Neutral Citation Number: [2022] EWHC 130 (Admin)

Case No: CO/0511/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

IN AN APPLICATION FOR JUDICIAL REVIEW

Before :

THE HONOURABLE MR JUSTICE LANE

- -

Between :

THE QUEEN ON THE APPLICATION OF:

TV HARRISON CIC **Claimant**

and

LEEDS CITY COUNCIL **Defendant**

and

LEEDS SCHOOL SPORTS ASSOCIATION

Interested party

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- -

For the claimant: Ms J. Wigley QC (instructed by Leigh Day)
For the defendant: Mr T. Straker QC and Ms V. Sedgley (instructed by Leeds City Council Legal Services)
The interested party did not appear and was not represented.

Hearing date: 16 December 2021

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Approved Judgment

Lane J:

A. THE LAND

1. The claimant, which is a community interest company, challenges the decision of the defendant on 22 December 2020 to refuse to include in a list of land in its area that is of community value, the TV Harrison Sports Ground, Oldfield Lane, Wortley, Leeds 12 ("the land"). Part of the land is owned by the defendant and part by the interested party ("IP"). The latter currently has a 99 year lease of the part which is owned by the defendant. The list is required to be maintained under section 87(1) of the Localism Act 2011.

2. Permission to bring judicial review was granted on all grounds on 25 May 2021 by HHJ Belcher, sitting as a Judge of the High Court.

3. The decision under challenge follows the previous refusal by the defendant on 18 June 2020 to include the land in question in the list of assets of community value. That previous decision was quashed by consent by Lang J on 4 November 2020.

4. The land is described by the claimant as a longstanding sports field, said to be greatly valued by the local community who, in recent times, have expended time and effort restoring it to a useable condition. It is resorted to for informal leisure and recreational activities and, following the recent restoration works, is now being used again informally as a sports field, including football matches.

5. The land is allocated for housing in the Leeds Site Allocations Plan 2019 ("the SAP"). Although it is said that this allocation resulted from an error by the defendant, relating to a supposed sufficiency of outdoor sports green space in the ward in which the land is located, it is common ground that it is now too late to bring any direct challenge to the allocation.

6. On 7 April 2020, the claimant's predecessor, TV Harrison Community Action Group, submitted a nomination to the defendant to add the land to the defendant's list of assets of community value. The nomination was supported by a number of sports foundations and clubs, local ward councillors, the Imam of a local mosque and leaders of the Sikh community. The nomination described the following activities as having been taking place on the land:

    morning runs;

    half term sports activities for children;

    community days;

    regular football matches and rounders matches for children and adults;

    continued and regular use by junior football teams for training;

    a football derby match between Armley and Wortley;

fundraising events; and

other community sports and social activities.

7. Following the quashing of the original decision of the defendant not to include the land in the list, the nomination fell to be determined afresh. Before that re-determination took place, however, a number of events occurred.

8. In December 2020, the defendant entered into an Agreement for Sale ("the Agreement") under which the defendant agreed to purchase part of the land owned by the IP, with the latter agreeing to surrender its lease to the defendant. The Agreement is conditional upon a number of conditions precedent, which at the date of the decision had not been met. These include the grant of "detailed" planning permission by the defendant (as local planning authority) to the defendant (as applicant) for development of the land by the construction of no fewer than 47 dwellings. The Agreement is also subject to a "disposal condition", under which the defendant may terminate the Agreement in certain circumstances including if the land is listed as an Asset of Community Value ("ACV").

9. Under clause 25.2 of the Agreement, the IP is required to use its reasonable endeavours to procure that any ACV nomination is dismissed, so as to be of no further effect or consideration, and so as to be not capable of impeding the disposal of the land as envisaged by the Agreement for residential development. Under clause 25.3, the defendant is required to provide the IP with such assistance as it reasonably requires in relation to procuring the dismissal of the ACV nomination.

10. On 16 December 2020, the defendant, in its capacity as local housing authority, made an application to itself as local planning authority for outline planning permission for residential development of the land.

B. THE DECISION

11. The defendant's re-determination of the claimant's nomination was made pursuant to an Officer's Report ("the OR").

"Summary"

12. The OR said there was no information from the defendant's Parks & Countryside Service or from the IP "to confirm or not" the description given in the nomination about activities that had been taking place on the land. The summary noted that the land had been allocated for housing under the SAP; and that there were "firm and settled plans by" the defendant, in its capacity as local housing authority, to develop the land for housing, subject to the grant of planning permission; and that it was "therefore recommended that it is reasonable for the Council to conclude that it is not realistic to think that there can continue to be non-ancillary use of the site which will further (where or not in the same way) the social well-being or social interests of the local community, and therefore the site should not be included in the List of Assets of Community Value".

"Recommendations"

13. The OR recommended that the Head of Asset Management should not include the site in the list, on the basis that the criterion in section 88(1)(b) of the 2011 Act had not been met.

"Main Issues"

14. In the body of the OR, it was stated at paragraph 3.1 that the report "has been based on an assessment of the nomination form and previous site visits by the Council's case officers, and on information provided by the Council in its capacity as local housing authority".

15. At paragraph 3.5, it was reiterated that the site was said to have been "greatly improved by the local community and is being used for informal leisure and recreational activities, and is now being used again informally as a sports field". The OR noted that this "has been confirmed by local Ward Members".

