



Final Report on the request to delist St Catherine' Road Community Gardens as an Asset of Community Value

Nominated Asset: St Catherine's Road Community Gardens

Eligible group: St. Catherine's Road Community Group

Introduction

The Localism Act 2011 requires local authorities to keep a list of assets (meaning buildings or other land) which are of community value. The effect of listing is that an owner intending to sell the asset must give notice to the local authority. A community interest group then has six weeks to register their interest as a potential bidder. If it does so, the sale cannot take place before a period of at least six months has passed. This period, known as "the moratorium", is to allow the community group to come up with an alternative proposal to purchase the asset if they so wish – although, at the end of the moratorium, it is entirely up to an owner whether a sale goes through, to whom and for how much.

In addition, there are various provisions by which an asset which has been registered can / must be removed from the register.

History of the nominated Asset

An application was made by the St Catherine's Road Community Group, an unincorporated body, to list the above location as an Asset of Community Value on the 18 May 2022. It was deemed that based upon the evidence provided, the St Catherine's Road Community Group satisfied the statutory test as being a group eligible to make a nomination. A completed application form, property records identifying the freeholder for the property and a plan showing the extent of the land to which this application relates was also provided in line with the guidance. The St Catherine's Road Community Group had therefore provided all the information required under the Localism Act in order for BCP Council to formally assess the application.

Eligibility as an Asset of Community Value

Legislation

Section 88 of the 2011 Localism Act provides as follows:-

"(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 land that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community.”

Regulation 2 of the Assets of Community Value (England) Regulations 2012 contains provision that:

“A local authority must as soon as practicable after receiving information that enables it to do so make the following amendments to an entry on the list—

...

(c) remove the entry if—

...

(ii) the authority for any reason no longer considers the land to be land of community value.”

Original assessment of the site at the time of nomination as an Asset of Community Value

Summary of original submissions

The applicant seeking to register the land as an asset of community value stated that in relation to the current use of the site ‘..the asset has been a community garden since 2009, when it was gifted by Bournemouth Council on an unofficial basis. It has been cared for and enjoyed daily by many residents and visitors since. It is of community value as it offers a place for residents, most of whom live in flats, to spend time outside and meet with each other and friends. People visiting the area comment on how nice it looks and appreciate what the community has done to keep it tidy.

Since 2009 and especially over the past 2 years the garden has been a lifeline for many. During the pandemic, when residents were unable to go far during lockdowns, the garden provided a safe space for people to come and sit, garden, or meet friends. Residents also appreciated it more and now meet monthly to clear, tidy, and enjoy the space. A table with benches has recently been added to provide a more permanent meeting place which can be used for picnics by locals and visitors.

The asset also links to BCP's Big Plan – Communities and Green Spaces – as such the residents have the support of Councillor Eddie Coope. We would like to place a small lockable storage hut on the site to keep garden tools, compost etc.'

The applicant stated that in relation to the future use of the site *"For many years it has and continues to, help many people with mental health problems – they leave food for the wild birds, plant flowers and find it a place of comfort. Dorset Mind has also used the space to help people with depression. Because of the pride the residents have in the garden and how much they enjoy it, it is realistic to think that it will continue to be a community asset for much longer than the next 5 years"*.

The landowners of the site, BCP Council, provided a response opposing to the proposed nomination based on the following grounds:

1. It was their view that any community use has always been ancillary to the primary use of car parking and has never interfered with such use (which is why it was permitted in the first place) and is therefore ineligible for listing under section 87. Furthermore, and without prejudice to that assertion, it is not realistic (as the section requires) to think that there can be any qualifying use at any time in the next five years, since the land is part of a site which the council is contractually required to sell if pre-conditions are met.
2. It was their view that insufficient information has been provided to qualify the eligibility of the community group to apply and therefore the application is incomplete.
3. That BCP Council has already entered into a binding agreement to dispose of the land.

Summary of original decision

It was considered that it was a valid nomination for the reasons set out above.

It was considered that there was sufficient evidence at the time of use of the area of land nominated by the local community for the purposes of meeting other people, recreation including gardening and social interaction – as set out in the application form.

It was considered at the time that it was realistic that there would continue to be community use of the land. It did not appear at the time, based on the evidence provided that there was anything to prevent the current use continuing and there was no current permitted development with planning consent in place. Whilst it was accepted that this might change and there could be alternative realistic uses in future depending upon the decisions made in respect of the site, the on-balance view at the time was that the current community use could realistically continue in future.

