NCN: [2025] UKFTT 00127 (GRC) **Case Reference: FT/CR/2024/0001**

FIRST-TIER TRIBUNAL

GENERAL REGULATORY CHAMBER

COMMUNITY RIGHT TO BID

Decided without a hearing

On: 2 December 2024

Decision given on: 11 February 2025

Between

(1) DANIEL HILL

(2) LOUISE HILL

Appellants

-and-

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL

Respondent

Before:

Judge J Findlay

Decision

The appeal is dismissed. The listing as an Asset of Community Value ("ACV") of the relevant land adjacent to 28 Badcock Road, Haslingfield CB23 1L ("the Land"), made by the Respondent on 12 December 2023, was correctly made.

Background

1. The appeal is made pursuant to Regulation 11 of the Assets of Community Value (England) Regulations 2012 ("the 2012 Regulations") by the owners of the Land, the Appellants, against the decision of the Respondent to include the Land in its list of assets of community value on 12 December 2023 ("the Decision") under sections 87 to 92 of the Localism Act 2011 ("the 2011 Act").

2. The 2011 Act requires local authorities to keep a list of assets (meaning buildings or other land) which are of community value. Once an 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.

The Land

3. The Appellants are the registered freehold proprietors of the Land registered at HM Land Registry which consists of two distinct parts. The plan of the Land appears at B116. One part consists of a hard-surfaced public footpath. The Appellants refer to this part of the Land in their grounds of appeal as the "Public Land" but the term the "Footpath" is used elsewhere. The other part of the Land consists of an area covered with grass or 'grasscrete' (concrete with a defined pattern of deliberate gaps through which grass is allowed to grow). The Appellants refer to this part of the Land in their grounds of appeal as the

"Private Land." There is no issue in relation to the listing of the Footpath. The issue relates to the Grass Area.

4. The Grass Area formerly contained four substantial trees and additional shrubs. The housing estate of which the Land forms part was constructed in about the 1970s. The Land was laid out for planting for access to oil storage tins, which are no longer present on the Land.

5. In 2003, planning permission was refused on appeal for the construction of a detached house and garage on the Grass Area.

6. The Appellant purchased the Land at auction in October 2023, prior to its nomination as an ACV. Haslingfield Parish Council ("the Parish Council") made various offers/bids for the Land before and at the auction but these were unsuccessful. The Parish Council subsequently had negotiations with the Appellant for the purchase of the Land in November and December 2023 which were unsuccessful.

7. The trees on the Grass Area were removed in about October/November 2023 and the Grass Area was fenced in about December 2023/January 2024.

8. The Land was nominated to the Council as an ACV by the Parish Council in a nomination form dated 20 October 2023.

9. The Decision to list the Land as an ACV was made for the reasons set out in the report dated 12 December 2023.

10. The Appellant requested a review of the Decision. The hearing of the Review took place on 19 March 2024 and the Review Decision was made on 25 March 2024.

11. The Appellant filed a Notice of Appeal on 19 April 2024.

12. The parties opted for a paper determination of the appeal. I am satisfied that I can properly determine the issues without a hearing within Rule 32(1)(b) of

The Tribunal Procedure (First-tier Tribunal)(General Regulatory Chamber) Rules 2009, as amended.

13. In reaching my decision I have taken into account all the evidence before me in an agreed Open Bundle ("OB") and an Authorities Bundle ("AB") and made findings on the balance of probabilities. The fact that I do not refer to a particular submission or evidential matter is not to be taken as indicating that I have not had regard to the same.

14. I have borne in mind that the 2011 Act specifies that the relevant consideration is the Respondent's "opinion" as to whether or not the statutory requirements are satisfied. I am not required to determine the merits of the nomination of the Land *de novo,* and I can disturb the Respondent's decision if I disagree with the Decision having given the deference and weight appropriate to a decision involving the exercise of judgement and opinion by the body specifically tasked by Parliament with the responsibility for making the decision. In brief, I must consider whether the Respondent should have decided the application differently.

15. I have rejected the Appellants' contention that this deference or special weight does not extend to questions of fact and law but rather only applies to the judgment of the decision maker arising from that. I prefer the opinion of the Respondent on this matter for the reasons set out on page A104, and, in particular, because the Appellant's interpretation requires making additions to the legislation.

Relevant legislation

16. S. 88 of the 2011 Act - Land of Community Value provides:

(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.

