brought forward quickly.

26. There is an extant assignable option to purchase the Land in favour of Trideca Ltd of Home Living, Brampford Speke, Exeter ("the Option"). The Option persists until terminated and pre-dates the listing of the Land. It is not realistic to think that, in the next five years, the sale value of the land will exclude any element of potential residential redevelopment uplift. It is not only fanciful to think that in the next five years the Appellant would sell the land for anything less than a sum which includes such an uplift, but also unrealistic.

27. Since the end of 2019 no steps have been taken by the Second Respondent, or any other body, to investigate or secure funding to substantiate any offers to purchase the Land.

Although there is no need for a worked-out business plan it should not be assumed that the requirement of section 88(2)(b) will necessarily be met, merely by a Micawber-like hope that something will turn up.

28. There is no evidence establishing that it is realistic to think that the Land could be acquired by a relevant body within the next five years and no evidence establishing that it is realistic to think that if it were capable of being acquired that it could feasibly be put into one or more relevant uses. The necessary fact-sensitive analysis shows no proper evidential basis to conclude that it is realistic to think that within the next five years the Land could be in non-ancillary uses that further the social wellbeing or social interests of the local community.

29. The Appellant asks that the appeal be allowed, the Land be removed from the Respondent's list of ACVs and that the Land be entered on the Respondent's list of unsuccessful nominations.

Evidence of Dame Angela Pedder OBE

30. Dame Pedder was appointed the Chair of the Trustees of Exeter Royal Academy for Deaf Education on 1 September 2020 having been a Governor and Vice Chair of the Governing Body of the Deaf Academy since December 2017. As Governor she worked closely with the Board of Trustees and the senior leadership team on governance frameworks and strategy development for the Appellant.

31. In her witness statement and in oral evidence Dame Pedder stated that purpose of Exeter Royal Academy for Deaf Education Charity is to provide education, training, care, accommodation, leisure opportunities, welfare and other support services to deaf people and people who are not deaf but who, due to some other disability, would benefit from the same with the object of developing their personal, mental, physical and spiritual capacities so that they may realise their full potential as individuals and members of their communities and society as a whole and so that their condition of life may be improved and to educate the general public in the needs and capabilities of deaf people with a view to achieving greater integration between deaf and hearing communities.

32. Charity Commission guidance sets out clear legal responsibilities for Trustees. These include a legal duty to act in the best interest of the Charity, manage the Charity's resources responsibly, act with reasonable care and skill. In addition for land sales and leases the Charity Commission guidance states - The law says you must try to get the best deal for your charity.

33. To comply with these requirements and to act in the best interest of the Charity the Trustees of the Appellant must maximise the value it can realise from the sale of the Land for the benefit of the people it serves.

34. Any sale of the Land must be concerned only with furthering the above charitable purposes and no other purpose.

35. In September 2020 the new Deaf Academy in Exmouth was completed and opened and the Appellant does not have any new development plans that would require new capital or project expenditure.

36. The Appellant's short and medium term objectives are to focus on embedding students and staff into the new facilities, building student numbers and achieving OFSTED ratings of Good or Outstanding for all elements of the education and care provision.

37. The Appellant's financial plans and forecasts do not include an assumption of sale proceeds from the sale of the Land and the Appellant's operational performance is not predicated on this. The Land is one of the Appellant's assets and the objective is to maximise the value of this asset in furtherance of the charitable and strategic priorities of the Appellant.

Evidence of Richard May

38. Mr May is a Member of the Royal Institution of Chartered Surveyors and specialises in planning and development.

39. In his witness statement and in oral evidence Mr May stated that while the Land would need careful design and a sensitive layout there is no reason why it could not be developed at some point in the future and it would not be appropriate for the First Respondent to seek to predetermine any such application that might come forward.

Evidence of Claire Quick

40. Ms Quick is the Director of Finance & Resources of Exeter Royal Academy for Deaf Education. She is a qualified Chartered Accountant with The Institute for Chartered Accountants in England and Wales and an Accounting Technician. She is responsible for Finance, Human Resources, Estates & Facilities, Health & Safety, and IT.

