



**FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
Community Right to Bid**

**Appeal Reference: CR/2017/0009**

**Heard at Fleetbank House  
On 15 December 2017**

**Before**

**JUDGE CHRISTOPHER HUGHES**

**Between**

**CRENDAIN DEVELOPMENTS LIMITED**

**Appellant**

**and**

**EALING COUNCIL**

**First Respondent**

**GOLDSMITHS RESIDENTS ASSOCIATION**

**Second Respondent**

Appearances

The Appellant:

Mr David Parry (Director)

First Respondent:

Mr Ned Westaway (instructed by Helen Harris,  
Director of Legal and Democratic Services)

Second Respondent:

Mr Alistair Milward

Cases:-

Wellington Pub Company v RBKC & Norland Conservation Society CR/2015/0007

Banner Homes Limited v St Albans City and District Council & Verulam Residents Association [2016] UKUT 232 (AAC)

Welwyn Hatfield Borough Council v Secretary of State for Communities and Local Government and another [2011] UKSC 15 [2011] 2 AC 304

## DECISION AND REASONS

### **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.

### **Legislation**

2. The Localism Act 2011 provides:-

#### **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)).

#### **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;

### ***Assets of Community Value (England) Regulations 2012***

#### **Land which may not be listed**

3.

A building or other land within a description specified in Schedule 1 is not land of community value (and therefore may not be listed).

#### **Procedure when considering whether to list land**

7.

The responsible authority must decide whether land nominated by a community nomination should be included in the list within eight weeks of receiving the nomination.

#### **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.

#### SCHEDULE 1

Land which is not of community value (and therefore may not be listed)

1. – (1) Subject to sub-paragraph (5) and paragraph 2, a residence together with land connected with that residence.

(2) In this paragraph, subject to sub-paragraphs (3) and (4), land is connected with a residence if –

(a) the land, and the residence, are owned by a single owner; and

(b) every part of the land can be reached from the residence without having to cross land which is not owned by that single owner.

(3) Sub-paragraph (2)(b) is satisfied where a part of the land cannot be reached from the residence by reason only of intervening land in other ownership on which there is a road, railway, river or canal, provided that the additional requirement in sub-paragraph (4) is met.

(4) The additional requirement referred to in sub-paragraph (3) is that it is reasonable to think that sub-paragraph (2)(b) would be satisfied if the intervening land were to be removed leaving no gap.

(5) Land which falls within sub-paragraph (1) may be listed if –

(a) the residence is a building that is only partly used as a residence; and

(b) but for that residential use of the building, the land would be eligible for listing.

2. For the purposes of paragraph 1 and this paragraph –

(a) “residence” means a building used or partly used as a residence;

(b) a building is a residence if –

(i) it is normally used or partly used as a residence, but for any reason so much of it as is normally used as a residence is temporarily unoccupied;

(ii) it is let or partly let for use as a holiday dwelling;

(iii) it, or part of it, is a hotel or is otherwise principally used for letting or licensing accommodation to paying occupants; or

(iv) it is a house in multiple occupation as defined in section 77 of the Housing Act 2004(1); and

(c) a building or other land is not a residence if –

(i) it is land on which currently there are no residences but for which planning permission or development consent has been granted for the construction of residences;

(ii) it is a building undergoing construction where there is planning permission or development consent for the completed building to be used as a residence, but construction is not yet complete; or

(iii) it was previously used as a residence but is in future to be used for a different purpose and planning permission or development consent for a change of use to that purpose has been granted.

3. Land in respect of which a site licence is required under Part 1 of the Caravan Sites and Control of Development Act 1960(2), or would be so required if paragraphs 1, 4, 5 and 10 to 11A of Schedule 1 to that Act were omitted.