16. At paragraph 3.6, the OR observed that although uses of the site may have taken place without the permission of the IP and may have been trespassory in nature, case law indicated that beneficial recreational activities, although technically unlawful in that they had not been permitted, should still be taken into account as actual uses of the nominated land. Paragraph 3.6 concluded by saying that it was "accepted that there are current, non-ancillary uses of the site which further the social interest or social well-being of the local community".

17. At the beginning of paragraph 3.7, the OR turned to the question of future uses.

> "3.7 As regards whether it is "realistic to think that there can continue to be" eligible, non-ancillary uses of the site, the site has been identified by the Council in its capacity as local housing authority, as potentially suitable for council housing. This use would be in accordance with the formal allocation of this site (housing) within the Site Allocations Plan (SAP). Consultation on the SAP commenced in 2013 and it was formally adopted in July 2019. During the SAP process there was extensive consultation with a range of stakeholders, including statutory bodies such as Sport England, Historic England, and the Environment Agency. In addition to this local communities were consulted, including hard to reach groups such as Travellers and Show people. Following this extensive consultation the SAP was approved and adopted by Full Council in July 2019. At the point of adoption, there was the opportunity to challenge the allocation for the site and no such challenge came forward relating to the allocation for this site.
>
> 3.8 In addition, it is to be noted that the Council, in its capacity as local housing authority has taken significant steps towards acquiring and then developing the site for Council housing. The table below indicates the key activities undertaken by the Council as local housing authority. In addition, it is apparent that the local housing authority has a clear timetable for the outstanding matters which need to be resolved before the development of the site for housing can start … .
>
> 3.9 An Outline Planning Application has now been submitted by the Council in its capacity as local housing authority, seeking approval for the principle of development and highways access into the site, whilst ensuring that the proposals are compliant with the specific Site Requirements of the SAP with regards to on-site greenspace, green link and any other matters. A consultation exercise has been carried out in the local area via both social media and postal consultation to seek

> feedback on the proposals, and the outcome of this has been incorporated in the Application.
>
> 3.10 …
>
> 3.11 Plainly, it is not certain at this point in time that the proposed housing development will proceed, as no planning permission for such a development has been granted. However, the proposed development is compatible with the formal allocation of the site in planning terms. The Council in its capacity as local housing authority, has demonstrated a clear and settled intention to proceed, having taken formal decisions to that effect, and having put considerable resource into extensive site investigations, local consultations, and the acquisition of the LSSA's title to the site. In addition, it is clear that the local housing authority has the necessary resources to develop the site for housing, and a building contractor has been appointed. It is also clear, that further more intrusive site investigations and surveys will need to be carried out, as more detailed design work for the proposed housing development progresses, and the current informal uses of the site are not compatible with those activities, and could give rise to safety risks for members of the public. Given all of this, it is considered that it is reasonable to conclude that it is not realistic to think that there can continue to be non-ancillary use of the site which will further (whether or not in the same way) the social wellbeing or social interests of the local community, in accordance with Section 88(1)(b) of the Act."

18. At paragraph 5.1, the recommendation to the Head of Asset Management, as set out above, was reiterated.

19. On 12 January 2021, the claimant sent a pre-action letter to the defendant, setting out a number of proposed grounds of challenge to the decision refusing the nomination of the land.

20. On 16 March 2021, the defendant, as local planning authority, granted planning permission to itself, as housing authority, for development including adopted highway access and associated external works on the land. Following a pre-action protocol letter from the claimant to the defendant, challenging the grant of permission, the defendant agreed to an order quashing that permission, which took place in the High Court on 4 August 2021.

21. The outstanding application for outline planning permission was re-determined and granted by the defendant on 25 October 2021. On 19 November 2021, the claimant sent the defendant a pre-action protocol letter challenging this re-determination. The present position, as I understand it, is that a response to that letter is awaited.

C. LEGAL FRAMEWORK

22. Section 87 (list of assets of community value) of the 2011 Act requires a local authority to maintain a list of land in its area that is land of community value. That list is to be known as the local authority's list of assets of community value.

23. So far as relevant, s.88 (land of community value) provides as follows:

> "(1) For the purposes of this Chapter but subject to regulations under subsection (3), a building or other land in the 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."

24. In Banner Homes Limited v St Albans City and District Council and Anor [2018] EWCA Civ 1187, Sharp LJ drew on judgments of the First-tier Tribunal regarding appeals against decisions of local authorities to include land in the statutory lists, in order to give the following overview:

> "10. ... The effect of the 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 a moratorium, will allow the community group to come up with an alternative proposal; although at the end of moratorium, it is entirely up to the owner whether the 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.
>
> 11. The Scheme therefore confers a right to bid (to a local community group as defined in the 2011 Act), but not a right to buy."

