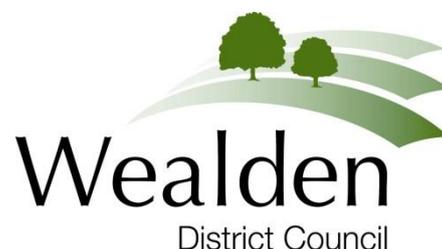


Localism Act 2011 Part 5 Chapter 3: Assets of Community Value



Review of Listing of Land as an Asset of Community Value.

Reviewing Officer: Isabel Garden, Director of Environment & Community Services

Decision Date: 5th February 2018

Land Listed: Vines Corner, Little Marklye, Marklye Lane, Heathfield, East Sussex ("the Land")

- A request for a review has been made under Section 92 of the Localism Act 2011 ("the Act") against the Council's decision to include the Land in the list of assets of community value.
 - The review has been requested by Ms Alison Reilly, Ms Amy Reilly and Mr Andrew Howie ("the Owners") as freehold owners of the Land.
 - The nomination reference ACV17012 submitted by the Green Open Spaces for Heathfield ("the Nominator") is dated 1st July 2017 and was received by the Council on 10th August 2017.
 - The Land was subsequently listed as an asset of community value ('ACV') on 5th October 2017.
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Procedural Matters

1. The request for review is contained in the Owners Review Request form dated 29th November 2017 and was received on 29th November 2017. The Owners made a written request pursuant to paragraph 7 of Schedule 2 to the Assets of Community Value (England) Regulations 2012 ("the Regulations") for an oral hearing. The oral hearing took place at the Council's offices on 23rd January 2018 and was attended by Isabel Garden (Reviewing Officer), Christopher Crichton (Legal), Doug Moss (ACV Administrator), Mark Best (Parker Dann - planning agent) and Hugh Reilly (acting on behalf of the Owners).
2. I have therefore considered the submissions contained within the Owners Review Request form, as well as the information contained in the nomination and supporting evidence; the Owners' original objections; the Council's original decision to list the land; and the representations made on behalf of the Owners at the oral hearing.

Relevant Legal Provisions

3. Whether land is of community value is defined by Section 88(1) and Section 88(2) of the Act.

Section 88(1) of the Act provides:

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.

Section 88(2) of the Act provides:

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.

Section 88(3) of the Act provides:

The appropriate authority may by regulations-

- (a) Provide that a building or other land is not land of community value if the building or other land is specified in the regulations or is of a description specified in the regulations;
- (b) Provide that a building or other land in a local authority's area is not land of community value if the local authority or some other person specified in the regulations considers that the building or other land is of a description specified in the regulations.

Issues

- Whether there has been a valid nomination
4. A local authority may only include land in its area in the list of assets of community value in response to a community nomination (section 89(1)(a) of the Act). A community nomination includes one which is made by a voluntary or community body with a local connection under section 89(2)(b)(iii) of the Act. A voluntary or community body is defined in the Regulations as, amongst other things, an “unincorporated body – (i) whose members include at least 21 individuals, and (ii) which does not distribute any surplus it makes to its members” (Regulation 5 (1)(c) of the Regulations). Regulation 6(d) of the Regulations stipulates a community nomination must include ‘evidence that the nominator is eligible to make a community nomination’.
 5. The nomination was submitted by a representative of the Nominator. The nomination was accepted as being valid by the Council, as it had been submitted on behalf of a body that met eligibility criteria set out in the Regulations. Sections A1 – A3 (inclusive) of the nomination and the supporting documentation listing the names and addresses of the members of the Nominator provided sufficient information that the nomination had been submitted by an eligible body and had the necessary local connection to the Land. The Council has also taken steps to verify that the names and addresses provided are authentic.

I am satisfied that it was appropriate for this authority to accept the contents of the nomination form as providing sufficient information to satisfy the requirements of the Regulations referred to above.