## ***The appeal***

3. The land under consideration is about 0.6 acres in extent in Acton in the London Borough of Ealing situated to the rear of the Goldsmiths Almshouses built in 1811. Since the 1940s the land has been used by members of the local community as allotments. The Goldsmiths Company sold the almshouses and adjacent land to a property company in 2001. This company applied for planning permission to improve the almshouses in 2007, in granting permission conditions protecting the allotments were imposed. On appeal the planning inspector noted that the allotments were “well-cared for” but concluded that the conditions were unnecessary to protect the allotments. The allotments were sold at auction in 2012 and were bought by Mr Parry in his own name.
4. Mr Parry served notice on the allotment holders to vacate the site. In response on 19 July 2015 the Second Respondent (“GRA”) applied to the First Respondent (“The Council”) for these allotments to be listed as an asset of community value. The Council’s processes were not as expeditious as they should have been. While by 20 August 2015 the extent of the land had been identified it was not until 26 November 2015 that the owner was contacted for comment (he did not respond). A draft report was prepared recommending listing on 28 January 2016 but was not signed. Mr Parry contacted the Council for the first time seeking to know the outcome of the application on 15 August 2016. In September 2016 Crendain Limited (“Crendain”) was formed with Mr Parry as its sole director and on 29 September 2016 Mr Parry sold the land to Crendain for the sum of £150,000; the transfer was registered on 21 October 2016. On 1 November 2016 Crendain became the registered owner of an adjoining house 10 Perryn Road. On 14 November 2016 Mr Parry again contacted the Council arguing that he believed the land was exempt from listing; on that date the Council conducted a land registry search which confirmed the change in ownership of the allotments. On 27 March 2017 the Council finally listed the land in that decision the Council officer concluded that the allotments and the property at 10 Perryn Road lacked the necessary functional connection and therefore the exemption from listing of residential property did not apply. Mr Parry requested a review of the listing on 5 April 2017.
5. The Council held a hearing of the request for review and by a decision of 25 May 2017 upheld the designation. It was uncontested that allotment use was a community use and this only ceased in 2015. The allotments were designated as a Community Open Space in 2012. 10 Perryn Road was acquired in October 2016; it and the allotments were held on separate registered titles. Mr Parry claimed that the allotments were being used as a garden for 10 Perryn Road, however this was a change of use requiring planning permission and no application had been made. The decision noted that:- *“an access between 10 Perryn Road and the allotment was created, after the purchase of 10 Perryn Road, by demolishing part of a garden wall. It appears that there is no historic connection between the two pieces of land.”* The reviewer found that:- *“given the date of purchase of 10 Perryn Road I am not satisfied that there is a sufficient functional relationship between it and the allotments, in order for the allotments to be considered as part of a garden.”* The reviewer therefore concluded that the land was eligible for listing and the exemption from listing for residential land was not applicable.
6. In the notice of appeal Crendain made two substantive points:-

- It argued that there was a current physical and functional relationship between 10 Perryn road and the allotments, they had 6/7 metres of common boundary with direct access between the two, they were both currently being renovated and while not currently physically occupied they were still in joint use and had been since 21 October 2016. Planning considerations were irrelevant since the question was of actual rather than authorised use.
  - There was no prospect of community use in the next five years; the residents had not bid at the auction in 2012. While the council had stated that the residents had expressed a willingness to bid for the land in future there was no evidence from the residents of their ability so to bid. There was no access to the land other than using Crendain's rights of way however Crendain would not assign those rights. Crendain had a range of plans for the use of the land for which it would submit applications for planning permission none of those would permit community use.
7. In the hearing Mr Parry (for Crendain) repeated these points. The land was excepted land which meant that it should not have been designated. Furthermore he had no intention of disposing of the allotment land separately or of permitting community use of it there was no possibility in practical terms of a community use. He stated, but produced no evidence, that the house was currently occupied by a friend and the friend was using the allotments as part of the garden. I find this improbable, I am not satisfied that there is any such use and occupation.
  8. A recent photograph was produced showing a view of the end of the garden at 10 Perryn Rd and the boundary wall separating it from the allotment land. The end of the garden appears to have some paving and gravel around a circular pond. Adjacent to it is a large shed and behind both is a wall approximately 1.5-1.8 m high with a jagged hole about 80-100cm wide broken in it. There is a difference in level between the two areas of land. The allotments, following removal and destruction of plants and allotment-holders equipment as well as spraying of herbicide is drab and barren.
  9. In resisting the first ground of appeal the Council argued that the residential exemption did not apply, the allotment site has never been ancillary to the residential use claimed. It was a separate planning unit with a separate designation. The history of the site was relevant to the issue and the acquisition of 10 Perryn Road was not sufficient to circumvent the provisions of the Localism Act. The Council relied on the decision of this tribunal *Wellington Pub Company* in arguing that particular factors in the identification of a planning unit were useful in considering Schedule 1 of the Act. These included the physical and functional relationship of the properties. There was no evidence that 10 Perryn Road was inhabited. It was stretching beyond breaking point to argue a connection between the properties given the significant difference of level and the wall. Shortly before the review hearing Mr Parry had knocked a hole in that wall. There was not ready access and the partial demolition of the wall in this conservation area would require consent. The first ground therefore fell.
  10. With respect to the second ground of appeal the test was it whether it was realistic to think that it could be brought into community use in the next five years. There were

clearly a range of possibilities and the Appellant's approach, that he would not permit it, was essentially trying to render the statutory framework entirely voluntary. The Council relied on the reasoning in *Banner Homes* that whether a future community use was a realistic prospect was a matter for the decision-making council in the circumstances of the case.

11. Mr Milward emphasised that the land had been of community benefit for many generations, considerable shock and distress had been caused by the eviction of the allotment holders, 10 Perryn Rd had been vacant for some time, the allotments were precisely the sort of land which designation as an ACV was intended to protect. The written submissions on behalf of GRA gave details of its membership and expressed confidence in the ability and determination of GRA to acquire the property for the benefit of the community. The submission set out planning considerations rendering it unlikely that planning consent for development could be obtained and argued that under such circumstances the appellant's best hope of recouping his expenditure was to sell the property to the community group.