41. Ms Quick stated in her witness statement and in oral evidence that in the past the Land was let on a commercial basis. Lettings were booked with the Facilities Manager and charged at an hourly or daily rate. The last recorded letting of the Land was August 2018. In the last 5 years the maximum number of full days the Land was let in any year was 112 days. Ms Quick annexed to her witness statement excel extract from the Charity's Finance System, scheduling the lettings over the previous 5 years. The schedule identified the last recorded letting to Isca School of English in August 2018. There had been a very small number of requests to hire the Land over the past decade. Where the proposed use did not align with the Appellant's objects or there were health & safety concerns, requests were refused. The Land is directly opposite St Leonard's Primary School. There were no approaches from this local school requesting to use or access the Land.

42. The charitable objects of the Second Respondent refer to 'benefit the inhabitants of St Leonards and neighbourhood'. There is no record of the Second Respondent making a request for the use of this Land or of residents of the St Leonards area doing so.

Grounds of Opposition

43. The First respondent submits that it is certainly realistic to think that a qualifying use would arise on the Land within the next five years.

44. Both the past and proposed uses of the Land meet the definition of 'social interests' in s88(6) of the 2011 Act, being both sporting and recreational, and possibly even cultural.

45. The Land has the potential to be more widely used as a playing field for activities which the First Respondent has identified as being in need of such facilities. It is land suitable for the location of a low-impact community building associated with not only outdoor playing field activities but also indoor community activities. The Second Respondent stated that in order for the Land to be self-financing, it is planned that it will be used for "…fetes, fairs, concerts, film nights, sports days, competitions, shows etc throughout the year…" The Second Respondent has conducted a survey indicating strong support for such events in the local community.

46. It is submitted that there is no reason to think that the Land could not be used for the activities outlined by the Second Respondent and that those uses would meet all of the elements of the definition of 'social interests' in s88(6) of the Act.

47. It is not a requirement that the decision-maker must be "…satisfied, on evidence, that 'community uses' will resume within the next five years" The statutory test does not require such certainty. The test in s88(2)(b) of the Act does not require the determination of the likely future use of the land or building in question but rather whether future community use is one of a number of realistic options for that Land.

48. It was stated in *Evenden Estates v Brighton and Hove City Council* CR/2014/0015 that what is realistic may admit a number of possibilities, none of which needs to be the most likely outcome. It was stated in *Gibson v Babergh DC CR/2014/0019* that a number of realistic outcomes may co-exist. The only proviso is that the possibility must not be merely 'fanciful'.

49. The proposed uses of the Land align with the Council's priorities for promoting active and healthy lives.

50. A nomination should not fail just because of the lack of willingness of an owner to negotiate with a community group - if that were so then all potential listings would fall to be defeated by unwilling owners.

51. It would not be feasible or necessary at this stage for the Second Respondent to have secured grant or loan funding or even a business plan - the moratorium period allows the time for funds to be raised.

52. In view of the First Respondent's priorities for promoting active and healthy lives and the availability of grants from sporting and community funding organisations, and local and regional councils, on balance the prospect of obtaining finance is not a fanciful one.

53. The pre-existing option does not in itself preclude the listing.

54. The Appellant's stated intentions fall to be taken into account as part of the whole set of circumstances, but are not decisive in themselves (*Patel v Hackney BC* CR/2013/005, para 11). If the owner's intentions were determinative then listing would become a voluntary process with the owner having the ability to prevent listing (*Singh v Leeds CC* CR/2015/0023).

55. In *Crendain Developments Limited v Ealing Council* CR/2017/0009 the appellant company stated that it intended to repeatedly make planning applications for the development of land and to retain it until successful. The judge stated that such an approach meant that one possibility was that the planning authority would continue to resist the development and that it was a foreseeable consequence that economic pressure would bring about a change of mind which would allow for a community use in the future.

56. If planning permission cannot in fact be secured for residential development of the Land, then the highest amount achievable in the market will be the value of the Land as a playing field, not its value with planning permission for lucrative residential development.

57. It is reasonable to assume that the Option will be triggered by a grant of planning permission for residential development. If that does not happen, the Option will expire with time. The existence of the Option forms the basis of the Appellant's view as to the value of the Land. However, the current value of the Land is for its use as a playing field. To see the value of the Land as reflecting its development value is highly aspirational given that the position has already been tested at planning committee and permission refused. It could therefore be said, as an aside, that it is the owner, not the nominator, which has the 'Micawber-like hope' in this case.

