FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Community Right to Bid

Tribunal Reference:	CR/2015/0002
Appellant:	C, S, and D Trouth
Respondent:	Shropshire Council
Second Respondent:	Caynham Village Hall Committee
Judge:	Peter Lane

DECISION NOTICE

Introduction

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

2. Section 88 of the 2011 Act provides as follows:-

> "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."

3. On 17 June 2014 the second respondent nominated under the 2011 Act (i) a playing field adjacent to the former Caynham Primary School and (ii) a car park, adjacent to the same site. Both pieces of land are situated in the village of Caynham, near Ludlow, within the area of the first respondent. The playing field and car park are owned by the appellants.

4. Following the first respondent's decision to list the playing field and car park, the appellants requested a review. This was undertaken in December 2014 by Christopher Edwards, Area Commissioner (South) for the respondent. The result of the review was to maintain the playing field and car park on the statutory list. The appellants appealed that decision to the Tribunal. The parties are content for the appeal to be determined without a hearing. In the circumstances, I am satisfied that I can properly determine the issues without a hearing.

History

5. The history of the two pieces of land is, I find, essentially as follows. The playing field and the car park were both originally part of the Caynham Court Estate. The Dale family gifted the Village Hall and its plot to the community in 1966. The playing field was leased to Caynham Primary School in 1975 by Dale Turkeys Ltd, the then owners. In 1977, Dale Turkeys Ltd leased the car park to Caynham Village Hall. A development company, Brew Glen Ltd, subsequently acquired the playing field and car park. When Brew Glen went into administration in 1996, the appellants purchased the property from Brew Glen.

6. According to heads of agreement of 13 July 1976, between Dale Turkeys Ltd and Caynham Parish Room Committee, the car park lease provided that the car park was to be used "only for car parking or as a play area". A lease dated 21 May 1986 between Brew Glen Ltd and Shropshire County Council, concerning the playing field, provided for the playing field to be used "for purposes connected with the Caynham Church of England (Aided) School or as a playground for use by the Children of the Village in and out of school hours and during school holidays and for no other purpose". Subsequent leases of the playing field had the effect of continuing that use. The playing field is not, however, any longer subject to a lease, given that in 2011 the school was relocated to Ashford Carbonel and the school buildings at Caynham were closed. The car park is also no longer the subject of a lease to (what is now) the Village Hall Committee.

7. Applications for planning permission by the appellants to develop the playing field for housing have been refused by the first respondent. An appeal against the refusal of application 13/03834/OUT was dismissed by the planning inspectorate on 11 February 2015.

8. The current stated intention of the appellants is to continue to press for planning permission in respect of the playing field. The same is true of the car park. Both the playing field and the car park have been respectively fenced and boarded off to prevent any use being made of them by third parties. Mr C Trouth, in his witness statement of 1 April 2015, says that:-

> "5. As to the future use of the Playing Fields, I can confirm that we have made planning applications to develop the land which so far have been refused. However, our intention is to continue to develop the land in the future. We have been made aware of new schemes by the Government to boost land supply for housing and we continue to explore all of those future possibilities and development opportunities.
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> 6. Our intention is not to leave the Playing Fields for the next five years for the use of the community. The Playing Fields are now overgrown and the main access through the Car Park is boarded off.

So far as the car park is concerned, Mr Trouth says:-

> "… an intention is definitely in the next five years to develop the land in a similar way as the Playing Fields. Not all potential development opportunities have been exhausted. There seems to be plenty of opportunities to develop the land and our intention is to do so. There is no intention to take the boarding down and allow the Car Park to be used by the local community in the foreseeable future or at least in the next five years".

9. The second respondent states that there have been three offers made by the appellants to the Village Hall Committee to lease them the car park, in return for

the Parish Council removing its objection to the development of the playing field: in June 2012, when the original application for six houses was submitted; on 2 November 2013, when the revised application for 4 houses was produced; and most recently in May 2014, when the latest application was considered by the first respondent's planning committee.