The nomination of St. Catherine's Road Community Garden as an Asset of Community Value was accepted on 19 July 2022.

A request to de-list St. Catherine's Road Community Garden as an Asset of Community Value

A request to remove the Asset of Community Value listing was received on 15 March 2024 from the Estates department within BCP Council. Justification for the request to delist identified as follows.

*"I have been instructed by Estates on behalf of the Corporate Property Officer to request the removal of the above site (**the asset**) from this council's list of assets of community value (**the list**) maintained under section 87 of the Localism Act 2011. In this request, I refer to this Act as **the Act**, and reference to sections mean the relevant sections of the Act. The regulations mentioned in section 88 are The Assets of Community Value (England) Regulations 2012 (SI 2421), and I refer to them as **the Regulations**. Reference to regulations mean the relevant regulations of the Regulations.*

Please note for the avoidance of doubt that this is not intended as a request for a review of the original inclusion of the asset on the list, made on 19 July 2022. At that time, the Agreement for Lease was subject to a condition that planning permission for residential development was in place, and that such permission was immune from legal challenge.

...

Planning permission was granted on appeal on 3 March 2023 (copy of the decision attached) and has not been overturned. The time limits for legal challenge have long expired, and this council is therefore required to grant the Lease of the car park (including the asset) with vacant possession. To comply with its contractual requirements, this council must clear the site, including the asset, and this is being done. It has been fenced off, and arrangements made with members of the community group to collect plants, furniture, etc.

It is therefore the view of Estates that there is no current use of the site in accordance with section 88(1)(a), and that even if section 88(2)(a) applies, it is not realistic to think that such use can continue: there is planning permission for residential development and there will be a lease granting exclusive possession of the site (including the asset), which clearly prevents use in accordance with section 88. Regulation 2(c)(ii) states that a local authority must remove the entry if "the authority for any reason no longer considers the land to be land of community value."

Process undertaken to review the request

Following initial consideration of the request, clarification of certain information was sought and an opportunity provided to the contact of the group who originally submitted the application for nomination of the asset to comment on the request.

Evidence provided by BCP Council

In addition to the request made on 15th March 2024, the extent of additional information available for the purposes of making an assessment under regulation 2 can be summarised as follow:

(a) Issues relating to access.

In a communication dated 17th April 2024, photographs taken by a surveyor in Estates, were provided showing:

- the notice put on the gate giving entry to the asset, which must have come to the attention of any visitors to it



To those concerned

Date: 2 February 2024

Contact: estates@bcpcouncil.gov.uk

Closure of Southbourne Crossroads Car Park - Site outlined in Red on drawing "Site Plan 1"



Site Plan 1 - Not to Scale, Illustration Only

This car park is now closed, and access (pedestrian and vehicular) without the express permission of BCP Council is prohibited. BCP Council will use all available powers to prevent any unauthorised access and/or occupation.

A number of chattels have been left on the above site, including an area planted with shrubs and trees. Any informal consent for the deposit of these items, including the act or acts of planting, is for the avoidance of doubt revoked with immediate effect by BCP Council.

Without prejudice to its rights and remedies otherwise available, which are fully reserved, BCP Council is prepared - for a period of three weeks from the date of this notice - to allow for removal of the plants and other items by appointment. Appointment should be made by means of the above email address.

Once this three-week period has elapsed, the Council will clear the site and remove any vehicles and all plants and other items so deposited without further notice, and may dispose of them as it sees fit. The Council hereby asserts its rights under sections 41(1), (5), (7) and (11)(b) of the Local Government (Miscellaneous Provisions) Act 1982.

- The Heras-type fencing erected by the council around the whole of the car park



- The cleared asset.



The communication explained that:

“... ”

The notice (dated 2 February) was also placed at various points in the car park before its closure, and its purpose was to revoke with immediate effect the licence under which the community group used the asset, and to provide three weeks to claim plants and other items located there. As will be noted, the car park (including the asset) has been securely fenced and the Heras fencing will remain until replaced by the building contractor’s secure hoardings....”

In relation to the tests for registering an asset of community value as set out in section 88 Localism Act 1988 as a result of this activity it was identified that:

“It is our reading of section 88(1) of the Act that land is of community value under that provision only if it meets the criteria under both paragraphs, due to the use of the word “and” at the end of paragraph (a). Since actual current use for any purpose set out in section 88(1) is now physically impossible, it must now be concluded that the land does not qualify under that sub-section and attention should turn to section 88(2).