58. Whilst the Appellant has suggested that the First Respondent is pre-determining future planning applications in emphasising that the Land is not suitable for residential development, the First Respondent is perfectly entitled to take into account its own published planning policy in so far as it is relevant to the listing decision. This is not remotely within the realm of pre-determination; it simply refers back to something that has already happened.

59. The First Respondent seeks to rely on Christopher Cant's ACV guide which states at pp71-72:

> "Just as a grant of planning permission will be a material factor with regard to this specific issue so will be a refusal of an application for planning permission. A refusal will mean that as regards the future it is a possibility that the planning permission wanted by the owner will not be achieved and so consideration will need to be given to what may happen if it is not. In such circumstances the owner will need to consider other options which may include seeking an alternative planning permission which includes a future community use or the owner deciding to sell or even to resume the former community use. It is not necessary to show that the owner will probably adopt a course which results in a future community use. It is enough that it is realistic to think that the owner could even if it is not the most likely outcome. Failure by the owner to achieve the desired planning permission will mean that there will be a number of possibilities as regards the future and so it is easier to conclude that it is realistic to think that one will result in future community use."

60. Permission for residential development was refused on principle, not merely on technical grounds for example. residential development of the Land does not accord with the importance to the First Respondent of protecting the Land as a green space, in line with its published planning objectives.

61. The First Respondent refers to the officer report in the planning application which recommended refusal on the grounds of harm to the area's heritage assets including listed buildings, the St Leonards Conservation Area, possible archaeological remains, and the harm by reason of the loss of recreational opportunities in the area, in addition to scheme-specific objections.

62. Permission was refused unanimously by the First Respondent's Planning Committee on 28 October 2019 for the same reasons as recommended in the officer report. There were a total of four reasons for refusal. It was not an 'on balance' decision; all of the reasons were strong and robust and, importantly, remain relevant today.

63. It is also notable that despite the existence of the Option, the refusal was not appealed.

64. Serious thought and planning has already gone into the realisation of a future continued community use of the Land by the Second Respondent. There is nothing merely fanciful about the Second Respondent's approach. It has been explained why there cannot be any firm offers of grants, etc at the current time given that the asset is not yet on sale and that nonetheless pledges have been received from private individuals which in themselves amount to a six-figure sum. Clearly, it is the function of the moratorium period in due course which would provide the space for funding to be fully worked out.

65. The First Respondent seeks dismissal of the appeal and confirmation of the listing.

The Second Respondent's Case

66. The St Leonard's Neighbourhood Association, ("SLNA"), the Second Respondent and Nominator, is a registered charity of some 40 years standing whose remit is "to promote the benefit of the inhabitants of St. Leonard's Exeter and the neighbourhood and without distinction of sex or of political, religious or other opinions by associating the local authorities, voluntary organisations and inhabitants in a common effort to advance education and to provide facilities in the interests of social welfare for recreation and leisure-time occupation with the object of improving the conditions of life for the inhabitants."

67. From the time that the Appellant's move to Exmouth became public knowledge the Second Respondent has been reminding the Appellant that it was interested in acquiring the Land for the community.

68. The correct test in s.88(2)of the Act is not that community uses 'will' resume on the land, but that the Land 'can' or 'could' be used.

69. The future use of the Land does have factual basis and is not 'fanciful.'

70. The Second Respondent has taken a number of steps which demonstrate the plans are more than fanciful.

71. There is no evidence that in the absence of a planning permission for residential development, there is a willing purchaser of the land, apart from the Second Respondent who is prepared to acquire the land at full market value and in doing so, follow the recommendations of any Section 119 Report and charity law.