Discussion

(a) The playing field

10. In reaching a decision in this appeal, I have had regard to all the written materials and submissions, including that not specifically mentioned in this decision. So far as the playing field is concerned, I find as a fact that the requirement of section 88(2)(a) of the 2011 Act is satisfied. Plainly, there was a time in the recent past when an actual use of the playing field, that was not ancillary, furthered the social wellbeing or interests of the local community. For many years, the lease has made it plain that use of the playing field was permitted for local children, quite apart from use of the playing field for the purposes of school recreation. The appellants have put forward no evidence to show that there was, in reality, no use made by local children or that use by local children was, on the facts, merely ancillary. The terms of the lease permitted such use both inside and outside school hours, with the result that, in terms of time at least, local use would far outweigh school use. Furthermore and in any event, significant use has been made of the playing field, with permission, as a result of the holding of village fetes, up to 2011.

11. So far as future use is concerned, I have had full regard to the stated intentions of the appellants, which are to continue to pursue their aim of development and to exclude the community from the playing field. The case for the appellants is that "it is more realistic to think" that the playing field will not be used for relevant social purposes in the next five years. As the first respondent's response points out, however, (paragraph 16) this is not the correct legal approach. As has been made plain in a number of decisions, the answer to the question of what is "realistic" may admit of a number of possibilities. In order to be "realistic", one possibility does not need to be more likely than all of the others. A possibility will not be "realistic" if it is merely fanciful.

12. The issue, therefore, is whether it can be said, looking at the present position, that future relevant community use of the playing field is merely fanciful or, in other words, unrealistic. I do not consider that the appellants have shown this to be the case. Their planning application to redevelop the playing field has been dismissed on appeal as recently as February 2015. The fact that, in Mr C Trouth's words, the appellants "continue to explore all … future possibilities and development opportunities" does not mean in any sense that, looking at the next five years, I should assume that the only realistic outcome is that the appellants

will succeed in their planning objectives regarding the playing field. The terms of the inspector's report certainly give no such indication.

13. I have, of course, had full regard to the stated intentions of the appellants regarding community use. However, as has been pointed out, such a stated intention cannot be determinative of the question to be answered in section 88(2)(b) of the 2011 Act; since, otherwise, listing would be possible, in effect, only with the consent of the landowner. One possibility, which cannot be dismissed as unrealistic in the current circumstances, is that the appellants conclude that redevelopment of the playing field is not going to occur within any commercially viable timescale. In such circumstances, a sale of the site would be a distinct possibility. Another realistic scenario is that the appellants decide to permit relevant community use, without giving up on their long-term development plans. In this regard, I note what the planning inspector had to say about the present condition of the overgrown playing field being "likely to provide a habitat to numerous birds and animals". Bringing the playing field back into social recreational use may well eliminate this particular potential obstacle to ultimate redevelopment.

14. For these reasons, the playing field meets the requirements of section 88 of the 2011 Act.

(b) The car park

15. I turn to the car park. It is common ground that the relevant use of this land is as a car park. The appellants contend that the "primary use of the car park is use for parking cars". Up until the time when the car park was boarded off by the appellants, it is also common ground that the car park provided parking for those attending activities in the Village Hall. Those events included meetings of the Women's Institute, Gardening Society, Shropshire Village Hall Quiz, Yoga classes, Book Exchange, Children's Film Shows, other social gatherings and civic functions. Recommending refusal of outline planning permission for development of the car park, the first respondent's development manager found that the car park "has served a useful purpose providing unrestricted off road parking for the school and the village hall. The car park has been closed and objections have been made to the loss of this facility".

16. The case for the appellants is that the use of the car park was "ancillary" for the purposes of section 8 to the use of the village hall and, accordingly, the requirements of section 88 cannot be satisfied. The first respondent's position as to the car park is "more neutral", according to its response of February 2015. The first respondent submits that the car park "is an essential parking facility for those attending the village hall. In providing that parking facility, this land furthers the social well being and interests of the local community". The first respondent's analysis is that the car park "has only one use. That use furthers the

social wellbeing and interests of the local community because it allows people to attend the village hall". The response continues:-

> "26. It is a matter for the Tribunal whether or not that analysis was correct. If the Tribunal considers that whereas the Car Park has only one use, that sole use was 'ancillary' for section 88 purposes (in that it furthered activities taking place on another piece of land) then the Council will accept that decision. Indeed, the Council would benefit from the Tribunal's guidance either way on what is not a 'clear cut' question in this context (to use the language from the review decision)."

