FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
COMMUNITY RIGHT TO BID

Tribunal Reference:	CR/2014/0016
Appellant:	Idsall School
Respondent:	Shropshire Council
Judge:	Peter Lane

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 appeal concerns the listing under the 2011 Act by Shropshire Council of School playing fields at Idsall School, Shifnal, Shropshire, following an unsuccessful attempt by the School, at a statutory review, to have the playing fields removed from the list. The School appealed to the Tribunal. A hearing of the appeal took place at Birmingham Employment Tribunal on 5 February 2015, when the School was represented by Mr David Brammer and the Council by Mr Robin Hopkins. I am grateful to them for their helpful submissions. At the request of the School, I made an accompanied site visit on 6 February.

3. Section 88(1) and (2) of the 2011 Act provides as follows:-

> "88 Land of community value
>
> (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 other land that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community.

4. The freehold of Idsall School, including the playing fields, and of the Idsall Sports Centre is owned by the Council. Idsall School is a secondary School which, on 1 June 2014, became an Academy. As from that date, the School and the playing fields were subject to 125 year lease granted to the School by the Council.

5. At the hearing on 5 February, I heard evidence from Mr Peter Bourton, head teacher of the School, Mr Christopher Edwards, Area Commissioner and Listing Review Officer for the Council, and Mr Peter Davies, Leisure Services Manager for the Council.

6. The land and building comprising the Sports Centre are not included in the listing. The Sports Centre building comprises a Leisure Centre, including a fitness suite. Use of the Sports Centre and the playing fields is subject to a Joint Use Agreement between the governing body of Idsall School (as it then was), Shropshire County Council and Bridgnorth District Council, dated 14 January 2000. The Agreement defines "School priority time" as 9am to 5pm Monday to Friday during School term time and "public use time" as being all other times. The preamble to the Agreement reads as follows:-

" 2.1 The parties to this Agreement have since 14 September 1973 worked together to enable community use of the premises at the School during public use time and wish to continue to do so.

2.2 The Governors have had regard pursuant to the Act to the desirability of the premises continuing to be made available for community use as defined in the Act.

2.3 The Governors are satisfied that the implementation of this Agreement will promote community use of the premises outside of School hours.

2.4 The Governors have agreed to transfer control of the premises outside of School hours to the Management Committee."

7. The Second Schedule to the Agreement makes provision for the membership of the Management Committee. As signed, the Agreement provided for members to be appointed by the County Council, the District Council, the Governors of the School, Bridgnorth and District Sports Advisory Council; and by the Management Committee itself "to represent the users of the facilities." By article 3.1, the Governors transferred to the Management Committee "control and use of the premises during public use time". Paragraph 3.6 provided that the Governors would "ensure that the operation of the School does not unreasonably hamper the use of the premises during public use time", whilst article 3.7 provided that the Governors could require the School to assume control of the premises during public use time "for School functions provided that the Governors give the management committee not less than 28 days prior written notice of such an event".

8. Mr Bourton, the Head Teacher, described the Joint use Agreement as belonging to "a bygone age". Amongst other things, Bridgnorth District Council had ceased to exist. Mr Bourton could not remember the last time the Management Committee had met. He thought it might have been six or seven years ago. He was unaware of its present membership. The Sports Centre has a manager, who is employed by Shropshire Council. Funding by the Council for the Sports Centre was being reduced and a decision would, in due course, need to be made as to whether, in the absence of funding, the School would be prepared to take on the running of the Sports Centre. Mr Bourton said that the use by the community of the playing fields was limited to the football season, whilst the School used the fields all year, including in the summer for cricket. He considered that 99 people out of 100 would, if asked, say that the playing fields were a School facility rather than something related to the Council. The School was fully subscribed and Mr Bourton was concerned that listing would impact adversely on the School's ability to provide extra classrooms, if necessary by the use of temporary buildings.

9. Mr Edwards, who conducted the Council's review, said he had considered that the issue was whether the use of the playing fields by the community could be said to be "ancillary" to their use by the School. He had concluded that it could not. The Sports Centre Manager had compiled usage figures for the playing fields by the community. These showed a total of 14,110 individuals from the community used the playing fields in 2012/13 and 14,930 used them in 2013/14. The total for the first two quarters of 2014/15 was 4,030. Mr Edwards had concluded that community use was not ancillary to School use but, rather, that the playing fields were subject to two roughly equal or "primary" uses, as reflected by the Joint Use Agreement. Mr Edwards considered that that Agreement was still in force. He had assumed the School was aware of it when the School became an academy in June 2014.

10. Mr Davies spoke to the Sports Centre Manager's community usage figures. He pointed out that the figures for 2013/14 represented an increase on those of 2012/13, thereby contradicting Mr Bourton's view that community use was declining. He understood that figures for October –December 2014 indicated community use by some 4,500 people, which would represent an increase in usage compared with the comparable quarter for 2013-14.

11. Under the heading "Branding", Mr Davies' statement attached marketing material from the Council concerning the Sports Centre, making it plain that users could book the rugby and football pitches through the Sports Centre. In his view, members of the public

who use or otherwise know the Sports Centre would tend to associate the use of the pitches on the playing fields with that Centre. The signage at the School entrance referred to both Idsall School and Idsall Sports Centre. A person who had already booked the use of a playing field would, upon arrival, go to the Sports Centre and tell the staff, before going to the pitch. If a pitch had not been booked, the person concerned would go to the reception desk in the Sports Centre in order to book one. Mr Davies agreed that the School maintains the pitches, including goal posts, recharging an element of that cost to the Council. This made sense in terms of the Joint Use Agreement. Mr Davies agreed that the reductions in Council funding would need to be addressed, in the way described by Mr Bourton.

