

Open spaces and the ACV regime

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Public houses have received great publicity in the context of the Assets of Community Value regime. With the changes in the Permitted Development Rights regime making it harder to redevelop a public house the number of contested nominations in relation to them is now reducing. As a result other areas of ACV dispute have moved to the fore. One area of focus now increasingly highlighted is open spaces. Often local residents will not want to lose unbuilt on land where they walk or exercise but the land could be developed to provide much needed housing. Nominating the land is seen as one way of seeking to prevent the grant of planning permission for a residential development. Once such planning permission is granted all hope of retaining the land as an ACV will be lost. No community interest group will be able after grant to fund the retention of the land and the only possible future use of the land is as housing.

This conflict between the conflicting need for open spaces to be retained and the need for new housing has been playing out in many parts of the country. It lies behind the saga concerning Bedmond Lane Field in St. Albans. This field comprises twelve acres of land described by Lady Justice Sharp in the Court of Appeal as having “been used by the local community for more than 40 years for various peaceful and beneficial recreational activities, such as children's play, walking, kite flying, exercising dogs, and the photography of flora and fauna. Banner Homes did not give express permission or grant a licence for the local community to use the Field (beyond the public footpaths); but it was well-aware the Field was used in this way by the local community, it made no objection, and until recently, it took no steps to stop it.” In an attempt to prevent it being developed for housing a group of local residents nominated it as an ACV. The listing decision was reviewed and then appealed unsuccessfully to the First-tier Tribunal (CR/2014/0018), the Upper Tribunal [2016] UKUT 232 (AAC) and the Court of Appeal [2018] EWCA Civ 1187.

Such a situation is mirrored in the ACV listing of the River Lawn in Tonbridge which is half an acre of land which the Council owns and wants to sell for a housing development. In an attempt to stop this the land was nominated and listed as an ACV.

A number of considerations need to be taken into account in relation to such open spaces:-

(i) Does the land further the social wellbeing or social interests of the local community? The land must be or have been in the recent past so used in order to satisfy the first statutory qualifying condition for an ACV. What this requires can be seen in the comparison of the nomination of two pieces of land which produced different outcomes. A 46 acre greenfield site known as Oliver's Battery near Winchelsea was nominated in January 2018. In the judgment of Judge Moira MacMillan (CR/2019/0001) the land was described as having “been used for agricultural purposes for many years. More recently it has been

designated as set-aside land under successive government schemes which allow grants to be paid when agricultural land is left uncultivated, planted as woodland or used to cultivate specified crops. The Land has qualified for set-aside grants on the basis that it has been left uncultivated. I find that, even when left uncultivated, agricultural use remains a current actual use of the Land that is not ancillary.

51. I find that the activities for which the Land is used by the local community as described in the bundle are clear examples of the recreational and sporting interests envisaged by s. 88(6) of the 2011 Act. These activities are an actual current use of the Land and further the social wellbeing and social interests of the community.”

The activities included walking, dog-walking, running, riding, cycling, kite-flying and fitness classes. The responses to a survey put the numbers using the land at 5-20 persons at any one time although at times as many as up to 100 were on the land. The listing of this land was upheld in the First-tier Tribunal appeal.

In contrast just over 87 acres of farmland at Lye Green Farm and Nashleigh Farm near Chesham was listed on 5th July 2019 but on the review of that decision removed on 3rd December 2019. This land was on a working farm with mixed arable and livestock farming. It was fenced off from public rights of way in the area. In careful reasons given for the review decision it was stated that

“10.2 The listed land is crossed by public rights of way, and I have seen no satisfactory evidence that the uses referred to in paragraph 6.1 have been carried out other than along these routes or around the edges of the listed land.

10.3 Whilst the footpaths viewed in isolation may further the social wellbeing and interests of the local community, my conclusion is that this footpath use is ancillary to the actual current use of the land, which is plainly agriculture/farming. I note that the aerial photographic layers show the listed land as agricultural land with hedgerows dividing it into ‘fields’.”

It was considered that the agricultural use of land could not by itself further the social well being or social interest of the local community and that as in the Banner Homes case a footpath by itself could not be listed as an ACV.

