

Guidance gleaned from ACV appeals and Planning Inspectors' decisions

The public interest in Assets of Community Value ("ACV") has been caught and is growing. This is emphasised not just by the regular daily output of news items on the topic but the ever widening range of the type of assets nominated. When something is to happen to land or a building which is not liked by local residents often now the first reaction is to threaten an ACV nomination. The scarcity of the asset such as the last pub in the village is no longer a relevant consideration as the multiple listing of all twenty pubs in Otby illustrated.

Alongside the continuing flow of nominations there have now also been twenty-three appeals to the First-tier tribunal from listing reviews. The commendably short judgments contain helpful guidance which put some flesh on the legislative skeleton of the ACV regime. Many of the phrases used were in deliberately general and vague terms with little by way of official guidance leaving it to the administering local authorities to decide what such phrases meant. There is now building up a body of guidance from the judgments of Judge Warren and Judge Lane which include consideration of the following issues.

In addition there have been a number of decisions by Planning Inspectors in relation to ACV and a useful judicial review decision. The planning position regarding ACV is increasingly important.

(1) "in the opinion of the authority" – the first point to note is that the guidance given by judges has a particular significance because it has been stated that on an appeal no extra weight is given to the views of the relevant local authority¹. The appeal is by way of rehearing taking into account all facts which occur between the listing review decision and the appeal as well as those occurring before². There is no question of applying the Wednesbury principle. The decision of the judge is a fresh decision on the facts replacing that of the authority notwithstanding that section 88 provides that to qualify as an ACV the criteria must be satisfied "in the opinion of the authority". This approach may be challenged but until it is successfully the judgments will provide useful examples as how the regime is implemented by the First-tier Tribunal.

(2) "furthering social wellbeing or social interest of the local community" – to qualify as an ACV the asset must either currently be being used or in the recent past have been used to further the local community's social wellbeing or social interests. There is no comprehensive statutory definition but it is expressly provided that it includes recreational, cultural and sporting interests. Judge Lane held in General Conference of the New Church v Bristol City Council³ that it did not include religious interests so that if a place of worship is to be listed then on the basis of that decision it would have to be because there has been other community use which is non-ancillary.

¹ Para. 7 Patel v Hackney LBC CR/2013/0005

² See, for example, Scott v South Norfolk DC CR/2014/0007

³ CR/2014/0013

The general factors which cause a use to be treated as a community use are not capable of scientific measurement but a more wide-ranging consideration of the circumstances is required. A good example is the judgment of Judge Warren in *Firoka (Oxford United Stadium) Limited v Oxford City Council*⁴. There were twenty-five matches a year played at the stadium. However, the judge considered that the role of the club went much wider because it “fosters community pride; stimulates daily conversations in pubs, work places and online; forges friendships and encourages the mix of generations.” (para. 11). Similar factors were referred to by Judge Warren in *Hawthorne Leisure Acquisition v Northumberland CC*⁵ with regard to public houses to which list was added the mixing of classes.

Inevitably authorities have been taking differing views as to whether certain assets can or cannot qualify as ACVs. One such type of asset is car parks used only for parking. The decision in *Trouth v Shropshire CC*⁶ makes clear that such an asset can be listed. On the facts of that case it was held to further the local community’s social wellbeing or social interests because it provided a convenient means of access to the social activities taking place in the adjacent village hall which was not listed.

(3) Ancillary/Non-ancillary use - to cause an asset to qualify as an ACV the community use must not be an ancillary use. It was thought that this meant that the community use had to be the primary use of the asset but that has been firmly dispelled (para. 9 of the *Firoka* judgment). Instead an approach that can be adopted by an authority is to identify the uses of the nominated asset either current (stage 1 of the process) or in the recent past (if the authority has moved on to stage 2 of the process). Those which further the local community’s social wellbeing or social interest then need to be assessed. There is a two pronged test to determine whether it is ancillary or non-ancillary.

(i) is the particular use significant (which does not require it to be the predominant use); and if it is then

(ii) is it supportive of a non-community use of the asset?

A significant community use which is not supportive of a non-community use will not be an ancillary use for these purposes.