25. At paragraph 8 of her judgment, Sharp LJ set out passages from the Ministerial Foreword to the non-statutory advice note for local authorities issued by the Department for Communities and Local Government on 4 October 2012:

> "From local pubs and shops to village halls and community centres, the past decade has seen many communities lose local amenities and buildings that are of great importance to them. As a result they find themselves bereft of the assets that can help to contribute to the development of vibrant and active communities. However, on a more positive note, the past decade has also seen a significant rise in communities becoming more active and joining together to save and take over assets which are significant for them.
>
> Part 5 Chapter 3 of the Localism Act, and the Assets of Community Value (England) Regulations, which together deliver the Community Right to Bid, aim to encourage more of this type of community-focused, locally-led action by providing an important tool to help communities looking to take over and run local assets. The scheme will give communities the opportunity to identify assets of community value and have them listed and, when they are put up for sale, more time to raise finance and prepare to bid for them.
>
> This scheme requires an excellent understanding of the needs of the local community. As such local authorities will have a pivotal role in implementing the Community Right to Bid, working with local communities to decide on asset listing, ensuring asset owners understand the consequences of listing, enforcing the Moratorium period and in taking decisions as part of any appeals process."

26. In the Court of Appeal, the Banner Homes case involved the interpretation of section 88(2)(a) of the 2011 Act. It is, however, important to observe what Sharp LJ had to say about the "future use point" in section 88(2)(b), since it is specifically with that issue that I am concerned:

> "32. Banner Homes also argued at the review hearing, and before the First-tier Tribunal that in view of the fact that the Field had now been fenced in, it was not realistic to think the Field could be used *in the future* to further the social wellbeing or social interests of the local community i.e. that regardless of its central argument on "actual use", the respondents could not satisfy the requirements of section 88(2)(b). In this connection, Banner Homes relied on a statutory declaration made on 3 September 2014 by its planning director, Mr Paul McCann which confirmed Banner Homes' intention not to dispose of the Field, to keep the fencing in place, to maintain the exclusion of the public from the Field apart from the public footpaths, and to promote the Field for development through the Council's Local Plan process. This point was called, below "the future use point."
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> 33. As to that, the First-tier Tribunal found as a fact that the requirements of section 88(2)(b) were satisfied, giving these reasons at para 38:
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> > "Given the long history of peaceable, socially beneficial (if formally unauthorised) use of the Field, and of the previous views of the owners, I do not consider that it is at all fanciful to think that, in the next five years, there could be non-ancillary use of the land, along the lines that pertained up to September 2014. The timing of the decision to fence the footpaths – coming hard upon the listing under the 2011 Act – strikes me as material. Also of significance is the uncertain present planning position of the land, where a recent application for the grazing of horses has been refused. Whilst I note Banner Homes' current stated stance, it is not fanciful, given the history of the Field, to think that Banner Homes may well conclude that their relations with the local community will be best served by restoring the *status quo* or by entering into some form of licence arrangement with the Residents' Association or similar grouping."
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> 34. The Upper Tribunal rejected Banner Homes' argument that in referring to what was "not fanciful" rather than what was "realistic" for the purposes of section 88(1)(b) and 88(2)(b), the First-tier Tribunal had made an error of law. The Upper Tribunal also rejected the argument that the First-tier Tribunal's decision on "the future use point" was contrary to the evidence, holding that what is realistic for the future, is a matter of judgment for the local authority (or on appeal, for the First-tier Tribunal) and is not a matter of "veto for the landowner", concluding that: "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 the reasons that it gave." See paras 34 to 39.
>
> 35. The Upper Tribunal refused Banner Homes' application for permission to appeal to the Court of Appeal on "the future use point", as did I on the papers, on 27 February 2017. The application for permission on this Ground has not been renewed."

27. In approaching the issue of future use (section 88(1)(b)) as it did, the First-tier Tribunal in Banner Homes adopted a construction of what the words "realistic to think" mean, which was first articulated by Judge Warren who, as President of the General Regulatory Chamber of the First-tier Tribunal, decided the first appeals brought against decisions to include land and buildings in the list of assets of community value.

28. In one such case, Patel v London Brough of Hackney and Anor (CR/2013/0005) Mr Patel had bought "a pub named the Chesham Arms which had been there since 1866". Mr Patel closed the pub as he "wants to turn it into flats" (paragraph 2).

29. At paragraphs 8 to 11, Judge Warren held as follows:

> "8. In earlier submissions it had been suggested on behalf of Mr Patel that it was essential to demonstrate on the balance of probabilities that the Chesham would reopen as a pub. At the hearing, Mr Turney resiled from that submission and in my judgement he was right to do so. The question posed by Parliament is whether "it is realistic to think" that there could be such an outcome. This should not be confused with the test which courts and tribunals use as the civil standard of proof; a test designed to produce one outcome. The language of the statute is consistent with a number of realistic outcomes co-existing.
>
> 9. It is convenient to deal next with a submission on behalf of the appellant in his reply concerning the weight to be given to Mr Patel's intentions. It is said that:-
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> > "The intentions of the appellant are clear and should indeed be the determinative factor in this appeal."
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> 10. Whilst I have no doubt that it is reasonable to take into account Mr Patel's intentions as part of a general consideration of the circumstances, I cannot accept this assertion about the weight to be given to them.
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> 11. If correct, it would seem to follow that that an owner need only say "I have set my face like flint against any use of community value" and listing will be avoided. This almost makes the scheme voluntary. I think it more reasonable to take into account Mr Patel's intentions as part of the whole set of circumstances. After all, they are the current owner's present intentions and the legislation requires an estimate of what will happen over the next five years" (original emphases).