- (b) Issues relating to grant of planning permission

Following on from the statement in the correspondence of 15th March 2024 that planning permission had been granted in relation to the site, two plans were provided with the most recent communication. It was explained that:

“ ...

Attached are two plans showing respectively the layout of the scheme and the dimensions of the various blocks. It will be seen that there is no provision for retention of the asset, or indeed any public use. The development will comprise private residential units leased at full market value for very long terms (the draft Lease to the developer currently specifies 150 years, though it is likely that the completed Lease will grant a much longer term, to allow for longer residential underleases).

...”

Further, confirmation that Planning Permission for both applications 7-2021-28119 and 7-2022-28119-A was granted on appeal on 3rd March 2023 was received from the Senior Planning Policy Officer along with copies of the decision.

The April communication identified that:

“ ..

... The planning applications were both the subject of appeals (one for refusal and the other for non-determination), and both appeals were successful. ... block A will be constructed on the land currently registered as a Community asset ; community use will be impossible.

.... It will be seen that there is no provision for retention of the asset, or indeed any public use. The development will comprise private residential units leased at full market value for very long terms (the draft Lease to the developer currently specifies 150 years, though it is likely that the completed Lease will grant a much longer term, to allow for longer residential underleases).

...”

(c) Intended future use

In relation to the issue of the potential future use of the land, the April communication identified as follows:

“ ..

On grant of the Lease, the developer (Vivir Estates Limited) will pay a substantial premium (the precise amount is still confidential, but is a seven-figure sum) having paid a large deposit, and has undergone the significant effort and expense of two planning applications and appeals, a process that has lasted over three years. We have therefore assumed that the developer is committed to implementation of the scheme, and that the challenging shape of the site requires maximum efficiency in layout. However, for the record, the developer’s director Eddie Fitzsimmons stated as follows in an email exchange with Miles Phillips (Mr Fitzsimmons’ comments are in red):

“We have discussed on Teams in the past, but I just wanted to clarify your intentions over the community land at Southbourne Crossroads. Is the new development that you’re proposing to implement going to be built over this land? i.e. will community use be impossible over this land? Correct block A will be constructed on the land currently registered as a Community asset ; community use will be impossible.”

...

When the Lease is granted, the developer will have exclusive possession of the site (including the asset). The House of Lords decision in the 1985 case of Street v Mountford sets out exclusive possession as an essential characteristic of a lease; it entails the tenant’s right to exclude everyone – including the landlord – from the demised land, unless rights of entry have been reserved by the landlord or are otherwise recognised by the law (for example, statutory rights for police officers to effect an arrest). During the term of the Lease, which is likely to be even longer than the 150 years as mentioned, the tenant will have the right to exclude anyone seeking access to the asset (for information, the rights reserved are set out at clause 4 of the form of Lease, at pages 40-41 of the pdf document, and are very limited in scope). Exclusive possession will also be enjoyed by residential leaseholders of individual units, including those in Block A, which as noted will be sited where the asset is now. During construction, the property will of course be a building site secured by hoardings

...”

(d) Terms of Agreement to lease / lease

A redacted copy of Agreement for Lease of 23 February 2021 was provided as part of the April Communication which stated that the Agreement was conditional on planning permission which was immune from legal challenge: clauses 1.1 (definition of Planning Consent) and 2.1.

The April communication went on to advise:

“...

the Agreement was conditional on planning permission which was immune from legal challenge: clauses 1.1 (definition of Planning Consent) and 2.1 (there were other elements to the Condition, which the developer’s solicitor has confirmed to me have been satisfied). Planning Consent, as defined, was achieved six weeks after 3 March 2023 (the date of the planning inspector’s decision) – the Civil Procedure Rules provide that a judicial review of a decision made under planning legislation must be brought promptly and in any case within six weeks of the decision. The Agreement was varied to allow use as a car park over the summer and autumn of 2023, but since 30 November 2023 either party may serve notice to complete (clause 6.1). The effect of such a notice is to require the other party to complete, failing which the party serving notice can withdraw and/or claim damages. You will

also note that clause 11.1 of the Agreement requires the council to grant the Lease with vacant possession, failing which the developer has a potentially substantial claim for damages. There is a great deal of case law on what vacant possession constitutes, but the requirements can be very strict and have been held to cover removal of underground cabling and other infrastructure. Both parties agree that the vacant possession obligation extends to removal of the planting and other items located on the asset, since their presence clearly prevents construction of Block A of the development.

...