- The extent of the land nominated and whether the actual current use furthers the social wellbeing or social interests of the local community
6. The Council received a nomination to list the Land as an ACV. The Land is registered under Land Registry Title Number ESX282637. The original decision took account of the evidence submitted within the nomination (section B2 & B5) and the accompanying supporting evidence, in addition to the objections received from the Owners.
 7. In summary, the Nominator states the Land is used for a variety of recreational purposes, such as dog walking, meditation, blackberry picking, group games, wildlife photography, kite flying, child’s play and as a unique view point over the Rother Valley / High Weald Area of Outstanding Natural Beauty.

8. At the oral hearing the Owners put forward a number of arguments as to why they believe that it would be inappropriate for the Council to list the Land as an ACV. These arguments are set out in full in Mr Best's letter of 25th September 2017 objecting to the nomination.
9. To summarise, the key objections that I have identified as being relevant for the purposes of this review and determining whether the Land satisfies the requirements of s.88(1)(a) are as follows:-
 - The use of the Land (as outlined in paragraph 7 above) does not benefit the local community of Heathfield as a whole. The use of the Land only benefits the adjoining property owners which are not a representative of the local community of Heathfield;
 - The current use of the Land is unauthorised and unlawful (trespass). It is confirmed that the users of the Land have no formal rights to enter or use the Land. Furthermore, the use, in particular meditative space, walking and as a unique viewpoint for the AONB / Rother Valley, are not sufficient uses to demonstrate any social wellbeing or social interests for the local community.
 - Notwithstanding the Owners other objections, it cannot be said that the entire site fulfils a community function that furthers the social interests or wellbeing of the local community.
10. In reviewing the original decision, I had regard to the First Tier Tribunal's decision under reference CR/2014/0018 (Banner Homes Ltd v St Albans City and District Council), as well as the conclusions reached in its subsequent appeal to the Upper Tribunal case reference Banner Homes Ltd v St Albans City and District Council [2016] UKUT 0232 (AAC) - collectively known for the purposes of this review decision as the "Banner Homes case". Although not identical, I believe there are clear factual similarities between the case before me and facts of the Banner Homes case.
11. Whilst I accept the Owners assertion that the Land for visual green space is not sufficient to demonstrate an "actual current use" of the Land. I do, however, consider that the other recreational uses, such as dog walking, kite flying, children's play etc, constitute a physical use of the Land which would further the social interests and/ or social wellbeing of the local community.
12. I believe this view is consistent with the approach adopted in First Tier Tribunal's decision in the Banner Homes case referred to above (paragraph 10). Whilst Judge Peter Lane concluded that on the evidence that the Nominator could not demonstrate that there had been an "actual current use" of the site for the purposes of s.88(1)(a) (primarily due to the erection of the fencing which prevented access beyond the public footpaths that ran across the site), it was however listed pursuant to s.88(2). This was because it had been demonstrated

that in the recent past (prior to the erection of the fencing) an actual current use had occurred, which furthered the social interests / wellbeing of the local community. It was considered that the past uses such as walking, exercising of dogs and informal play by local children, were sufficient in furthering the social wellbeing / interest to the local community. On this basis, given the similarities between the uses in the Banner Homes case and the present case, I am of the view that the Nominator has sufficiently demonstrated that an actual current use exists and that it furthers the social interests / wellbeing of the local community.

13. In considering whether the actual current use must be a 'lawful' use, I had regard to the Upper Tribunal's decision of *Banner Homes Ltd v St Albans City and District Council* [2016] UKUT 0232 (AAC). The Upper Tribunal agreed that the word "lawful" had been deliberately omitted from the s.88 test and that the doctrine of *bonam partem* (in good faith) does not apply.
14. From the Mr Reilly's submissions at the oral hearing, it is clear that the Owners are aware, and have been for some time, that third parties have benefitted from unrestricted access to the Land. A number of entrances to the Land exist and it is noted that properties adjoining the Land can gain direct access via rear garden gates. From the evidence provided, with the exception of some incidents in the 1980's regarding damage to fencing and livestock being injured / killed in dog attacks, it would appear that there has been a peaceful use of the Land. I have also taken into account the activities being carried out on the Land are not of a criminal nature (albeit unauthorised / trespass).
15. Taking into account the Upper Tribunal's decision referred to in paragraph 13 and the facts set out above, I am satisfied that the use, despite being unauthorised (trespass), can be taken into account for the purposes of determining whether the s.88 test is satisfied.
16. I also disagree with the Owners' objection that the entire site should not have been listed. The evidence provided by the Nominator, in particular the aerial photographs, visibly show various desire lines cutting through the majority of the Land. Furthermore, due to the lack of barriers or other obstacles (natural or otherwise) third parties are free to roam without restriction across the whole the site. There is nothing preventing the public straying off these informally created routes. Having conducted my own investigations, it is also evident that the extent of the desire lines has intensified over recent years. Referring back to the decision in the Banner Homes Case, it was concluded that the entire site qualified as an ACV even though the majority of the traffic across the site would have presumably have been limited to the public footpaths.