In the Lye Green case the Council was not persuaded that there was a non-ancillary recreational use of the farmland which was being actively farmed. In contrast in the Oliver’s battery case there was particularly bearing in mind that the area comprised set aside land.

(ii) is it realistic to think that the land will be used in the future to further the social wellbeing or social interests of the local community? This is the second statutory qualifying condition which needs to be satisfied in order that nominated land be listed as an ACV. As stated above if planning permission for a residential development is granted then there is no possibility of this second qualifying condition being satisfied. The funding level is pushed too high for a community interest group. This can occur even before such a grant. Allocation of

the land to housing in a local plan can have this effect. It was a factor considered in the review decision relating to the land at Lye Green albeit that it did not carry weight in that case (para. 11.2). It has been a decisive factor with nominations of other properties.

(iii) if ACV listed will this prevent the land being developed for housing? The ACV listing of public houses has not meant that a grant of planning permission for conversion to residential use would never be made in relation to such public houses. Some owners have achieved this objective after a number of planning applications. In some cases it has seemed to be a wearing down process. The same may be true with ACV listed open spaces. Notwithstanding the ACV listing of the River Lawn mentioned above an application to register it also as a village green has failed. It is reported in the local press that the Council has given the local group six weeks to find a purchaser for the half acre land valued at £2,125,000 in 2018 and if it fails to do so then the land will be sold to developers. That valuation would appear to be without planning permission.

On 12th February 2020 St. Albans Council granted planning permission (ref. 5/2019/2892) to convert the use of Bedmond Lane Field from agricultural to the keeping of a horse and authorising the construction of two accessways. It is acknowledged by the applicant that this is the first step in seeking to obtain authorisation for a residential development. A number of similar planning applications had previously failed but the removal of a stable for the horse from the application secured this permission. As regards the ACV listing of the field it was stated in the planning officer's report that the Council's policy is :

"8.8.3 "The provisions do not place any restriction on what an owner can do with their property, once listed, if it remains in their ownership. This is because it is planning policy that determines permitted uses for particular sites. However the fact that the site is listed may affect planning decisions – it is open to the Local Planning Authority to decide that listing as an asset of community value is a material consideration if an application for change of use is submitted, considering all the circumstances of the case"."

The report then further stated:

"8.8.8 Furthermore, it is considered that the proposals would not conflict with the purpose of the ACV listing which is to provide an opportunity for the local community to bid for / buy the land on the open market if it came up for sale.

8.8.9 Indeed, as set out at paragraph 2.3 above, the Inspector in relation to the appeal against the refusal of application 5/2014/1394 concluded that "there is nothing to indicate that the site would be lost as open land as a result of the proposal. As such its status as ACV is of limited weight in reaching my decision".

The field was listed as an ACV in March 2014 and so the ACV listing expired in March 2019. As yet no fresh nomination has been made. It has been recently reported in the Herts Advertiser that the "group is working on an application to have the meadow's ACV status

extended, but said the owner of an ACV can make it "almost impossible" to renew the status by closing the area off to the public."

As a result of the ACV listing a wire fence was put up by the owner which whilst not blocking the use of the public rights of way prevented access to the remainder of the field by the public. Lord Justice Davis stated at para. 69 that it "has been an unfortunate consequence in this case that, by reason of the nomination, Banner Homes felt constrained, in order to protect its commercial interests as the land owner, to fence off the Field from the public footpaths. It would be a further unfortunate consequence if other land owners, perhaps holding land with a view to potential development in the future, likewise were to feel constrained to restrict public access to their land. That particular unfortunate result which has arisen in this particular case may prove to be an unintended consequence of the 2011 Act. But be that as it may, that can provide, of itself, no reason for departing from the clear statutory purpose behind, and the clear statutory language of, the 2011 Act."

It is this fencing which has discouraged the local group who consider that a fresh nomination will have to establish the benefit derived from the field by the local community even though it is now fenced off. This is a point that has arisen with closed public houses. It is an undecided point whether the recent past should be extended if an asset has been unused since the ACV listing. It is over six years since the original nomination of this field. It would appear that this saga still has life in it with an as yet uncertain outcome. As with many sites in the end the strong need for new housing may win through.

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