72. The Second Respondent maintains that it is perfectly realistic to think that the land may be sold to a community group within the next five years because:-

    a) As set out in correspondence by the Appellant to the Second Respondent, including in April 2019, *"the Charity has made a decision to dispose of Mount Radford Lawn"*.

    b) The Appellant has granted a number of 'time limited options' to third parties (the latest as recently as April 2020), to acquire the land.

    c) As of April 2020, the land is surplus to requirements, the Appellant having sold off its adjoining school land, removed the footbridge connecting the two properties and relocated to Exmouth.

    d) The Appellant claims that the sale of the land is not pressing and so it can therefore 'can wait' for as long as it likes, to try to secure the highest amount achievable in the market. The Second Respondent believe any sums raised from the disposal of the Land in the next five years will be sorely needed, as the Appellant is trying to raise funds to support its cause and has carried out several appeals for funds. For example extracts from their website state," *we need to fundraise to ensure we are able to provide the very best facilities and life experiences possible, enabling them to thrive.*"; "*Every penny will help to make a difference*"; "*with the postponement, cancellation or reduction of many fundraising activities and donations, the Deaf Academy is likely to lose over £100,000 due to the impact of Coronavirus."* And *"donations and fundraising support are extremely important to us."*

    e) It is entirely realistic for the Tribunal to think that the Appellant would be keen to realise a major asset within the next five years and not wait 'Micawber-like' for something to turn up.

73. Consequently, the Second Respondent consider that there is a reasonable likelihood that the Land will be sold off in the next five years.

74. Whether such a disposal will be to the Second Respondent or to another charitable body, will depend upon a range of factors, however the test under the act is not what is the most likely outcome (or the most likely purchaser) but whether it sits within a range of realistic outcomes for the land. The Second Respondent believes that it does.

75. The Second Respondent stated in making an offer to purchase the land at the full market value, *"it would protect the site in perpetuity and manage the land as open space, much like the Deaf Academy has done over the last 100 years."* This offer remains on the table.

76. The Land is 2.4 acres of flat grass surrounded with a sturdy metal fence. It has 3 access points, two pedestrian and one vehicular, the only thing which has changed from when it was used as a playing field is that the grass has grown. For it to be reinstated as a community asset the gates need to be unlocked, for it to be reinstated as a playing field the grass needs to be mown. Neither of these are beyond the realms of realism or rationality.

77. The Second Respondent believe it reasonable to think that over the next five years the Appellant will, by following charity law, bring the land to the market and that, through listing, the Second Respondent will be given ample opportunity to buy it.

78. The Act was intended to achieve 'Community Empowerment' and the Second Respondent representing the community of St Leonards, Exeter believe that a listing of this asset will be

an important step in achieving empowerment over its use for the 'social wellbeing of the community'.

79. The Second Respondent has published a Vision Document and has a website. The Vision has two phases, firstly to re-open the playing field to the previous community users as well as to a greater range of outdoor activities and secondly, at a later date (and subject to securing funding), to build a covered area which can act as a much needed indoor community facility.

80. The Second Respondent seeks the dismissal of the appeal.

Conclusions

81. The task before me is to make a fresh decision standing in the shoes of the First Respondent. I am able to take into account events occurring between the date of listing and the date of the appeal and accept additional material.

82. I find that Mr Fitzhugh as Chairman of St Leonard's Neighbourhood Association is the proper person to represent the Second Respondent.

83. I find the chronology of events is correctly set out at B1-2.

84. It is agreed between the parties and I find that the nomination by the Second Respondent was a valid community nomination as defined.

85. The Appellant disposed of the main campus and on 28 June 2018 the First Respondent granted planning permission to a developer to demolish the buildings and erect 146 dwellings, a care home, assisted living units, accommodation for a pre-school and associated works. The Appellant relocated to a new purpose-built camp-us to provide state-of-the-art education for deaf young people, with modern classrooms and the therapeutic facilities with well-equipped residential accommodation. This will place the Appellant at the cutting edge of deaf education in Europe.

86. The Land is subject to an assignable option to purchase in favour of Trideca Ltd of Home Living, Brampford Speke, Exeter ("the Option"). The Option persists until terminated. The Option pre-dates the listing of the Land and so any disposal of the Land pursuant to the Option is not a 'relevant disposal' for the purposes of the Act or the Regulations.

87. Purchase prices and overage clauses contained with the Option are commercially sensitive but I find it likely that they are within a range that reflects commercial values of land for residential redevelopment in the location of the Land. Redevelopment of the Land (incorporating dedicated public open space) would be consistent with the permission to redevelop the Appellant's previous main campus site for 146 homes etc already granted by the Respondent and would further defray the costs incurred by the Appellant in relocating to its new campus.

