FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Community Right to Bid

Tribunal Reference: CR/2014/0006

Appellant: Higgins Homes PLC

Respondent: London Borough of Barnet

Judge: NJ Warren

DECISION NOTICE

1. The Localism Act 2011 requires local authorities to keep a list of assets (meaning buildings or other land) which are of community value. Once an asset is placed on the list it will usually remain there for five years. The effect of 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 "the moratorium" will allow the community group to come up with an alternative proposal – although, at the end of the moratorium, it is entirely up to the owner whether a 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.

2. The Greensquare Residents' Association represents residents living in Briarfield Avenue, Tangle Tree Close, Rosemary Avenue and Dudley Road in Finchley, London N3. On 17 October 2013 they applied to the London Borough of Barnet for two adjacent pieces of land ("the listed land") to be added to the list of assets of community value. The application was successful. Regrettably, Barnet failed to notify the owner of the land Higgins Homes PLC ("Higgins"), as they were required to do, of the application. Nothing now turns on that administrative error.

Higgins applied for a review. The review decision confirmed the listing and they now appeal to the Tribunal.

3. The questions at issue in this appeal are whether the listed land satisfies both the present and future conditions set out in Section 88(1) of the Act.

4. The present condition requires that 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.

5. The future condition is 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.

6. The facts of this case are unusual. The four streets served by the residents' association enclose the listed land. There is access to the land from Dudley Road and from Tangle Tree Close. The land comprises two land registry titles, AGL88313 ("313") and AGL90336 ("336"). Most of the listed land was at one time the subject of a lease made in 1910 for a period of years expiring in Sept 2006. It would be artificial to treat the remaining portion of the listed land separately, not least because it provides access to the listed land. The purpose of the lease was to provide a private recreation ground for the streets which the owner had just developed. The trustees of the lease promised to lay out two tennis courts and were given power to sublet to a lawn tennis or other sports club.

7. The land in title 313 has been rented for many years by the West Finchley Bowling and Social Club. Until 2006 the landlords were the trustees of the 1910 lease.

8. Use of the rest of the listed land became less organised. There was a tennis club which failed and then allotments which fell into disuse. In 1993 the residents' association restored the land, now known as Greensquare Field. The field is approached by paths through scrubland at either end. The scrubland could fairly be

described as consisting of thickets but there are blackberries and fruit trees. The paths lead to a well kept green with a tree at its centre. There is a set of miniature football goalposts, two to three benches, a picnic bench, a swing and a litter bin. Children use the field for playing out, tree climbing, birthday parties and bird watching. Older residents go blackberrying, pick the apples and walk their dogs. Before the lease expired the residents association held more formal community gatherings such as barbecues, firework displays and royal jubilee parties.

9. Higgins bought the land in both titles before 2006. They are residential property developers. In February 2006 they granted West Finchley Bowling Club a lease over the land they had always occupied. There was a break point for the tenant in September 2011. The next break point, which applies to both landlord and tenant is September 2016.

10. In 2007 Higgins built fencing and gates around the rest of the listed land. These were disabled by persons unknown and since then access to the Greensquare Field and use of it as an informal recreation ground has continued. The local residents recognise that their legal rights to use the land have gone.

11. In January 2007 Higgins applied for planning permission to demolish 63 Briarfield Avenue, thus permitting access to the Greensquare Field and to build nine four bedroom houses. This was refused. In 2010 another application for three detached dwellings was also refused. More recently in November 2013 an application to build one detached dwelling house retaining publically accessible open space was also unsuccessful. In 2010 the residents had failed in their bid to have the field classified as a town or village green.

12. There was a hearing of this appeal on 19 September 2014 at which Ms Ellis QC represented Higgins and Mr Booth represented Barnet. I am grateful to both of them for their assistance with this case.

13. It is convenient to take first the land entitled 313 which is that occupied by the Bowling Club. The land includes a brick built club house and a bar. The club has playing and non-playing members and holds regular competitive matches. I have no hesitation in concluding that the present condition is satisfied in respect of this land.