30. In Gullivers Bowls Club Ltd v Rother District Council and Anor (CR/2013/0009), Judge Warren heard an appeal by Gullivers Bowls Club Ltd, the owner of land used as a bowls club, which appealed against the inclusion of its land in the statutory list, following nomination by a Community Association. Judge Warren held:

> "11. Turning to the future condition in Section 88(1)(b) Mr Cameron [representing the Bowls Club] submits that the existing bowls club has no realistic prospect of continuing. He points to the poor state of the buildings and the finances and relies on a report prepared by GVA. This finds that Gullivers is not commercially viable. Mr Cameron submitted that since listing lasts for five years, my starting point in considering whether the future condition was satisfied, should be whether the bowls club could continue in existence for that length of time.
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> 12. I do not accept that the statute requires me to foresee such long-term viability. Indeed, it seems in the very nature of the legislation that it should encompass institutions with an uncertain future. Nor, in my judgment, is commercial viability the test. Community use need not be and often is not commercially profitable.
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> 13. On this issue, I accept the submissions made by Mr Flanagan. Gullivers may be limping along financially but it still keeps going and membership is relatively

> stable. Of course it is possible that something could go drastically wrong with the buildings and Gullivers would not have the capital to repair them; but that has not happened yet and, in an institution that has lasted for 50 years, it would be wrong to rule out community spirit and philanthropy as resources which might then be drawn on. In any event, should the site cease to be land of community value, Rother would have power to remove it from the list."

31. In Worthy Developments Ltd v Forest of Dean District Council and Anor (CR/2014/0005), Judge Warren dismissed the appeal of a developer, which had bought a former pub known as the "Rising Sun" outside Chepstow, and wished to build two four-bedroomed houses on the site. A planning application to that effect had been refused but was likely to be appealed. The respondent accepted nomination by the "Save our Sun Committee" of the land and building comprising the pub. On the issue of section 88(1)(b), Judge Warren held:

> "17. In respect of the future condition, Worthy Developments Ltd asked me to have regard to their intention to develop the plot to provide two houses. I take that into account although I balance it with the fact that they have not yet obtained the necessary planning permission. I also take into account the remoteness of the public house which must compound the general malaise affecting public houses nationally.
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> 18. The written submissions ask me to consider which was the more likely to happen, that planning permission should be obtained and houses be built, or that the building be revived as a pub? In my judgment, however, to approach the issue in this way is to apply the wrong test.
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> 19. I agree with the council. The future is uncertain. Worthy Developments Ltd may or may not obtain their planning permission. They may or may not sell the land. The Save our Sun Committee may or may not see their plans reach fruition. It remains still a realistic outcome that The Rising Sun might return to use either as a traditional pub or as a pub/shop/community centre as envisaged by the committee.
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> 20. My conclusion in this respect is reinforced by the pledges of support and petitions gathered by our (sic) Save our Sun Committee. It is true that they have not yet made an offer with a firm completion date but their proposals are not fanciful. It is enough that return to use as a pub or some other venture furthering the social wellbeing or interests of the local community be realistic."

32. In J Haley (Old Boot Inn) v West Berkshire District Council and Anor (CR/2015/0008), the proprietor of the Old Boot Inn appealed against the decision to include those premises in the statutory list. The First-tier Tribunal held as follows:

> "17. As has been pointed out in other cases, the requirement in section 88(1)(b) is that it is "realistic to think that there can continue to be" relevant use of the building. Whether something is realistic does not mean that it must be more likely than not to happen. A use may be "realistic", even though it is one of a number of possibilities.
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> 18. In paragraph 17 of his report, the planning inspector found that Mr Haley's:-
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> > "financial accounts would be a significant consideration for any person or company looking to take on the public house as a business. No doubt, it could influence whether the new operator could raise finance. However, possible new operators will differ in their need to raise finance and the operating profit

> of a previous operator will not necessarily be the same as another operator. Therefore, estimating trading potential rather than the actual level of trade under existing control is highly relevant which is the approach taken by the DCL report and the RBCPL." [DCL is a Council-commissioned report and RBCPL is the Re-boot Community Pub Ltd]

19. I agree with the inspector's conclusion on this issue. If the second respondent acquires the Old Boot Inn allowing a tenant to run the business as a commercial concern (from the tenant's perspective), that is clearly a different proposition from an outside purchaser of the Old Boot Inn, who might have to factor-in the cost of acquiring the property in formulating its view of the business's viability. Furthermore, as Mr Morgan's report makes clear, if a couple were to purchase the Old Boot Inn as both a family home and a place of business, they would make more intensive and cost-efficient use of the asset than Mr Haley appears to be doing. In short, Mr Haley's way of running the Old Boot Inn is far from being the only viable means of doing so.

20. For the purposes of determining this appeal, it is unnecessary for me to prefer one "viability method" over another. Notwithstanding the points made by Mr Culverhouse, it has not been shown that Mr Morgan's method is so deficient that it cannot support a conclusion that it is realistic to think that relevant community use can continue. Indeed, the points made above regarding the consequences of the Old Boot being owned by, respectively the second respondent or by a couple making maximum use of the residential opportunities of the property do not require one to choose one particular profit-calculating method over another.