88. The Appellant is a registered charity and is obliged to achieve the best terms of sale which are reasonably achievable in the market (and to have the same certified by a suitably qualified and experienced surveyor). At the present time the Appellant states that there is no immediate requirement to sell the Land and the Appellant has stated that it can wait for an opportune sale.

89. The Appellant is seeking a purchase price that reflects the aspiration for the Land to be developed for housing. Planning permission has not been granted so the Option has not been triggered. There is a considerable difference between the likely market value of the Land with planning permission and the likely value of the Land as a playing field without planning permission.

90. I accept Dame Pedder's evidence that there is a legal duty on the Trustees of the Appellant to act in the best interests of the Charity and manage the Charity's resources responsibly and to act with reasonable care and skill and I accept there is an obligation on the Appellant to maximise the value it can realise from the sale of the Land.

91. At the date of the hearing the one application for planning permission had been refused.

92. I find that the Land was used up to June 2018. It was used as a playing field by pupils from a variety of local schools in addition to the Appellant itself, and for other recreational purposes such as the pre-school play. I find that the Land was used in the mid 1970s and football was being played on the Land in 1996. I find that the Land had been used for decades and that use in 2018 was, in these circumstances, in the recent past. This is not in issue between the parties.

93. I find that there is no current use of the Land and s.88(1) does not apply. I find that the conditions of s. 88(2)(a) are satisfied that there is a time in the recent past when an actual use of the Land that was not an ancillary use furthered the social wellbeing or interests of the local community. This is not in issue between the parties.

94. In relation to conditions of s.88(2)(b) it is not necessary for me to be satisfied on the evidence that community uses will resume within the next five years. The Appellant accepts that this is a rehearing and not subject to the narrow limitations applicable to a judicial review. The Appellant accepts that the First Respondent does not have to defend an 'irrationality' challenge.

95. The test in s. 88(2)(b) of the Act does not require the determination of the likely future use of the Land but rather whether future community use is one of a number of realistic options for the Land. I find that there are a number of realistic options for the future of the Land and none of these realistic options needs to be the most likely outcome. The test of what is realistic is not a high test and the test of 'realistic to think 'is consistent with a number of realistic outcomes coexisting.

96. I have considered below four of those realistic outcomes.

First Realistic Outcome

97. The Appellant may submit an amended application for planning permission for the Land with careful design and a sensitive layout as suggested by Mr May. That application may be granted, the Option triggered with the consequential uplift in the value of the Land.

98. In reaching the decision that this is one of the realistic outcomes I have attached weight to the submission of the Appellant that there is a shortfall of land for housing in the area. The national planning policy requirement that planning authorities be able to evidence a five-year supply of housing land and the First respondent, the planning authority for the relevant

area, has only 2 years and 1 month of housing land supply. Small sites like the Land can be brought forward quickly which might be significant in any future application for planning permission.

99. I have taken into account the Appellant's assertion that it has no operational requirement to sell the Land and it is an asset which can be held for as long as necessary until it is capable of being sold for a price which maximises the value of the Land in accordance with the Appellant's charitable purposes.

100. The Appellant's stated intentions fall to be taken into account as part of the whole set of circumstances, but are not decisive in themselves. If the Appellant's intentions were determinative then listing would become a voluntary process with the owner having the ability to prevent listing.

Second Realistic Outcome

101. The Appellant may submit one or more applications for planning permission which are refused.

102. In reaching the decision that this is a realistic outcome, I have taken into account that one application for planning permission has been submitted, tested and refused. It was refused for the reasons in the officer report which recommended refusal on the grounds of harm to the area's heritage assets including listed buildings, the St Leonards Conservation Area, possible archaeological remains, the harm by reason of the loss of recreational opportunities in the area and scheme-specific objections. The reasons for the refusal remain relevant and the refusal was not appealed.