17. The second respondent notes guidance contained in the Government's "planning portal" which states:-

> "Where land is or buildings are being used for different uses which fall into more than one class, then overall use of the land or buildings is regarded as a mixed use, which will normally be sui generis. The exception to this is where there is a primary overall use of the site, to which the other uses are ancillary. For example, in a factory with an office and a staff canteen, the office and staff canteen would normally be regarded as ancillary to the factory." (http://planningguidance.planningportal.gov.uk/blog/guidance/when-is-permission-required/what-is-development/ Paragraph: 010 Reference ID:13-0102-0140306)

18. The second respondent cites the Royal Town Planning Institute as saying:-

> "Ancillary uses are smaller/secondary use that takes place within premises classified by their main use. A popular ancillary use is the café/restaurant element of a garden centre."
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> (www.rtpi.org.uk/media/5511/Response-2-sent-1.pdf 'How change of use is handled in the planning system')

19. Relying on these statements and examples, the second respondent contends that the argument for the appellants on this issue "would only be correct if the Car Park formed part of the premises of the Village Hall. It does not (and if it did there would be less need for it to be listed on the Asset Register)".

20. It is plain from the passages cited by the second respondent that, in planning law, one takes a particular planning unit (referred to as a "site" and "premises" in the examples) and then examines the uses to which that unit is put, in order to see whether one such use is ancillary to another.

21. Since section 88 refers in general terms to "a building or other land", it would be theoretically possible for nominators (in the RTPI's example) to nominate merely the land within the garden centre that is being used for a café or

restaurant, on the basis that the café or restaurant is used by local persons and thus furthers relevant social wellbeing or social interests. There are plainly problems with such a scenario; and I do not consider Parliament envisaged that it would lead to the café or restaurant being listed as an asset of community value. Accordingly, in such a situation, it might be said to be open to the listing authority to refuse to treat the nomination as relating to anything other than the land comprising the entirety of the garden centre, to which the café or restaurant would plainly be ancillary. Alternatively, in order to preclude the 2011 Act being used in a way which I consider Parliament plainly did not intend, one could treat the references in section 88(1) and (2) to ancillary use as extending beyond the confines of the nominated land to the actual land unit – in this case, the garden centre – of which the café or restaurant is, on any rational view, merely a component part.

22. Both approaches achieve the same result; but I consider the second approach is preferable. It avoids "threshold" questions about what land may be the subject of a "community nomination" (section 89). The issue of whether the land alighted upon by the nominators is to be treated as a unit in its own right, within which the categorisation of uses as primary or ancillary falls to be determined, will be a question of fact and degree. Although the concept of the "planning unit" will often provide a useful guide to answering this question, I do not consider that it is necessary or desirable to make that concept the sole, automatic touchstone. Each case will be fact-specific.

23. In the present case, the history of the land comprising the car park, as set out above, and of the village hall, is such that I find as a fact the car park falls to be regarded as its own land unit for the purposes of the 2011 Act. Although the car park has a close geographic and functional connection with the village hall, I do not consider that this connection is such as to compel the conclusion that the land unit is the village hall and the car park. The history of different ownerships (originating almost 50 years ago) and of different objectives of the different owners means that it is not appropriate to treat the car park in that way. Accordingly, for the purposes of the 2011 Act, I find that the car park has its own main use (as the appellants state); namely, land for the parking of cars. There is no ancillary use.

24. It is plain on the facts that the car park satisfies the requirement of section 88(2)(a). The issue is whether it is realistic to think there is a time in the next five years when there could be a return to the use of the car park, as a car park. I find that it is realistic so to think. Again, I have had full regard to the stated intentions of the appellants. The planning position regarding the car park is, however, currently such that it cannot be said that redevelopment is the only realistic scenario within the next five years. I also have regard to the evidence concerning offers (albeit hitherto rejected) by the appellants to the Parish Council to return the car park to its previous use. That use, I find, furthered the social wellbeing and social interests by providing convenient means of access (particularly for

those with mobility issues) to the wide range of social activities taking place in the village hall. It is realistic to think that that use may resume within the statutory timescale, either because the appellants conclude that redevelopment within a commercially viable timeframe is unlikely to be achieved, and so decide to dispose of the land, or because they decide that there is utility in letting car parking resume, whilst they continue to press for planning permission.

Decision

25. This appeal is dismissed.

Peter Lane

Chamber President

Dated 11 June 2015