17. The legislation provides limited guidance on what can constitute the 'social wellbeing or social interests of the local community.' It depends on the particular circumstances of each case.

Issues

18. There are two key tests in determining if the Land is an asset of community value. The first test is to determine if there is a qualifying use ("the First Test") and the second test is to determine whether it is realistic that any qualifying use will either continue if current or occur within the next 5 years ("the Second Test").

19. The First Test consists of three parts. Firstly, the claimed use must further the social wellbeing or interests of the local community. Secondly, the claimed use must have occurred in the recent past. Thirdly, the claimed use must not be an ancillary use of Land. The standard of proof is the balance of probabilities.

Grounds of Appeal

20. The Appellants submit that the decision to include the Land on the list of assets of community value should be reversed.

21. Contrary to the Respondent's findings in the Review Decision, the evidence does not fulfil and is incapable of fulfilling the requirements of s.88(2)(a) and/or that the decision was unreasonable given the substance and nature of the available evidence.

22. Contrary to the Respondent's findings in the Review Decision, the evidence does not fulfil and is incapable of fulfilling the requirements of s.88(2)(b) and/or the decision was unreasonable given the substance and nature of the available evidence.

23. There was an obligation on the Respondent to explore the sufficiency of the evidence in its determination of the First Test to the civil standard of proof. The Respondent should have considered whether first hand evidence of actual use has been provided and then the extent to which hearsay evidence is sufficient reasonably to establish the claimed use. The Respondent should have also considered whether the evidence goes to the whole or only part of the nominated Land. The Appellants rely on the explanation of the standard of proof in *Afi v Rather DC* [2022] UKFTT 495 (GRC) (AB17/145). The Respondent did not address the issues addressed in that case in its Review Decision and made no attempt to distinguish that evidence which may have pointed to a non-ancillary use in the recent past with that evidence before the Respondent that did not. Indeed, apart from its speculative components, there is no linkage of any actual evidence of user to any such use in the recent past (as should have been defined) with the conclusion reached. By illustration, the evidence of the annual scarecrow celebration appears to be evidenced photographically only and on only one occasion. Indeed, it is impossible to link the decision to any particular evidence and its timeline and, therefore, to know whether regard was had to evidence that could not on any reasonable application of the statutory provisions constitute evidence of non-ancillary use in the recent past.

24. In relation to the Second Test the same guidance in *Afi v Rather DC* provides that evidence might include local stakeholder support for the nomination

(surveys, petitions etc.) reference to and evidence from Parish Plans and other local documents as to the importance of the asset locally, market testing, planning history, business plan, survey reports. It is clear in this case and was clear to the Respondent in making its decision that the Parish Council had failed to purchase the Land at auction and could not come to terms with the Appellants as owners prior to the Nomination. The Respondent also knew that the Appellants had no intention of selling the Land in the next five years. There was no business plan or any evidence before the Respondent to show on what basis any community use could be established on the Land. There was nothing to justify the Respondent's decision that the purchase of the Land by the Parish Council within 5 years is a realistic possibility by reference to a business plan, evidence of the likely availability of funds or any other evidence that might legitimise this conclusion.

25. The Appellants refer to *Carsberg v East Northamptonshire Council* UKFTT CR2020/004 [AB18/155], where it was held that the term "realistic" meant having to show "a sensible and practical idea of what can be achieved". There is no definition of the expression "recent past" as used in s.88(2)(a). lt must be given its natural meaning so that, whilst no minimum time period is prescribed, the approach of the decision maker on the issue of recency should be reasonable. The exercise of this judgment requires the decision maker firstly to be properly satisfied that there is evidence, on the balance of probability, to establish not only if that claimed use took place, but also when it took place, as well as its consistency and/or frequency and that it was substantial and not de minimis. The Test does not invite supposition or conjecture and the Respondent has produced no evidence of "a sensible and practical idea of what can be achieved" within that time.

26. The evidence before the Respondent either related to a timeframe which could not be reasonably be considered to be recent, or was without reference to time, or indicated an intermittent use (annual only), was of a general nature and did not provide first hand evidence of user in the recent past. The absence of any linkage to any such evidence explains the fact that the Respondent resorted to supposition and conjecture in its Review Decision.