12. I have had regard to the oral and written submissions and the oral and written evidence, including that not specifically mentioned in this decision. It is common ground that the essential question in this appeal is whether use of the playing fields by the community is "an ancillary use" within section 88(1)(a) of the 2011 Act. If it is, then section 88(1)(a) is satisfied. Despite the discussions which both sides anticipate will need to occur, consequent upon reductions in Council funding of the Sports Centre, there is no suggestion that – if the issue of "ancillary" use is resolved in favour of the Council – section 88(1)(b) will not be satisfied; in other words, despite the forthcoming funding issue, it is realistic to think that use of the playing fields by the community will continue.

13. The listing of the playing fields occurred as a result of the nomination by Shifnal Town Council. The School considers that the Town Council's actions represented an improper use of the 2011 Act, being motivated by a desire to preclude development on the playing fields, which properly falls to be addressed through the legislation relating to development control, rather than the 2011 Act. This point was not energetically pursued at the hearing; rightly so, in my view. Although an extraneous motive may serve to highlight weaknesses in a case for listing under section 88, the essential question remains whether the requirements of that section are satisfied. In the present case, the motivation of the Town Council (even if true) does not, I find, have any material bearing on how the Tribunal should approach the question of whether use of the playing fields is ancillary.

14. In Harrods Ltd v Secretary of State for Environment etc [2002] EWCA civ 412, the Court of Appeal was concerned with whether the building of a helicopter landing facility at Harrods Department Store in Knightsbridge amounted to a material change of use, requiring planning permission, or whether it could be said to be reasonably incidental to the established use of the land as a shop. In determining that question at first instance, Sullivan J had held that, whether the test was expressed in terms of whether a use was "incidental" or "ancillary" to another use, the proposed new use had, in effect, to be "ordinarily" incidental or ancillary to that other use.

15. In the circumstances, I do not consider that the *Harrods* cases offer much assistance in deciding whether the use by the community of the playing fields at Idsall is "ancillary" to the School's use of them. Of more relevance is the First-tier Tribunal's decision in Dorset County Council v Purbeck District Council (CR/2013/004), where the President held that use of School playing fields at Wareham by established community sports teams was "an ancillary use of the school site" [17]. In so finding, however, Judge Warren specifically rejected the contention that community use of school premises, pursuant to Schedule 13 to the School Standards and Framework Act 1998 (whereby a community's

use of school facilities "must always be subordinated to the primary needs of the school") meant that, for the purposes of the 2011 Act, such community use must necessarily be "ancillary" [13] and [14]. In Judge Warren's view it:

> "will depend on the facts. I specifically reject the submission that the "quantum" or amount of use cannot be determinative and that it is the status of the user as against the rights of the owner which counts" [14].

16. I respectfully agree. The issue of what is "ancillary" for the purposes of the 2011 Act is essentially fact-specific. I see nothing in the Act which compels the conclusion that there must always be only one primary use of the land or buildings in question, to which any other use must necessarily be ancillary. If use A is, in reality, no more than supportive or otherwise serving the purpose of use B, then use A will be ancillary to use B: as Mr Bircher observed, the word "ancillary" comes from the Latin *ancilla* = maidservant. I also agree with Mr Hopkins that there may be cases where, even though there is no functional relationship between uses A and B, use A may properly be said to be ancillary to use B if a comparison of the two reveals use A to be so minor or minimal as to make it unreal to equate the two uses for the purpose of section 88. Accordingly, like Judge Warren in the *Dorset* case, I reject the submission that the quantum or amount of a use cannot be determinative, at least in certain situations.

17. The Council contends that the number of hours designated for community use, pursuant to the Joint User Agreement is more than the number allocated for School use. The School counters that, in reality, the playing fields, (not being floodlit) are unavailable for community use during the winter months, given that it will be dark by 5pm. Both sides have a point. The reality, however, is that the usage figures for the playing fields demonstrate what in my view is very significant community use, which is plainly not supportive of the School's use.

18. In the circumstances of the present case, the Joint User Agreement is also a relevant factor in my conclusion that the use by the community is not "ancillary" to the use by the School. The School's attempt to portray the Agreement as defunct is, I find, misconceived. Shropshire Council is the successor both to Shropshire County Council and to Bridgnorth District Council. The normal legislative arrangement, when local authorities are reorganised, is that the new authority steps into the shoes of its predecessor. I have not been shown anything to suggest that such was not the case with the Joint User Agreement. The fact that the Management Committee has not met recently is, in my view, indicative of the fact that the arrangements are working well on the ground, as between the School's officials and those of the Council; in particular the Manager of the Sports Centre.

19. The School has taken issue with Mr Davies' view of the signage and marketing material for the Sports Centre as having significance in terms of "branding" the Sports Centre within the site. But whether or not one adopts the terminology of "branding", a visit to the site reveals the fact that the Sports Centre has a significant presence there, as announced by the signage. The position on the ground is such that I agree with Mr Hopkins that the playing fields are an integral part of the Sports Centre's facilities. The reality is that there are two facilities on the site – the School and the Sports Centre – each of which has a significant "call" on the playing fields. The fact that the School may have

a greater call in terms of hours spent using the playing fields does not make the Centre's use of them ancillary.

20. The requirements of section 88 are made out. This appeal is dismissed.

Peter Lane

Chamber President

Dated 16 March 2015