In the *Firoka* case the use of the stadium by the Football Club was one of three uses with the other two being use by London Welsh and the hiring out of facilities for events. The London Welsh used the stadium more than the City’s football club whilst the greatest revenue came from the hiring out of the facilities. This did not stop the use by the football club being significant and it was not supportive of either of the other two uses so that it qualified for listing.

Apart from what is meant by ancillary there is a separate issue which has been recently considered by Judge Lane. This is the context in which it is determined whether a

⁴ CR/2013/0010

⁵ CR/2014/0012

⁶ CR/2015/0002 at para. 24

use is ancillary or not. Is it within the context solely of the land nominated or can it be by reference to a larger unit? Judge Lane held in the *Trouth* case that if the nominated land was part of a larger single unit then this issue of ancillary or non-ancillary use could be determined by reference to that larger unit.

The judge cited the example of a café in a garden centre when the café alone is nominated. The use of the café is supportive of the principal use of the garden centre and so an ancillary use preventing the café from being listed. To achieve such an outcome the judge considered that it was necessary to determine the issue in the context of the garden centre rather than just the café even if the nomination was limited to the café.

Interestingly in that case the judge held on the facts that the issue was to be determined in the context of just the nominated car park and not the car park taken with the adjoining village hall. This was because there had been a history of diverse ownership and occupation. In consequence parking was the principal use of the nominated asset rather than ancillary to the use of the village hall.

(4) “recent past” – if the first stage of the determination finds that there is no actual current community use then the appeal decisions make emphatically clear that in the second stage of the process when considering whether there is any such community use in the recent past five years will not automatically constitute the recent past.⁷ There is no precise period or means of measuring the recent past. It is for the authority to decide what constitutes the recent past in any case based on all the circumstances of the particular case. One factor which will be relevant is the length of time the asset has been used to further the local community’s social wellbeing or social interests. The longer such period the longer the period that the authority may consider constitutes the recent past. For instance, in *Crostone v Amber Valley DC*⁸ Judge Lane took into account the two hundred years use of the asset as a village pub. Other factors which may be material are the type of asset involved and the nature of the connection between the asset and the local community.

(5) “realistic prospect” – to qualify as an ACV there has to be a realistic prospect of future community use. What is required to establish a realistic prospect is clearer as a result of the appeal decisions? The test does not require that the community use will be the probable future use. What an authority needs to do is first ascertain whether the owner is in a position to prevent a future community use. If an owner wishing to change the use has the necessary planning permission and the funds and cannot be stopped then there is no realistic prospect of a future community use (*Spirit Pub v Rushmoor BC*⁹). Save in those circumstances the owner’s intentions will not be conclusive (*Patel v Hackney LBC*¹⁰).

If there is uncertainty as to the outcome as regards the owner’s intentions particularly if a planning application is needed and a grant is not assured then the authority needs to consider what possible future uses there could be. As regards any possible future

⁷ *Scott v South Norfolk DC* supra at para. 7.

⁸ CR/2014/0010 at para. 14

⁹ CR/2013/0003

¹⁰ CR/2013/0005

community use the test is low. The authority has to decide whether such a possible future community use is fanciful or more than fanciful. If the possibility is more than fanciful then for these purposes there is a realistic prospect of a future community use (as in *Worthy Developments v Forest of Dean*¹¹ and *Moat v North Lincolnshire DC*¹²). A realistic prospect of a future community use will then require the authority to consider whether or not such future use is an ancillary or non-ancillary use. It means that the threshold is set at a low level.

(6) Listing of only part of the nominated land - the ACV regime does not specify whether an authority has the ability to list only a part of the land nominated if the authority forms the view that not all of the nominated land qualifies as an ACV. This is a set of circumstances which crops up from time to time. In *Gullivers Bowling Club v Rother*¹³ the issue was debated because one of the two rinks had been disused for a significant number of years but notwithstanding this lack of use Judge Warren decided that the whole of the nominated land should be listed. However, he did say that there was nothing in the regime to prevent the authority from adopting such a course of action¹⁴. Similarly in *Punch Partnership v Wyre BC*¹⁵ in relation to a nominated public house there was substantial argument as to whether to exclude the car park and some of the grassed areas from the listing due to a proposed retail development. The consideration of such arguments suggest that it was accepted that if appropriate, which in the circumstances it was not, a listing of only part of the nominated land would have been a possible course of action open to the authority.