21. Finally, the planning decision is manifestly relevant to the section 88(1)(b) issue in that, since planning permission for change of use has been refused on appeal, it must, as matters stand, be realistic to think that Mr Haley will continue to run the Old Boot Inn as a pub, furthering local social wellbeing and interests; alternatively, that a buyer may emerge for the Old Boot Inn as a pub."

DISCUSSION

33. The nature of the challenge brought against the defendant's decision of 22 December 2020 can be summarised as follows. In forming its opinion under section 88(1)(b) that it was not realistic to think that there can continue to be non-ancillary use of the land which will further the social well-being and social interests of the local community, the defendant erred in law in the following respects.

34. Ground (1): the defendant took into account considerations which resulted in the decision-making process being circular and, thus, defeated the statutory purpose of the legislation: Padfield v Minister of Agriculture, Fisheries and Food [1968] A.C. 997.

35. Ground (2): the defendant failed to avoid the appearance of bias and/or acted with actual bias by entering into a prior contract to assist in procuring the dismissal of any ACV nomination and by placing determinative weight on its own intentions as part landowner, part purchaser and intended developer.

36. Ground (3): in relying on its own development intentions for the land, the defendant failed to take into account matters that were obviously material to the likelihood of that development proceeding and the timing of any such development.

37. Ground (4): in deciding that it was not realistic to consider that the current use of the site could continue, the defendant either applied the wrong threshold or acted irrationally in concluding that the threshold was not met.

38. Before considering these four grounds in detail, I consider it helpful to address two related submissions of Mr Straker QC, for the defendant, as this will have a bearing on all of the claimant's grounds. He urged me to treat with caution the appeal decisions of the First-tier Tribunal in ACV cases. Those decisions concerned the approach to be adopted where a local authority has decided to include land in the statutory list and an appeal is brought against that listing. In such a case, the First-tier Tribunal has (at least up to now) treated the appeal as a *de novo* examination, based on the evidence put to the Tribunal, of whether the section 88(1)(a)(b) requirements are met; that is to say, relevant actual current use and a relevant future use which it is realistic to think can continue.

39. Mr Straker points out that the criterion for listing under section 87 is whether "in the opinion of the authority" the tests in paragraphs (a) and (b) are met. In order to overturn a decision of a local authority that the tests are not met, its decision must be shown to be materially infected by public law error.

40. Mr Straker draws an analogy between the position here and that in the law of town and country planning, whereby a decision to grant planning permission is not appealable and, thus, can be challenged only on judicial review.

41. Although the decisions of the First-tier Tribunal have no authority as precedents, as such, there can in my mind be no doubt that the construction of section 88(2)(b) adopted by Judge Warren, and thereafter consistently followed, is the correct one. The legislation does not require there to be only one "realistic" future use of a building or other land. Several possibilities may each be realistic. The legislation does not require a potential future use to be more likely than not to come into being, in order for it to be realistic. The fact that the most likely of a number of scenarios is one which would not satisfy the statutory criteria (eg. a change of use from pub to residential) does not mean that any other potential future use is, without more, rendered unrealistic. It is only if the non-compliant scenario is so likely to occur as to render any compliant scenario unrealistic, that the non-compliant scenario will be determinative of the nomination.

42. It is clear that there can be only one correct statutory construction of section 88(1)(b). It is therefore, in my view, equally clear that a local authority must adopt that construction, in deciding whether to accept a nomination. To hold otherwise would render the statutory scheme incoherent. The fact that a refusal to nominate can be challenged only on conventional public law grounds is nothing to the point. If, adopting a correct approach to section 88(1)(b), an authority concludes that the test is not met, the mere fact that some other hypothetical authority, following the same approach, might have concluded differently will be immaterial to any assessment of the legality of the first authority's decision. That, however, is the extent of the significance of the words "in the opinion of the authority" in section 88(1).

Ground (1) The defendant took into account immaterial considerations and/or offended the Padfield principle by frustrating the legislative purpose of the Act.

Ground (3) The defendant failed to take into account material considerations.

43. I take these two grounds consecutively because there is a good deal of interconnection between them.

44. I deal first with Ground 3. In doing so I accept that, as Mr Straker points out, we are not here concerned with a decision made by the defendant as a local planning authority. There is, accordingly, no reason to expect the OR to read like a planning officer's report to a planning committee. What is to be expected of the OR depends on the nature of the legal task placed on the defendant. I also remind myself that, in the absence of any express statutory requirement to have regard to a particular matter, a challenge based upon failure to have regard to relevant considerations must show that any such consideration was so obviously material as to demand the decision-maker's attention (R (Samuel Smith Old Brewery, Tadcaster) & Ors. v North Yorkshire County Council [2020] UKSC 3).

45. Bearing all this in mind, I am in no doubt that the Ground 3 has been made out. The heart of the defendant's reasoning is to be found at paragraph 3.11 of the OR. One looks in vain there for any reference to countervailing matters, which might affect the defendant's ability to deliver its development proposals and, thus, make it "realistic to think" that the existing social uses of the land can continue for the purpose of section 88(1)(b). All that we see is the exiguous observation that it is not "certain" the housing development will proceed, as no planning permission has been granted.