### Consideration

12. This appeal has proceeded in two grounds; the first that the residential exemption applied; the second that there is no realistic prospect of future community use. Before proceeding to a consideration of those two grounds it is appropriate to consider the shortcomings of the handling of this matter by the Council. The application for listing was made on 19 July 2015. Regulation 7 of Assets of Community Value (England) Regulations 2012 requires the Council to make its listing decision within 8 weeks; i.e. by 13 September 2015. While some delay will often arise during a process such as this, a delay of over 18 months is a matter of considerable concern. If I were not deciding the substantive appeal on the basis that I am, then given the actions of the Appellant during that intervening period; his actions which were directed to creating facts to defeat listing could have been effective in causing de-the listing of this site and so depriving the community of the opportunity to protect the allotments as an ACV, a foreseeable and avoidable consequence of the Council's inaction.
13. Despite the Appellant's strenuous efforts to create facts to establish the residential property exemption I am not satisfied that it has done so. *Crendain's* case is that it owns a house, on the other side of a wall (through which it has now knocked a gap) it owns lands which have been historically used as allotments. The Appellant argues that the provisions in Schedule 1 to the Regulations (which are intended to give effect to the community right to bid) mean that these two parcels of land are connected and the allotment land is exempt from listing. This is resisted on the basis of the reasoning in *Wellington Pub* in that there is no functional or structural relation between the two, that they are distinct registered parcels of land with distinct histories of use and distinguished in planning terms, the use as a garden is contrary to planning law as is the partial demolition of the wall. I am satisfied that the latter is the correct analysis, there is insufficient nexus between the two parcels of land to justify considering them as a single unit. I am fortified in this analysis by the Upper Tribunal in *Banner Homes* of the reasoning of the Supreme Court in *Welwyn* where Lord Mance stated (paragraph 54):- "*Whether conduct will on public policy grounds disentitle a person from relying upon an apparently unqualified statutory provision must be considered in context and with regard to any nexus existing between the conduct*

*and the statutory provision.*" In this case we have a long history of use, attempts to change the planning use, a claimed deliberate breach of planning control (use as a garden, demolition of a wall) in the interests of private gain and at the expense of the public interest of the ACV. I am not satisfied on the evidence that there is any real occupation of the house as a residence in recent times and at no time a use of the house and garden as a single unit, on any proper construction of the statute there is no connection. I am however satisfied that to recognise these actions as effective would breach the *in bonam partem* principle. Furthermore the inaction of the Council in failing to discharge its duty in a timely manner (also laid down in the regulations which create the residential exemption) which occasioned the opportunity for the Appellant to attempt to create new facts, should not be allowed to defeat the public interest the Council is supposed to protect. At the time that the Council should have decided the case (in autumn 2015) the house in Perryn Road and the allotments were in separate ownership. The Localism Act creates rights for communities to obtain some protection for assets of community value. A statutory instrument made under the Act creates a duty on the Council to act promptly and the same statutory instrument also creates an exception to the types of land which may be listed as assets of community value. The statutory instrument should not be construed in such a way that the breach by the Council of its duty under the Regulations to decide the application for listing within eight weeks enables the owner to defeat the purpose of the statute. Regulation 7 provides that:- "*The responsible authority must decide whether land nominated by a community nomination should be included in the list within eight weeks of receiving the nomination*" This is a mandatory obligation. I am satisfied that in considering whether land is connected, the proper time to evaluate the situation is the date by which the decision should have been made.

14. The second ground of appeal may be dealt with more briefly. This relies entirely on the expressed intention of Mr Parry to prevent any community use of the land. As has been observed above to permit that to be determinative would be to render the entire statutory framework meaningless. At the moment Mr Parry's company has substantial capital tied up in two non-performing assets. The permitted use of the allotment land is for that use. Various planning policies are designed to protect such use, to maintain green spaces for community use in the middle of the city and to prevent more intensive development. This far Mr Parry has been unsuccessful in obtaining planning consent for development; the continuation of the ACV listing will provide further protection for the green space and render any development which does not provide community benefit more unlikely. The implicit position of Mr Parry is that the company will retain the land and continue to seek planning consent until something is granted. It is entirely possible that the Council will continue to resist development. The period of protection is for five years. To consider the level of uncertainty over that period of time it is salutary to consider the last two five year periods. The last two five year periods have seen the 2008 banking crisis and the vote to leave the European Union in 2016; both were largely unexpected and both have had significant impacts; the next few years are foreseeably unforeseeable. The economic pressures and his own personal circumstances may be such that Mr Parry will change his mind and the company he controls may adopt a different approach to the possible community use of the land, or may decide to dispose of the interest in the land entirely to another person or entity prepared to develop community use of the land. These are among foreseeable consequences occurring in the period of listing.



15. For the reasons stated I am satisfied that the grounds for listing this land under section 88 are made out and this appeal is dismissed in its entirety.

**Judge Hughes**

**9 January 2018**