No documentation contradicting any of the information contained in either of the March or April communications has been produced.

Representation from St Catherine's Road Community Group

The nominators for the Asset of Community Value, St Catherine Road Community Group, were written to by email on 11 April 2024 informing them of the request to remove the listing and asked them to provide any representations on this matter by the 26 April 2024. The following response was received:

“...

Thanks for the opportunity to comment on this, but I'll leave things for now.

Think this is well and truly a done deal - which is a great shame for anyone that wants to visit the beach on a nice day.

For a council that relies on and promotes tourism it makes no sense.

Thank you for all your help with this process.

..”

No further community representations have been received.

Legal Considerations

Actual Use

The tests set out in sections 88 (1) (a) and (2) (a) of the Localism Act 2011 are concerned with the “use” to which land and/ or buildings are being put; subsection (1) (a) is concerned with “current use”, whilst (2) (a) is concerned with “actual use” in the “recent past”.

In Banner Homes Ltd v St Albans City and District Council (2014) First Tier Tribunal (Regulatory) consideration was given in relation to an argument that the observation of a field amounted to use of it. It was argued on behalf of the owner of the field that:

“... the use of the word “actual” in section 88 “strongly suggests an intention that ‘physical’ use was intended.....visual observation of things growing or otherwise present on land may be an aspect of section 88 use but that mere reliance on people looking at such things from across a fence is not what Parliament had in mind, enacting the 2011 Act.”

The view of the judge on this point was:

"I agree.... the examples given in the gov.uk website on the 2011 Act all comprise or involve "physical" uses: for example a village shop, pub, community centre, allotment or recreation ground.

The council's interpretation would, I consider, have some surprising consequences. Local residents who derive enjoyment from viewing attractive scenery from a road might, on the council's view, be able to have the land in question placed on the list, even though they have never ventured upon it. Mr Hopkins suggested that any mischief which such an interpretation might entail would in practice be alleviated by the fact that the "scenic" aspect of the land would, in most cases, be merely ancillary to its agricultural use. However, one can envisage situations where that would not be the case. In any event, it is in my view highly unlikely that Parliament intended the owners of such land to be compelled to rely on the non-ancillary requirements of section 88, in order to defeat listing".

Recent Past

The Localism Act 2011 does not define the length of time that is meant by the phrase "recent past" in section 88 (2) (a). However, it does not have to be the same as the five year period specified in section 88 (2) (b). In Worthy Developments Ltd v Forest of Dean District Council (2014) (FTT – General Regulatory Chamber) it was explained that *"...It was submitted that, in the absence of any definition of the phrase "recent past" that a period of five years should be looked at..... It seems to me illogical to seize on the period of five years, as some suggest, when applying the past condition. This figure is chosen because it is the length of time specified by Parliament over which the future condition is to be assessed. It seems to me, however, that Parliament's failure to specify the precise period of five years when defining the past condition, cannot be taken as intending that the more precise period used in the definition of the future condition should be imported."*

Grant of planning permission

It has been accepted in relevant tribunals that the grant of a planning permission is capable of being material to an assessment of whether an asset should be registered:

"13. Both the grant and the refusal of planning permission for the change of use of a listed asset are capable of having a material effect upon a decision as to whether the test in section 88(2)(b) of the 2011 Act is met, looking at matters as at the date of deciding the appeal. In a number of cases, the Tribunal has found that the refusal of planning permission may have a bearing in, for example, making it realistic to think that the owner of the property may put it on the market in the next five years for a price that reflects its current permitted use (rather than any possible change of use); or else decide to run it as a pub, serving the community. Conversely, where, as here, planning permission for a change of use has been granted, and where there is nothing to suggest that the appellant would be at all inclined to market the Alexandra as a pub, the planning permission may, depending on all the circumstances, render "much less likely" other possibilities within the next five years, involving social uses

of the kind contemplated in section 88(2)(b)." STO Capital Ltd v London Borough of Haringey (2015) FTT

Realistic to think

In relation to the phrase "realistic to think" as set out in section 88 it has been accepted that the threshold test is not high:

59. The statutory test of "realistic to think" as used in section 88(2)(a) has consistently been interpreted by the First Tier Tribunals as a low threshold, to be distinguished from higher thresholds, notably the "balance of probabilities". "Realistic" does not mean "most likely"; it permits of a number of possibilities; see Evenden Estates v Brighton and Hove City Council I CR/2015/0015). In Carsberg v East Northamptonshire Council UKFTT CR 2020/004, Judge Findlay held that the term "realistic" meant having to show "a sensible and practical idea of what can be achieved". I agree with that interpretation." Richard Sanders v Stafford Borough Council, New Red Lion Sutton Ltd (2022) FTT