103. In reaching the decision that this is a realistic outcome I have taken into account the reasons for refusal which I consider to be significant and are set out on pages B167 and 168 - Loss of Playing Fields/Open Spaces (B167 and 168) which stated:

> "Mount Radford Lawn represents an important area of green space which adds to the character and appearance of the conservation area. In addition to its visual function, the site has historically been used for recreational activity in association with local schools, community groups and sports clubs. It is clear from the correspondence of previous users, photographic evidence and comments made by Sport England that the site has been well used over a significant number of years. Indeed correspondence has stated that the field was used as early as this year in connection with the local school, until this permission was removed by the landowners. The planning system cannot insist that an area of land is made available for public use, however local schools and groups have expressed interest in continuing using the land in association with outdoor recreation. An example of the local community interest in the land is evident from St Leonards Neighbourhood Associations proposal to use the site for a community building and associated open space. Whilst this highlights local interest it must be stressed that this is not a matter for consideration as part of this application. The significant number of objection letters/emails and the comments raised indicates the strength of feeling against development of the site for housing. Whilst the site is not designated as an area of open space in the Local Plan and therefore Policy L3 is not applicable, the use of the site for playing pitches does warrant assessment against Policy L5 which states that 'development that would result in the loss of a playing field will not be permitted if would harm recreation opportunities in the area'. The Local Plan does highlight

> circumstances when this can be set aside, which include when there is an excess of playing field provision in the city or replacement provision is made of at least equivalent community benefit. This Policy reflects the criteria as stated within the NPPF paragraph 97 and Sport England's own playing fields policy which states that they '... will oppose the granting of planning permission for any development which would lead to the loss of, or would prejudice the use of all or any part of a playing field, or land which has been used as a playing field and remains undeveloped, or land allocated for use as a playing field'. It is accepted that the land is currently in private ownership and the local authority has no powers to insist on access for its public use. However it is clear from the correspondence that the land is valued by the local community and considerable benefit has been gained over the years by a variety of local communities and sporting organisations. As the Local Plan states 'playing fields are significant resource for sport but they are under constant pressure for development. Once developed they are likely to be lost for ever. The Government places particular emphasis on the protection of playing fields and stresses that local authorities should carry out local assessments of demand'. The Council has recently (July 2019) published a Physical Activity Strategy and Built Facilities, Playing Fields, Pitches, Play Areas, Parks and Green Spaces Strategy which emphases its commitment to being a physically active city. Whilst the documents do not refer directly to the application site it is notable that the later document highlights a deficiency in playing pitches across the city. It is understood that a Playing Pitch Strategy will be published early in 2020 and the creation of additional playing pitch facilities (in locations yet to be determined) is likely to be the conclusion. The applicant has offered a financial contribution to offset the loss of existing playing pitches/recreational use to be used in targeted areas as considered appropriate by the Council. However it is clear that local residents and groups value this area of land and until and until this Strategy is concluded any decision to develop the site could at best be considered premature. It is consider that financial contribution offered does not outweigh the potential this area has for public playing pitch/recreation spaces (subject to the agreement of the land owner) and accordingly the development would be contrary to the National Planning Policy Framework, Sport England's playing field policy and polices L5 of the Local Plan and CP10 of the Core Strategy."

104. I agree with the observations of the Judge in *Crendain Developments Limited v Ealing Council* who in response to the situation where the appellant company had declared an intention to repeatedly make planning applications for the development of land and to retain it until successful, stated that such an approach meant that one possibility was that the planning authority would continue to resist the development and that it was a foreseeable consequence that economic pressure would bring about a change of mind which would allow for a community use in the future.

105. I have taken into account the Appellant's stated intentions to hold onto the Land in order to maximise the value of in furtherance of its charitable and strategic priorities. However, this intention is to be taken into account as part of all the circumstances, but it is not decisive in itself.

106. In reaching the decision that the Appellant's intentions are not the only realistic possibility I have attached weight to the fact that the planning permission was refused on principle, not merely on technical grounds and residential development of the Land does not accord with the importance to the First Respondent of protecting the Land as a green space, in line with its published planning objectives.

Third Realistic Outcome

107. As a consequence of planning permission being refused the Appellant may decide to place the Land on the market for sale with the value of a playing field without planning permission.

