

Footpaths and Assets of Community Value

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The Assets of Community Value (“ACV”) regime was brought in by the Localism Act 2011 (“the 2011 Act”). Much attention then as now focused on saving public houses. For users of public rights of way that is not an unimportant subject. However, an increasingly important aspect of the developing ACV regime is the breadth of the types of assets now listed as ACV. Imagination has been shown in the nominations. It is to be expected libraries, theatres, cinemas, gyms, swimming pools, playing fields and football stadia are amongst those assets which have been listed. In rural areas it includes village halls, wildlife habitats, nature reserves orchards, woods and commons. Threats of sales off have less expectedly resulted in the listing of Blencathra, Stickle Tarn and Craggy Wood.

Some assets have given rise to differences as to whether as a class they can qualify as an ACV with different authorities taking different approaches. Considerable anger can be generated over differences as to what assets qualify as a community asset. A recent example is the cattle market at Shaftesbury. Due to fears that it was to be sold by North Dorset DC with the agreement of the tenant, the market operator, a community nomination was made. This would have been the first listing of a cattle market had it been successful. In principle is there any difference between local residents meeting to socialise in a village pub and local farmers meeting at a cattle market to trade and socialise before moving on to an ACV listed public house? On 12th June it was reported in the local paper that there had been a meeting with angry local residents who were told the market had been sold to Lidl. If true even if the market is now listed as an ACV the moratorium provisions will not apply to the sale.

This divide in approach can be seen with regard to the different listing decisions made in relation to police and fire stations and memorials. Another type of asset which has been the subject of different treatment by listing authorities is public footpaths. Two have been listed by Huntingdonshire DC – footpaths 4 and 5 being public rights of way 184/4 and 184/5 in Little Paxton Cambridgeshire. In contrast a number of authorities have refused nominations of footpaths. East Dorset DC refused to list part of the Star Valley Way at

Dudsbury. Guildford BC has refused to list land south of Ash lodge which was crossed by public rights of way and Blaby DC has refused to list both the Long Walk because the reasons for nominating it concerned the land surrounding it and the Grassland Field and Wet Willow land because as regards the public highway it was used only for passing and repassing and for no greater benefit.

ACV qualifications - In order to be listed as an ACV one of two sets of criteria have to be considered by the listing authority (which is the local planning authority) to be satisfied. The statutory criteria are set out in section 88 of the 2011 Act. Each of the two criteria contains two conditions which must be satisfied. The first condition is concerned with either current use or if there is no current community use then use in the recent past. The second condition is concerned with future use. The assessment is carried out in two stages once a community nomination has been made to the listing authority in relation to a particular asset.

Stage 1 of the assessment is governed by section 88(1)(a). It has to be determined whether “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” (“community use”) if it does then for the asset to qualify as an ACV sub-section (1)(b) requires in addition that “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.” Without getting bogged down with many of the issues that arise from this set of criteria the principal requirements in the first stage are that there is an actual community use which is not an ancillary use and that in the future it is realistic to think that a non-ancillary community use will continue even if it is different to the current use.

If the asset does not qualify as an ACV in the first stage of the assessment, normally because there is no current community use, then the assessment moves on to the second stage of the assessment which is governed by section 88(2) of the 2011 Act. In that second stage the first condition that has to be satisfied is contained in sub-section (2)(a) and requires that there has been “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”. If there has then the second condition contained in sub-section (2)(b) is

that 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. There is no set period which represents the “recent past”. It is a matter for the listing authority to determine but there has been guidance given in the ACV appeals to the First-tier tribunal.

Guidance has also been given on the application of the statutory criteria to public footpaths. The ACV appeal in *Banner Homes v St. Albans City and District Council* (CR/2014/0018) concerned the listing of Bedmond Lane Field (“the Field”) which is a meadow across which two public rights of way run. This is the case which has recently been to the Court of Appeal on the issue whether use of a meadow by local residents which constituted trespass could satisfy the first condition (actual use or use in the recent past) in the two sets of statutory criteria. In the First-tier Tribunal appeal that constituted the second argument for upholding the determination that the statutory criteria had been satisfied which was successful. The first argument was that use of the public footpaths satisfied the first set of statutory criteria (actual use) and adopting a common sense approach justified listing the whole meadow. This was notwithstanding that by that time the owners had erected fencing so that the remainder of the meadow could not be accessed or used.

Judge Lane accepted that when applying section 88 a common sense approach should be adopted but that did not mean that use of the footpaths justified an ACV listing. The judge stated that if use meant physical use then walking along the footpaths could not sensibly relate to the whole meadow. On behalf of the Council it was argued that it was sufficient that local residents derived enjoyment from observing flora and fauna from the footpaths. Judge Lane rejected this on two grounds. First, in his judgment “use” in the context of these statutory criteria means actual physical use and so visual amenity over other land by itself is not enough. Second, the principal use of the footpath is passing and repassing and so any enjoyment of views from the footpath is an ancillary enjoyment and consequently as an ancillary use does not satisfy the statutory requirements. The footpath was merely a trodden grass path without “any significant flora or fauna of interest to the local community”. This argument was not the subject of appeal to the Upper Tribunal and so was not considered by either the Upper Tribunal or the Court of Appeal.