Owner's intentions

The opinions of an owner / future owner in relation to an asset has been identified as being potentially material to an assessment but will not be determinative in their own right. For example, in one tribunal decision it was identified that:

"61. The starting point in this case is that the Red Lion is currently owned by a developer who purchased the property as a cash purchaser on the open market and who has stated that he has no intention of selling it or of running a pub from it. However, as was held in Patel v London Borough of Hackney CR/2013/0005, whilst it is reasonable to take into account the Appellant's stated intentions as part of a general consideration of the circumstances, of themselves, they cannot be determinative. Otherwise the statutory regime for the protection of Assets of Community Value would be rendered effectively voluntary." Richard Sanders v Stafford Borough Council, New Red Lion Sutton (2022) FTT

Fencing off land

The fencing off of land can be relevant to an assessment; however, ultimately it has been concluded that its relevance to a specific factual situation is still a matter of judgement:

" The other ground is that the First-tier Tribunal reached its decision "in spite of unchallenged evidence" given on behalf of the appellant as to the fencing and notices. Although findings of fact must be based on the evidence in a particular case, the question of what is realistic for the future is a matter of judgment for the local authority or, on appeal, for the First-tier Tribunal. It is not a matter for veto by the landowner. The First-tier Tribunal made a finding that was open to it on the particular facts of this case, especially in view of the history of use, and for reasons that it explained." Banner Homes Ltd v (1) St Albans City and District Council (2016) UT (an attempt to challenge this point to the Court of Appeal was rejected).

Findings of the request to remove the listing on the asset

Section 88(1) of the 2011 Localism Act states: *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.

In light of the evidence provided of the land being cleared and now being fenced off and cleared, it is accepted that the site is not currently undertaking use that furthers the social wellbeing or social interest of the local community.

This is further confirmed by the response from St Catherine Road Community Group who provided no further evidence to support its community use.

It is therefore not considered that the asset would meet the test as set out in section 88(1) Localism Act 2011.

Consideration therefore needs to be given to section 88(2) of the 2011 Localism Act which states:

(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 land that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community.

In relation to section 88(2)(a) as the asset was only registered as an asset of community value in 2022, for the reasons given at that time as to why it was registered, it is considered that it would be reasonable to conclude that there was a time in the recent past when the asset did further the social wellbeing or interests of the local community. Consequently, the requirements of section 88(2) (a) are considered to be met.

However, in order to accord with the requirements of section 88(2), both the tests in (a) and (b) would need to be met.

With regard to the test in section 88(2) (b), having reviewed the evidence provided, it is clear that the site has now been awarded planning permission on appeal for development of the site. The planning permission granted and associated plans

detail that the area known as the Asset of Community Value will be built upon as residential housing as part of the site's development.

This, alongside the expenditure incurred by the proposed developer to date (deposit, planning application and appeal process), would support a conclusion that the developer is committed to implementing the development scheme. Further, the very fact that planning permission has been granted for residential development requiring the use of the current registered asset would potentially seem to make it far less likely an owner would seek to put the land on the market in the next five years for a price that reflects its value as an amenity space rather than its development value.

Conclusion

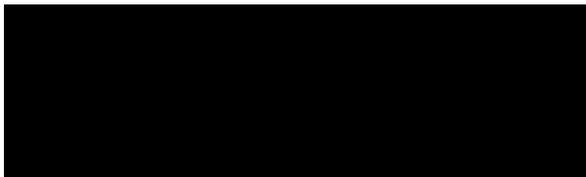
From the information provided and as a consequence of the conclusions set out above, it is my view that it would no longer be reasonable to consider that the asset meets the relevant tests of being "land of community value" as defined in section 88 Localism Act 2011. In particular and having regard to the relevant approaches adopted by tribunals to such matters, it is no longer considered realistic to think that there is a time in the next five years when there could be non-ancillary use of the building or land that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community.

Accordingly for the purposes of regulation 2 of the Assets of Community Value (England) Regulations 2012 I consider there is good reason on the basis of information now available to remove the listing from the Asset of Community Value register kept under the Localism Act 2011.

Other options considered but rejected.

Not to remove the asset from the register.

Signed:

A large black rectangular redaction box covering the signature of Kelly Deane.

Kelly Deane, Director of Housing and Communities

14 May 2024