In such circumstances the approach may require a nuanced consideration by the authority. Does the community nomination form relate to a single nominated land or to more than one nominated land? If the nomination form contains more than one nomination then each should be considered separately without the result being conditional on the outcome as regards the other or others. This seemed to have been the approach in the *Trouth* case although not expressly spelt out. On the other hand if the nomination relates to a single nominated land and the authority considers that only part qualifies then it is suggested that the authority can list only the qualifying part provided that there is sufficient information available to the authority to allow it to accurately describe the part to be listed. The alternative would be to reject the nomination and for a fresh nomination to be made relating to only the qualifying part. This would seem to be an unnecessary waste of resources.

(7) Planning matters – Save as regards pubs listing does not impose any restrictions on the use to which a listed ACV can be put. This is a matter for planning law. There is little official guidance as to the consequence of listing in the context of planning. DCLG guidance

¹¹ CR/2014/0005

¹² CR/2014/0014

¹³ CR/2013/0009

¹⁴ At para. 9

¹⁵ CR/2015/0001

states that it is for the authority to decide whether ACV listing is a material consideration for planning purposes.

The only current restrictions are those imposed by the Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2015/659 which removes from the Permitted Development Rights regime listed or nominated public houses and requires that before commencing a development of any public house a request be made of the relevant authority as to whether it has been listed and a period of 58 days from the making of the request must first expire.

The significance of an ACV listing in the context of planning has recently been raised in *R (oao Loader) v Rother DC* [2015] EWHC 1877 (Admin) which involved judicial review proceedings over a planning permission to carry out a residential development at the listed Gullivers Bowling Club. The allegation was that the planning committee had been misled as to the effect of the listing. In rejecting this contention Mrs. Justice Paterson without any criticism set out (at para. 87) in full the minutes of the advice given by the authority's planning lawyer. This set out the workings of the ACV regime and then went on to say:-

“With regard to this, planning applications have to be determined in the normal way in accordance with the development plan unless material considerations indicate otherwise. At present there is no direct case law on what weight is attached to ACV listing. The weight to be given to any material consideration is a matter for the decision-maker, subject to his decision being reasonable and rational in all the circumstances. Each case depends on its merits. Reference has been made to the NE Derbyshire case, but in that case the proposal was also contrary to a planning policy. In making your decision here you will be doing the usual balancing act to see what weight you attach to material considerations in question.”

What weight has been attached to listing has varied from case to case. There are three possibilities

(i) it may be a reason for refusing permission as with the refusal of the planning application to change the use of the Pear Tree public house in Hildersham which although closed was listed.

(ii) In other cases the proposals have included provision for replacement alternative community facilities and this has been sufficient to overcome the weight attached to the listing (as in the decision of Brendan Lyons in relation to the Queensbury public house in Brent on 23rd March 2015 – APP/T5150/A/14/2219081).

(iii) the listing has been accorded negligible weight which results in the grant of planning permission even if the proposed development does not include replacement community facilities. An example of the latter class is the decision of the Planning Inspector (APP/Y5450/W/14/3001921 - 12th May 2015) in respect of a planning application for permission to convert the Alexandra in Haringey into two three bedroomed dwellings. It had loose associations with the Davies brothers of Kinks fame and had been listed as an ACV. The refusal by the council was overturned by Mr. N Taylor who stated at para. 22 that the “relevant ACV legislation sets out specific tests which are narrower than the planning

considerations before me. The primary purpose of ACV listing is to afford the community an opportunity to purchase the property, not to prevent otherwise acceptable development. Accordingly, whilst I afford it some weight in this case it is not determinative.” Perhaps significantly in reaching his decision the Inspector considered that the needs of the community could be met by the other public houses in the area. There was a similar outcome with the Seven Stars public house in Sedgley which was listed as an ACV in October 2014 but an Inspector granted in July 2015 permission for change of use to retail so that it could become a Morrison supermarket.

Once the planning committee or Inspector decides to attribute little weight to the ACV listing the Courts will not interfere as it is a matter for the exercise of planning judgment (Lang J. DBE in R (oao East Meon Forge and cricket Ground Protection Association) v East Hampshire DC [2014] EWHC 3543 (Admin) at para. 100).

A more extensive consideration of the ACV regime can be found at <http://www.9stonebuildings.com/barrister/christopher-cant/>

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