The ACV listing of the Field was upheld by the local resident's use of the whole meadow. One of the witnesses in support of the nomination was Dr. Wareing who has lived in the vicinity of the Field for more than forty years. His evidence was referred to by Lady Justice Sharp in the Court of Appeal in her judgment upholding the ACV listing. Part of this evidence stated that

"It has been an inspiration and a joy for us. We have spent at least an hour each day almost every day – in total amounting to more than 10,000 hours – enjoying the enchanting environment and diverse and rich flora and fauna. We use it for walking our dog, for playing with our grandchildren, and our children before that. More recently, for the perfect tranquillity it affords, whilst I have been convalescing after a life-threatening illness."

The only issue before the Court of Appeal was whether such use which constituted a trespass could be the basis for qualification as an ACV. It was held that unlawful use could and that for these purposes there were not different degrees of unlawful use. The safeguard in the ACV regime was considered to be the requirement that the use whether lawful or unlawful has to further the social wellbeing or social interests of the local community. *Raves* it was felt would not achieve that objective.

Subsequent ACV appeals have followed the decision on that first issue in *Banner Homes*. The golf course in *Haddon Property Development Limited v Cheshire East Council* (CR/2015/0017) was removed on appeal from the ACV list because its club house had ceased to have planning permission with no prospect of an extension. Judge Lane citing the *Banner Homes* case stated that the existence of rights of way across the course was not use of the course by the local community and pointed out that they would continue after the removal from the ACV list.

Prior to the *Banner Homes* case it had been held by Judge Warren in *Gullivers Bowls Club Limited v Rother DC* (CR/2013/0009) that care home residents overlooking the bowling greens from nearby residential care homes did not constitute a use of the bowling greens and even if it was that use would be ancillary. Judge Lane in *Banner Homes* on the first issue was agreeing with this dicta. Judge Lane was followed by Judge Simon Bird QC in *Astim v Bury Council* (CR/2015/0022) who stated that "In my view, to extend the term *"cultural interests"* as used in section 88(1) to embrace the enjoyment of the historic environment from public vantage points extends the term beyond the intention of the legislation. That

conclusion is consistent with the approach of the Tribunal in Banner Homes Limited v St Albans City and District Council CR/2014/18.”

Since those decisions Judge Jacqueline Findlay has been prepared to take into account the visual benefits to be gained by the community with regard to allotments in Hounslow. In Earl Percy's Appointed Fund v London Borough of Hounslow (CR/2016/0007) she stated that “I am satisfied that allotment land not only provides recreation and food for its direct users but also provides community benefits as green space with concomitant benefits to air quality and visual amenity. This is particularly so in a heavily built up area like Hounslow.” Whereas Judge Warren held that the activities on and connected with the bowling greens in the Gullivers Bowling Club case were a use furthering the social wellbeing or social interests of the local community but in doing so deliberately excluded consideration of visual amenity Judge Jacqueline Findlay in contrast formed the same view as regards the activities carried on upon the allotment but adopted a much broader assessment of the community benefits including air quality and visual amenity.

When the asset is already clearly an ACV due to the activities carried on upon the property then to take into account the visual amenity does not really add anything to the determination. It is a different matter if there is not carried on upon the property activities furthering social wellbeing or social interests of the local community but the property provides a visual amenity to the local community. In such circumstances a community nomination is unlikely to succeed.

From the ACV appeal decisions to date and the decisions of listing authorities it appears that

(i) land crossed by public footpaths will be listed as an ACV if there are activities carried on or which have been carried on in the recent past upon the land which further the social wellbeing or social interests of the local community. The Field in the Banner Homes case is an example. Another is the decision in Trustees of Sundorne Estate v Shropshire CC (CR/2016/0015) concerning a green in the middle of a housing development with a path crossing it but the whole of which could be accessed and was used by children to play on. A further example is land informally used for recreation by locals called Cocklemoor at Langport, South Somerset which has the River Parret Trail cross it and was listed in 2013 although no longer on the ACV list. Land at Fordrough known as Copse and Bridleway

comprising a wooded wildlife habitat and footpath connecting Heart of England way to the south and west was listed by Solihull MBC.

(ii) the public right of way in such circumstances adds very little to the exercise of determining whether the land as a whole. It is a part of the overall communal picture.

(iii) the weight of decisions is against listing a public right of way by itself notwithstanding that there is at least one example of a listing;

(iv) notwithstanding (iii) there are still interesting arguments if the public right of way is used for exercise rather than just being a means of walking from one place to another or has interesting flora or fauna on it or is wide enough for recreational activities to take place on it.

(v) an unexpected and unfortunate consequence of the ACV regime may be that owners will now block access to land with the objective of preventing it qualifying as an ACV. In the Banner Homes case access to the Field was blocked by the erection of fencing so only the two public rights of way could be used.

(vi) as yet there has been no consideration of the impact of the ACV regime on the acquisition of public rights of way and in particular by agreement. It is likely that this will first be considered in the context of the dedication of public highways as part of a residential development. It is an issue which has already arisen.

For a fuller consideration of the ACV regime the sixth edition of my guide can be found at either <http://www.9stonebuildings.com/barrister/christopher-cant/> or <http://www.christophercant.co.uk/assets-of-community-value/>

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