27. The Nomination Form provides only generalised statements. Some of these are inaccurate or at odds with the nature and disposition of the space, some activity obviously being related to the Public Land. There was nothing in the Nomination Form which addressed the Second Test (the s.88(2)(b) issue) at all in relation to the Land. The testimonials (AB13/103) similarly provide only generalised statements which tend to focus on its amenity value in visual terms as open space or as a place to observe fauna. None of the evidence acknowledges that the Land is private and not dedicated as public open space. Hence, if the Private Land has been accessed from time to time in the recent past by residents, there is nothing to establish its frequency and the nature and quality of the use, as a means of establishing whether it was in fact used for a defined purpose in the recent past that furthered the wellbeing or interests of the local community. The fact that it might have been incidentally walked upon by users of the public footpath forming part of the Land from time to time is insufficient to establish this requirement.

28. The Parish Council and residents registered a bid for the Land and had a fair opportunity to buy the Land but it was too expensive and they withdrew. The Appellants have received two offers to purchase the land through land agents which have been refused. They have provided a figure of the amount required to sell the Land.

29. The local community does not have legal or authorised use of the Land. The Land is privately owned and has been since the development was finished and any use of the Land is trespassing. The Land has no legal classification as amenity land and never has. The previous owner deemed it development land and submitted a planning application.

30. When visiting the site the Appellants have never seen a child, adult or dog using the Land. It is a piece of grass not a play area. The Land has no facilities, no safety fences for young children, no seating areas for parents and no bin. The Land is grassed and it would be impossible to roller skate or learn to ride a bike. It is more likely that the paths and car parking areas were used not the Grass Area. The Grass Area is too small to play football and would be unsafe as is next to the road. There is a huge playing field 2 minutes' walk away with facilities and this should be used instead. In relation to the scarecrow festival the Grass Area has been used only twice for an

event that has been running for 21 years. It is untrue that the Land has been used for fundraising teas, community picnics and Jubilee teas. The Appellants have checked social media and there is no mention of the Land being used for these purposes.

31. The Appellants ask that statements supporting the application be sworn affidavits.

32. Comments from the planning officer in 2002 are not relevant.

33. The Parish Council are trying to jeopardise the Appellants' planning applications even though planning policy welcomes development and has recently approved the building of two houses in the street.

34. The appeal should be allowed and the Land removed from the list of assets of community value.

Grounds of Opposition

35. There was ample evidence (whether as part of the Decision and/or the Review Decision) to allow the Respondent to form the opinion that the requirements of s. 88(2)(a) of the 2011 Act was satisfied, namely, that there is a time in the recent past when an actual use of the relevant land that was not an ancillary use furthered the social wellbeing or interests of the local community.

36. There was ample evidence (whether as part of the Decision and/or the Review Decision) to allow the Respondent to form the opinion that the requirements of s. 88(2)(b) of the Act was also satisfied, namely, 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 relevant land that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community.

37. Under s. 88(2) of the Act, the relevant consideration is not the Tribunal's "opinion" as to whether or not the statutory requirements in s. 88(2) are satisfied, but rather the Respondent's "opinion" of these matters. This is

because the statutory scheme requires an "opinion", and it expressly specifies that it should be the "opinion" of the Respondent, not the Tribunal or the Court. Consequently, this appeal is not an unconstrained determination *de novo* of the merits of the nomination of the relevant land as an ACV or the question whether it should be listed as an ACV. Rather, in deciding this appeal, the Tribunal must not disturb the Respondent's Decision unless the Tribunal is satisfied that that decision is wrong. "Wrong" in this context does not mean that the Tribunal is confined to setting aside that decision only if a public law error is identified (such as would be the case on a judicial review). Rather, it means that, in determining this appeal, the Tribunal can disturb the Respondent's Decision only if the Tribunal disagrees with the Respondent's Decision despite having accorded to it the deference or special weight appropriate to a decision involving the exercise of judgment and opinion by the local body specifically tasked by Parliament with the primary responsibility for making decisions in relation to ACVs.

38. The Decision was not wrong in this sense (or any other sense). On the contrary, it was plainly correct. The evidence and other matters relied on in reaching the Decision and/or the Review Decision, the layout and location and nature of the Land, the circumstances of the case, and the inferences which could legitimately be drawn from those matters and circumstances, amply justified the Respondent in forming the opinion which it did and therefore reaching the decision to list the relevant land as an ACV.