108. In reaching the decision that selling the Land for field value is realistic, I have taken into account that the Appellant is a registered charity and is obliged to achieve the best terms of sale which are reasonably achievable in the market. If planning permission is refused, it is realistic to think that the Trustees may be advised to accept that development value with the benefit of residential planning permission could not be achieved and decide to sell the Land for the best price that could be then be achieved on the open market. Although the Appellant has asserted that there is no need at present to sell the Land circumstances and priorities can always change in response to an altered economic climate. If planning permission were refused on a number of occasions it is unlikely that the Appellant would not decide to sell the Land for what could be raised as a failure to act would not be in keeping with its charitable obligations.

109. The Covid-19 pandemic has a potential impact on all Charities, and, in particular, on their funding and future strategies.

110. Clearly, if planning permission cannot in fact be secured for residential development of the Land, then the highest amount achievable in the market will be the value of the Land as a playing field, not its value with planning permission for lucrative residential development.

Fourth Realistic Outcome

111. The Appellant may accept an offer from the Second Respondent to purchase the Land at the value without planning permission.

112. In reaching the decision that this is a realistic outcome, I have taken into account the steps taken by the Second Respondent as follows:

a) Invested charitable money and employed the services of an independent property consultant at commercial rates who has entered into discussions with the Appellant's surveyor.

b) Sought and received financial pledges to the value of six figures.

c) Investigated grant-aiding organisations and their requirements and received positive replies on the suitability of applications.

d) Opened discussions with the Leader of Exeter City Council and others over the future of the playing field when in the ownership of the community.

e) Produced and circulated a Vision document of the future of the playing field when in the ownership of the community.

f) Consulted the community of St Leonards as to their views and ideas for the use of the land with overwhelmingly positive results.

g) Instructed solicitors to act in conveying the land, establishing the most suitable charitable status and other legal matters.

h) Assessed the possible uses of the playing field and their suitability for the financial viability of its use in furthering the social wellbeing or social interests of the local community.

i) Corresponded and communicated with the Appellant's employees and the Appellant's property consultant regarding the possible community use of the land over several years.

113. Mr Fitzhugh and his committee have demonstrated great commitment and energy and have thought through what would be needed to purchase the Land and generate sufficient funds to maintain it. In my view it is not significant that the Land was not more widely used by the local community before 2018. It is clear from the evidence of Ms Quick that the Appellant had no need to generate more income from the use of the Land and, therefore, no steps were taken advertise its availability and encourage greater use. The Second respondent has given consideration to how the Land could be more widely used and generate a greater income.

114. The Appellant has submitted that the figures relied on by the Second Respondent in relation to the percentage of the local community supporting the future plans, are flawed. In my view it is not necessary for the figures to be precise or entirely accurate. It is enough to show that there is strong support from at least part of the local community who are determined and enthusiastic. I am satisfied on the basis of the evidence that the local community is likely to support the plans of the Second Respondent.

115. It is realistic that the purchase monies could be provided by way of financial support from private individuals, financial community support and grant and loan funding.

116. It is not necessary for the Second Respondent to have a detailed business plan business plan to secured grant or loan funding. In my view it is entirely reasonable that the Second Respondent has not yet made any applications for funding in the present uncertain situation regarding the future of the Land and it is not necessary for the Second Respondent to have secured grant or loan funding or to have prepared a business plan. In view of the First Respondent's priorities for promoting active and healthy lives and the availability of grants from sporting and community funding organisations, and local and regional councils, on balance the prospect of obtaining finance is realistic and not fanciful.

117. I am satisfied that the Land has the potential to be more widely used as a playing field for activities and is suitable for the location of a low-impact community building associated with outdoor playing field facilities and indoor community activities. It is realistic to suppose that the Land could be used for fetes, fairs, concerts, film nights, sports days, competitions and shows throughout the year and thereby further the social wellbeing and social interests of the local community.

118. I found Mr Fitzhugh to be pragmatic and determined and his written and oral evidence demonstrated that he and the SLNA Committee have given serious thought and planning to

the realisation of a future continued community use of the Land. I accept that pledges have been received from private individuals amounting to a six-figure sum and the moratorium period would provide the space for funding to be fully worked out.

119. I am satisfied that the above realistic outcomes coexist and the ground for the listing of the Land under section 88 is made out and the appeal is dismissed.

Tribunal Judge J Findlay **DATE: 1 February 2021**