17. Finally, I disagree with the Owners' assertion that those individuals who use the Land are not representative of the local community. Whilst there is no statutory definition or guidance defining what constitutes "local community" for the purposes of the ACV regime. In my view such a narrow interpretation to exclude local residents would be contrary to the spirit of the ACV legislation. What constitutes the "local community" will vary on a case by case basis. In this instance, I do not believe it would be appropriate to consider the local community as meaning the whole of Heathfield. It is my view, the local residents who are within the vicinity or walking distance of the Land could constitute the "local community" for the purposes of the s.88 test. Alternatively, it could also be argued that the users of the Land, although a small minority in comparison to the population of Heathfield as a whole (approx. 8000 residents), still form part of that local community. Therefore, the local community still derives a social benefit.

I therefore agree with the original decision that the actual non ancillary current use furthers the social wellbeing or social interests of the local community and consider that this brings it within S.88(1)(a).

- Whether 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.
18. The second condition that must be satisfied with regards to s.88(1) test, is whether it is realistic to think the use of the Land can continue to further the social wellbeing / interests. During the oral hearing the Owners confirmed that negotiations are ongoing with a major developer regarding the potential development of the site.
19. To date, no planning permission has been granted to change the planning use of the Land to residential (C3). It should be noted that a planning application (reference WD/2016/2063/MEA) had recently been submitted, however the application was withdrawn by the Owners prior to formal determination.
20. The Owners submit that it is not realistic to think the use of the Land can continue as it is their intention, with assistance of the developer, to fence off and prevent public access to and use of the Land.
21. It is my view that it is realistic the use of the Land can continue. The s88(1)(b) test only requires the Council to consider whether an outcome is "realistic" in all the circumstances. It does not impose a higher test of what is the "most likely outcome". I believe that it is entirely realistic, that the Owners could continue to maintain the status quo (as has been the case for many years) and for no fencing to be erected, thus the use would continue. Alternatively, I think it is also plausible that until such a time planning permission is obtained to

develop the site, the Owners could enter into a licence with the Nominator or such other community body / association to regularise the unauthorised use of the Land.

Therefore, I consider that it is realistic to think that there can continue to be this use which would further the social wellbeing or social interests of the local community and that the test in s.88(1)(b) is satisfied.

Conclusion and Decision

22. Having reviewed the original decision and considered the additional information submitted as part of the review (including the oral hearing), I am satisfied that the Property meets the test set out in s.88(1) of the Act and that the Council's decision to include Land in the list of assets of community value was correct.
23. The Property will remain on the successful nominations register for a period of 5 years from the 5th October 2017 unless a relevant disposal pursuant to 95(1) of the Act takes place, whereby the Property will then be removed from the listing with immediate effect and all restrictions relating to its ACV status removed.

Isabel Garden
Director of Environment and Community Services
Reviewer on behalf of Wealden District Council

Right to Appeal

You have the right to appeal against this decision notice to the First-Tier Tribunal (General Regulatory Chamber). Information about the appeals process may be obtained from:

General Regulatory Chamber
HM Courts & Tribunals Service
PO BOX 9300
Leicester
LE1 8DJ

Telephone: 0300 123 4504

Website: <https://www.gov.uk/guidance/community-right-to-bid-appeal-against-a-listing-decision>

If you wish to appeal against the decision notice, you can obtain information on how to appeal along with relevant forms from the Information Tribunal website referred to above.

Any notice of appeal must be served on the Tribunal within 29 (calendar) days of the date on which this decision notice is sent.