14. At one point, the appellant submitted that any use of land made by a private members club could not possibly come within Section 88(1) of the Act but, at the hearing, Ms Ellis abandoned this submission. In my judgement, she was right to do so. It was then submitted that only use by the private members could be taken into account and that any others attending the premises such as members guests or visiting teams were merely "ancillary". I am not attracted by the idea that when a club member and his or her guest share a drink together one of them is making ancillary use of the premises while the other is making non-ancillary use. Ms Ellis also submitted that in a dense urban area "the local community" must mean more than just a small number of local individuals. She pointed out that there was no requirement for members of the club to reside in any particular area such as the streets surrounding the land and no evidence that a significant number of them does so.

15. In the absence of special circumstances pointing to the contrary, in my judgement, the Act does not impose upon a local authority a duty to inspect the books of a sports club to find out just what proportion of its members come from the local community. The bowls club is active. It has 35 playing members ranging from aged 15 to the mid 70s as well as a handful of non-playing members. Its fixture card contains more than 50 league cup and friendly games not to mention individual use of the facilities. In these circumstances, it seems to me to be obvious that this is a use of the bowling club land which furthers the social wellbeing and social interests of the local community. It is plainly not an ancillary use.

16. As to the future condition, the bowling club holds a 21 year lease. Admittedly, it is at risk of the landlords taking advantage of the 2016 breakpoint but this means that

the use is guaranteed for another two years. The future condition is therefore also satisfied.

17. Turning to the rest of the land. Ms Ellis first submitted that local residents who used it did so as trespassers; and their trespass was enabled by past vandalism to gates and fences. This, she submitted could not amount, as a matter of law, to "an actual current use" of the land within Section 88(1) of the Act. This would be to encourage bad behaviour and to breed disrespect of other people's rights.

18. I have no doubt that current legal rights attaching to the listed land ought to be taken into account. The fact that the residents no longer have a right to use the land is relevant; as are the owner's intentions.

19. In my judgement, however, Ms Ellis' submission goes too far in suggesting that the absence of a legal right to use the land means that I must ignore the use altogether. First, as a matter of common sense, I am unable to accept that taking into account the informal recreational use of the land in these circumstances is to encourage bad behaviour or to breed disrespect for other people's rights. When the inspector who reported on the town and village green application described the picnic table under the tree as "doubtless a very nice spot indeed to sit with the children in the summer", he was charmed, as anyone would be; he was not corrupted. It is difficult to see how a safe haven for children on summer evenings and the friendship of people walking their dogs is an encouragement to bad behaviour. No doubt it is unusual for a non-ancillary use of a piece of land to be an act of trespass; but then again, these are unusual circumstances. No doubt in the last century there were many more stretches of derelict or fallow land which were the subject of informal community use. It is all a question of fact.

20. Taking into account all the circumstances, I agree with Barnet that the current informal recreational use satisfies Section 88(1)(a) of the Act.

21. Turning to future use, Ms Ellis stressed the owner's right to prevent trespass. Of course that right exists and is to be taken into account. I accept that Mr Hancocks, a director of Higgins, when he visited the site recently told some young boys that they should not be playing football on it. At present, however, the status quo seems to be maintained. No doubt it is a delicate balance. The company must insist on its ownership rights – and the local community do not dispute those. The residents association, for example, has deliberately stopped holding formal events on the field. On the other hand, there is a sense in which the company might find a strict enforcement of their rights to be unpalatable. It might be bad local PR. It might even be that the residents' careful and tranquil use of the land is a cheap form of security. There is no planning permission to change the present use.

22. In these circumstances whilst Greensquare Field might reasonably be regarded as the subject of a fragile or uneasy truce, the absence of any contrary planning permission is significant enough for me to regard it as realistic that the status quo can continue (as it has done) and that the future condition is satisfied.

23. Miss Ellis QC also referred to ECHR Protocol 1 Article 1. I am not entirely clear that the article is engaged because this part of the Localism Act seems to me to be a law that the state has deemed necessary to control the use of property in accordance with the general interest. In any event, as I have indicated the Act contains provisions for compensation should an owner incur loss. I have applied the plain words of the statute. In my judgement, the Human Rights Act 1998 does not require me to interpret them in any other sense.

NJ Warren
Chamber President
Dated 23 October 2014