46. The most glaring omission from the OR is the requirement on the defendant, stemming from section 122 of the Local Government Act 1972, to appropriate its freehold land (comprising the majority of the current sports ground) for housing purposes. Before appropriating land consisting or forming part of an open space (which this land plainly is), an authority must advertise notice of its intention to do so and consider any objections to the proposed appropriation which may be made to it (section 122(2A)). No steps have yet been taken by the defendant in this regard. At the time that it took the impugned decision to reject the claimant's nomination under the 2011 Act, it could not be said it was a foregone conclusion whether the defendant would have been able lawfully to decide, in the light of any objections, that the land is no longer required for the purposes for which it is currently held. I accordingly agree with Ms Wigley QC that, in relying on the defendant's future plans for the site as the basis for concluding that the section 88(1)(b) test was not met, the issue of appropriation under the 1972 Act was so obviously material as to have demanded consideration. I should mention, for completeness, that the land is "open space" for the purposes of section 122(2A), given it is used for the purposes of recreation (section 336 of the Town and Country Planning Act 1990).

47. I also accept the claimant's submission that, in considering the planning position, it was obviously necessary for the OR to have regard to the position under the National Planning Policy Framework ("NPPF"). The fact that the proposed development might be "compatible with the formal allocation of the site in planning terms", as paragraph 3.11 of the OR noted, is very far from being an adequate analysis of the planning position, given the purpose of the OR, which was to decide whether it was "realistic to think" that existing community uses could continue on the land. Whether or not the land ought to have been allocated for housing under the SAP, any planning application would need to be considered by reference to the NPPF, which places significant weight on community's access to open spaces, sports and recreation land including playing fields. The OR failed to have regard to this obviously material consideration. This point is underscored by the fact that the original grant of planning permission was subsequently quashed by consent, because the defendant had not had regard to the NPPF.

48. By using the "realistic to think" test, Parliament has set a standard which means that a local authority must not approach the future use of land as necessarily a binary issue, as between the current intention of the owner and the current proposals of the nominator. Although the development intentions of the owner will be relevant, particularly in the planning context, any factors casting doubt on the owner's ability to achieve those aims must be considered. It is on the strength of those doubts that the "realistic" nature – or otherwise – of the envisaged social use may depend.

49. With this in mind, I agree with Ms Wigley that – besides the glaring omissions concerning appropriation and the role of the NPPF – the OR also failed to have regard to the obviously material issue regarding the terms of the Agreement. Those terms make it abundantly plain that the true position is very far from that portrayed in paragraph 3.11 of the OR. The Agreement for sale is conditional upon the grant of detailed planning permission for 47 residential dwellings. Article 3.6 of the Agreement provides that either party is entitled to serve notice to terminate if planning permission is refused, or is granted in terms which are not acceptable. As matters stood at the date of decision, no application for such detailed planning permission had been made. The application for outline permission clearly envisaged many substantial issues concerning the development being reserved for future determination by the local planning authority.

50. One such matter was the investigation of the site. The significance of a "survey condition" was acknowledged by the parties to the Agreement. In the light of the surveys not proving acceptable, either party to the Agreement may (pursuant to clause 4.5) serve written notice on the other, terminating the Agreement. The witness statement of Ms Laura Whitehead, for the defendant, states that "when the planning permission was granted, I was on the point of ordering works, including peppering the site with boreholes and trial pits for a number of weeks (minimum 2 and potentially 6 depending on if there were any gas monitoring requirements)."

51. I note that condition 21 of the outline grant dated 16 March 2021 (but subsequently quashed) stated that development (excluding demolition) was not to commence until a desk study had been submitted to and approved by the local planning authority; and that where the study indicated "intrusive investigation is necessary", development was not to commence until a report "which includes a scheme of intrusive investigations to establish the risks posed to the development by past shallow coal mining activity" had been submitted to and approved by the local planning authority.

52. Thus, at the date of decision, the Agreement made it quite evident that there were questions concerning the defendant's ability to deliver its planned redevelopment of the land which needed to be considered in the OR, having regard to the nature of the statutory test in section 88(1)(b) of the 2011 Act.

53. Ground 3 accordingly succeeds.

54. I turn now to Ground 1. The claimant submits that the OR demonstrates the defendant, in reaching its decision, had regard to immaterial considerations; namely, the allocation of the land in the SAP for housing, the intentions of the IP to sell its freehold interest and dispose of its lease; and the steps taken by the defendant, as local housing authority, which the OR categorised as demonstrating "a clear and settled intention to proceed" with the development.

55. By taking into account immaterial considerations, the claimant submits that the defendant has breached the "Padfield" principle by frustrating the legislative purpose of Chapter 3 of the 2011 Act.

56. It seems to me to be evident that each of these matters and, indeed the others mentioned in paragraph 3.11 of the OR, are matters to which the defendant could have regard, in reaching its decision on the nomination. Indeed, given the nature of the statutory test, the defendant would, in my view, have been rightly criticised if it had not given appropriate consideration to them. The reason why I nevertheless have concluded that Ground 1 is made out is because, having identified above the obviously material matters to which the defendant failed to have regard, it can be seen that paragraph 3.11 represents a wholly one-sided approach. Having failed to have any proper regard to the future uncertainties concerning the defendant's redevelopment plans, the defendant could not merely rely on the factors set out in paragraph 3.11 in order to mandate rejection of the nomination.