39. The appeal should be dismissed.

Conclusions

40. In reaching my decision I have borne in mind that the purpose of the community right to bid regime is to provide a tool and means for communities to be given the opportunity to identify assets of community value, have them listed and when they are put up for sale have time to raise finance and be prepared to bid for them. It was recognised that throughout the country there were buildings, land and amenities that were integral to the communities that use them. The closure or sale of such buildings, land and amenities can create lasting damage to communities and threaten the

provision of services. The intention of the regime was to provide greater opportunities for communities to keep such buildings, land and amenities in public use to ensure they remained a social hub for those communities. However, it is clear that there was an intention for there to be limits to the assets that could be listed as ACVs. It was intended that there would be exceptions to the general rule that any asset could be listed as an ACV if the requirements of s.88 were satisfied. The intention was by including a provision for land which is not of community value and Parliament set out the definition of such land and the tests to be applied.

41. I find that the nomination was valid and satisfied the legislative requirements.

42. I am satisfied that it is proper and sensible to base findings no only on the primary facts but on inferences which can properly be drawn from facts. I reject the submission of the Appellants that the Respondent should have based its "opinion" only on direct evidence and that the Respondent should not have drawn any inferences from the primary evidence and the surrounding circumstances.

43. The Parish Council is a public body funded by a precept from council tax and is democratically and legally accountable for its decisions and conduct. When assessing the evidence filed by the Parish Council, the Respondent was entitled to bear in mind that the evidence came from a reputable source which is a public body comprised of democratically elected representatives who represent the local community and that weight could be attached to the evidence even though it was hearsay.

44. The Respondent was able to take into account the testimonials even thought they were both hearsay and anonymous. The reasons for the testimonials being anonymised have a reasonable explanation. A lot of bad feeling and tension has arisen over the use, listing and future of the Land, as set out by Ms Hawkes, Communities Manager, in her witness statement dated 8 February 2024 (pages B133 to 135). It is understandable, in these circumstances, that members of the community do not wish to be identified.

45. There is no reason why the Respondent should not receive and take into account hearsay evidence and anonymised testimonials and attached appropriate weight to this evidence. It has been accepted that a flexible approach is permissible in respect of nominations for ACVs that would not be the case in other areas of law. The Appellants have submitted that statements supporting the application should be sworn affidavits. There is no requirement for sworn affidavits in this appeal process and would not be appropriate taking into account the history.

46. In reaching my decision I have borne in mind that planning concerns are not relevant to the issued before me in deciding whether or not the Land was correctly listed. Also, the protection of wildlife is a matter to be addressed in relation to planning law and development control, and outside the ACV provisions.

47. I find that the Land has been used by the community for many years and certainly in the recent past and up until it was fenced. There was actual use which was not ancillary and furthered the social wellbeing and interests of the local community. I find that the use of the Land was all year round, regular and not trivial, sporadic, occasional or temporary.

48. Before it was fenced off the Land was open and accessible to all and I find that children played on the Land without the need to cross the main road to get to the playing fields. I find that the Land was available for everyone, adults and children, to access and enjoy on a daily basis. This includes being on the Land and enjoying the space and wildlife.

49. The Appellants have submitted that any use of the Land has been unlawful. I find that trespass or unlawful use can constitute a qualifying use because it is actual use that is the test and the legislation makes no reference to unlawful use or trespass use being excluded. The actual use is the use, even if it is unlawful, provided that it promotes the social wellbeing or the interests of the local community.

50. I find it supportive of my decision that the Land was laid to lawn and kept mown by volunteers and since 2023 by the Parish Council. If it was not being used it would not need to be mown.

51. I find that the Land in the recent past has been used for community events and taking into account that the events were informal I do not consider it significant that those events were not advertised on social media and photographs did not appear on social media as asserted by the Appellants. Taking into account that residents would not wish to be identified, for the reasons identified by Ms Hawkes, I do not consider it significant that limited photographic evidence was submitted in support of the nomination.

52. I find that the Land was used in the recent past to share excess produce by the community.

53. I find that the Land in the recent past was used for community Easter egg hunts, table tennis and scarecrow events.

54. I find that the Land was used for community teas and celebrations on special occasions.

55. I find that although there is a nearby playground with facilities and a skate park, these are on the other side of the main road through the village and not as accessible as the Land. I find that the use of the Land was different in nature to the use of the nearby playground.

56. I find that parents were aware and content for their children to play on the Land because they knew their children would be safe and nearby.

57. I find that people used the Land to walk their dogs.

58. I find that during the Covid Lockdown the Land was used for remote PE classes.

59. It is unnecessary for the Respondent to have sought details about the number of days in a year that the Land was used for the above activities. All the activities individually and as a whole were activities which furthered the social wellbeing or interests of the local community.