57. This is particularly so, given that the correct approach to the "realistic to think" test, as demonstrated in the decided cases, means that a landowner's "clear and settled intention to proceed" has to be weighed against other, potentially competing considerations. By the same token, a landowner may well have "put considerable resource" into paving the way for the desired redevelopment, and yet be unable to demonstrate that community use of the land may, nevertheless, still be a realistic prospect. The same is true of the owner having "the necessary resources to develop" and having identified "a building contractor".

58. This is not a question of the court attempting to impose its own views as to the weight to be accorded to particular factors. Rather, the problem with paragraph 3.11 (and the OR as a whole) stems from the defendant's failure to undertake the required holistic analysis. In its absence, there was, I find, no way in which the defendant could rationally ascribe determinative weight to the factors relied upon in paragraph 3.11.

59. I have mentioned under Ground 3 the issue of site investigations. Paragraph 3.11 said it was clear that "further more intrusive site investigations and surveys will need to be carried out" and that "the current informal uses of the site are not compatible with those activities", citing risk to members of the public. Ms Whitehead's statement, however, tells us that the works in question would last only six weeks, at most. Clause 4 of the Agreement requires the defendant to cause "as little inconvenience and damage as practicable" and immediately to make good "any damage so caused" to the IP's property. I also accept the claimant's submission that the survey is likely to result in development and is likely to require some form of consent. Viewed overall, the reliance placed by paragraph 3.11 on the surveys, as going to show that the test in section 88(1)(b) was not met, is unsustainable. The potential surveys cannot properly be said to render unrealistic any relevant community use of the land in the future scenario set by section 88(1)(b).

60. This brings me to a point touched on in oral submissions. Ms Wigley suggested that, even if the relevant social use of the land could be said to be bound to come to an end in a matter of months, owing to the redevelopment, the land should still be included in the list because the section 88(1)(b) condition would still in the meantime be satisfied.

61. One can readily see that giving free rein to such an interpretation is likely to cause serious difficulties. It is unlikely to have been Parliament's intention that listing as an ACV

should take place in circumstances where, on the facts, the test in section 88(1)(b) will, on any view, cease to be satisfied within a short period of time.

62. At paragraph 4.82 of *Adamyk: Assets of Community Value – Law and Practice* (2017), the author opines that the words "can continue" in section 88(1)(b) do not require the local authority to be able to envisage a lengthy period of continuance. In his view, "a practical (if rather generalised) test to apply would be to ask whether the use can continue for a period of time which is reasonable having regard to the nature of the use and the purpose of the listing."

63. Since my decision in the present case does not turn on it, it is unnecessary for me to make a finding on this issue. I would merely say that the answer in a particular case is likely to be one of fact and degree.

64. Ground 1 succeeds.

Ground (2): the defendant failed to avoid the appearance of bias by placing undue and unexplained weight on the intentions of itself as part landowner, part purchaser and intended developer of the land.

65. In Porter v Magill [2002] 2 AC 357, the House of Lords held that the appropriate test in determining an issue of apparent bias was whether the fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the Tribunal in question was biased.

66. It is now well-established that what the fair-minded informed observer expects of a democratically-elected local authority making decisions on planning applications and other regulatory matters is different from what is expected of those exercising traditional quasi-judicial functions: R v Hereford and Worcester County Council Ex parte Wellington Parish Council [1996] J.P.L. 573; R (Lewis) v Redcar and Cleveland Borough Council [2009] EWCA Civ 3. In summary, elected local representatives are not required to be impartial in deciding such matters but to judge them fairly on their merits. Whilst they may approach the issues with a predisposition, they must not close their minds to arguments which point to a contrary conclusion.

67. In the local government context, the hypothetical fair-minded observer will also be aware that Parliament has conferred upon local authorities a plethora of functions, with the result that an authority, in the exercise of its social and economic development functions, may need to obtain regulatory consent or approval from itself, under a quite different legal regime.

68. In R(G) v Thanet District Council and Anor [2021] EWHC 2026 (Admin) Mr Timothy Corner QC, sitting as a Deputy High Court Judge, held:

> "24. Where a local planning authority has an interest in a site for which it is considering a planning application, it is under a particular duty to weigh the issues, engage with objections thoroughly, conscientiously and fairly (Stirk v Bridgenorth District Council (1996) 73 P&CR 439 at p. 444) and to set out all relevant material in any report (R v South Glamorgan County Council ex p. Harding (1998) COD 243). In such circumstances procedural requirements require close observance (R v Lambeth Borough Council ex p Sharp [1987] JPL 440 at 443 and (1988) 55 P&CR 232 at 237-240)."

69. A local authority which finds itself in a position just described may, therefore, find its decisions subjected to a more intense form of scrutiny. As the Deputy Judge in G observed, citing Richards J in Georgiou v LB Enfield LBC [2004] EWHC 779 (Admin), "it is important whenever an authority's decisions are being challenged not to apply the test in a way that renders the decision-making impossible or unduly difficult" (paragraph 117).

70. The claimant submits that apparent or actual bias arose in the present case because, prior to making the impugned decision, the defendant had entered into contractual obligations, which obliged it to assist the IP in ensuring that any ACV nomination was dismissed; and that fulfilment of those obligations was conditional on the land not being listed as an ACV. Furthermore, apparent or actual bias has arisen because the decision placed undue and unexplained weight on the intentions of the defendant as landowner, proposed purchaser and developer of the land.

71. Ms Wigley submits that, in a case where the local authority is unconnected to the landowner or developer, it would be inconceivable that the intentions of the landowner to sell to a third-party, and the intentions of the purchaser to develop, were to be determinative of a refusal of an ACV nomination. That would allow the landowner/developer, in effect, to have a veto over the listing of the land.

72. In G, there was a contract involving a developer and (amongst others) the local authority which granted planning permission for the development. At paragraph 119, the Deputy Judge noted that, where the authority engages with the developer in such circumstances, "there is likely to be a contract obliging the developer diligently to pursue the submission of a planning application and obliging the authority (as landowner) to assist or not obstruct". At paragraph 120, the Deputy Judge observed that when an authority contracts directly with a developer, "there may be a specific clause providing that nothing in the contract shall be taken to prejudice the decision to be made on any planning application by the authority in its capacity as local planning authority".

73. Since, in the present case, the development cannot take place without planning permission, an agreement along the lines described in G is understandable. The housing development simply cannot come about without planning permission. There is, however, no legal necessity for land not to be included in the list of assets of community value, in order for planning permission to be granted for development, where that development is incompatible with the social use (or uses) that caused the land to be included in the list. That said, it is, however, true that the fact of listing as an ACV can be a material consideration for the local planning authority in deciding any planning application to redevelop the land (see discussion in *Adamyk*, beginning at paragraph 5.76). The inclusion of clause 25.2 and 25.3 in the Agreement must, therefore, be because the defendant and the IP consider that preventing nomination is commercially and/or practically essential.

74. Although the obligation to use reasonable endeavours to have the ACV nomination of the land dismissed is somewhat striking, I nevertheless accept there can be said to be similarities between this obligation and one which requires reasonable endeavours of a party to obtain planning permission (and on the other party to assist in that regard). Furthermore and in any event, there is, importantly, a saving provision in clause 26 of the Agreement, which provides expressly that nothing in the Agreement affects the defendant's obligations in the exercise of its functions as a local authority.

75. What, then, is the hypothetical fair-minded observer to make of this? On its own, for the reasons I have just given, I do not consider that he or she would regard the Agreement as disclosing actual or apparent bias. I am, however, firmly of the view that the terms of the Agreement, so far as they bear on the ACV issue, are such that the observer would expect the defendant's decision on the nomination to be meticulous in addressing all the relevant factors concerning whether it is "realistic to think" that social uses of the land can continue.

76. For the reasons I have given in relation to Grounds 1 and 3, the fair-minded observer would be bound to conclude from the decision that nothing of the kind had taken place.

77. I agree with Ms Wigley that the emphasis placed by the decision on the time and effort that the defendant, as housing authority, had spent on pursuing matters, and its possession of the necessary resources to develop the land, would be very unlikely to have constituted good reasons for rejecting the nomination, had the defendant been considering the actions and resources of a purely commercial developer. Mr Straker said that we are, here, concerned with one of the largest local authorities in England and not "any old Joe". That may be so; but the hypothetical observer would expect the decision to recognise and give proper attention to the regulatory challenges faced by the defendant, in common with any other developer; not to mention the additional hurdle in the shape of section 122 of the 1972 Act.

78. Accordingly, I find that the terms of the Agreement and the contents of the decision, taken together, are such as to give rise to the appearance of apparent bias.

79. Ground 2 accordingly succeeds.

Ground 4: the defendant failed to apply the correct threshold and/or acted irrationally.

80. I accept Mr Straker's submission that the threshold for a "pure" *Wednesbury* challenge is a high one: Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374. I agree with him that the defendant did not act "irrationally" in the way described by Lord Diplock at p.410 G-H of his opinion in CCSU.

81. At p.410 F, however, Lord Diplock identified "illegality" as a ground of judicial review, in the sense that "the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it". For the reasons I have given, the defendant did not understand and/or give effect to section 88(1)(b). Its decision conspicuously fails to adopt the broad evaluative approach required by the language of that sub-paragraph. In particular, the decision displays no appreciation of the important point that it may be "realistic to think" that a relevant use can continue, even if that use is not the most likely future possibility. In this regard, the remark at the beginning of paragraph 3.11 of the OR that "it is not certain at this point in time that the proposed housing development will proceed" was not followed by any analysis that was capable of justifying the conclusion that development was, nevertheless, so probable as to render relevant future social use unrealistic. This is not to say that, adopting a proper approach, the same conclusion may not be reached.

82. In all the circumstances, therefore, I find that the defendant did not "understand correctly the law" that regulated its decision-making under section 88. The fact that section 88(1)(b) was accurately cited in paragraph 5.1 of the decision cannot save it. The same

is true of the closing words of paragraph 3.11; although, here, the conclusion "that it is reasonable to conclude that it is not realistic to think …" is additionally problematic. The question is not whether the defendant could rationally adopt a negative response to the nomination but whether the requirement of section 88(1)(b) was actually met.

83. Ground 4 accordingly succeeds.

Decision

84. Each of the Grounds succeeds. I invite counsel to prepare the resulting order.