60. In reaching my decision I have rejected the Appellants' assertions that many events held on the Land were annual events and therefore not non-ancillary use. I find that there were a number of annual events held on the Land which when combined with the regular use of the Land do amount to non-ancillary use.

61. In reaching my decision I have rejected the Appellants' assertions that if the Land is a wildlife habitat as claimed it could not have been used on the scale as claimed and, therefore, the use must be ancillary and that the non-ancillary use is more likely to be confined to the Footpath. There is nothing inconsistent about a green space being a wildlife habitat and being used for the social activities as stated above.

62. I reject the Appellants' submission that any future use which would seek to restore that Land as a natural site with trees and wildflowers excludes the possibility of the Land being used for the social wellbeing or interests of the local community. It is clear that encouraging wildlife and nature on the Land would enhance not exclude the community use and these are not competing or conflicting activities.

63. I find that the use up until the Land was fenced is in the recent past. Although some of the testimonials refer to use in the distant past it is clear from the evidence that the use continued until the land was fenced.

64. I find that it is not significant that the Appellants have stated they have no intention to permit public access to the Land. It is submitted on behalf of the Appellant: " … that the Landowners will not permit public use of the Private Land. The animosity created by the residents makes such scenario entirely unrealistic. They will assess their planning options for the land" (B176). The fact that the Appellants have by fencing the Land prevented community use and stated an intention to prevent future access and use is a factor to be considered but not a determinative factor. What is realistic for the future is a matter of judgment and not a matter of veto for the Appellants.

65. I find 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 and social interests of the local community. When considering the

Second Test the language of the legislation is consistent with the consideration of a number of realistic outcomes co-existing.

66. It not certain at this point that development will proceed as no planning permission has been granted. However, one realistic outcome is that planning permission will be granted to the Appellants and they will pursue their wish to build on the Land.

67. A second realistic outcome is that the Appellants decide to cut their losses and sell to the Parish Council or a community body at a price that can be met. Taking into account the enthusiasm and passion of the local community to keep the use of the Land, money could be raised and an offer made to purchase the Land either by the Parish Council or a community group which would be acceptable to the Appellants. Thereafter the Land could continue the established use or could be made into a more formal play area and public open space with some modest facilities to be used by the local community.

68. A third realistic outcome is that there could be some form of licence arrangement with the Parish Council or local community group for the use of the land.

69. In my view all of these options are realistic. I have borne in mind that realistic does not mean that it must be more likely than not to happen.

70. The Appellants have submitted that no plans have been put forward to raise money to purchase the Land and taking into account that there have been previous unsuccessful offers the suggestion that the Parish Council could buy the Land is not realistic or practical and is simply fanciful.

71. The Parish Council made an unsuccessful pre-auction bid, made an unsuccessful auction bid and terms could not be agreed when the Appellants offered the Land to the Parish Council. However, this does not mean that there could be no acceptable offer in the future. I find it entirely realistic that with community effort and enthusiasm steps could be taken to raise the money to purchase the Land. I do not consider such a possibility to be fanciful taking into account the value of the land to the community and the strong desire to maintain the Land as a community asset to be enjoyed by all.

In this regard I have attached weight to the evidence from Ms Jackson (B118) that the local residents "feel passionately about this space and feel it belongs to the village."

72. In my view, that the Parish Council has made two offers indicates the serious nature of the interest in purchasing the Land not indicative, as suggested by the Appellants, that there is no hope that a further offer will be made. In reaching this view I have borne in mind that it is not necessary for there to be a business case or financial analysis at this stage. The legislation does not require that any future use must be shown to be commercially viable.

73. The listing of the Footpath is not in issue, but for completeness I find that it has an actual current use that is not an ancillary use and that this furthers the social wellbeing or social interest of the local community. I find that the Footpath is used by walkers and cyclists as an access route between Lilac Road from Badcock Road and in the past before the fence was erected, as access to the Grass Area. I find that it is realistic to think that in the next five years the use of the Footpath will continue and will be a non-ancillary use that will further the social wellbeing or social interests of the local community as a footpath.

74. I find that the requirements of s. 88(2)(a) and (b) of the 2011 Act are satisfied and, accordingly, the appeal is dismissed.

Tribunal Judge J Findlay **DATE: 2 December 2024**