# FIRST-TIER TRIBUNAL
# GENERAL REGULATORY CHAMBER
# Community Right to Bid

| | |
|---|---|
| **Tribunal Reference:** | CR/2014/0018 |
| **Appellant:** | Banner Homes Limited |
| **First respondent:** | St Albans City and District Council |
| **Second Respondent:** | Verulam Residents' Association |
| **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 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.

2. This appeal concerns land known as Bedmond Lane Field, St Albans. The appellant, Banner Homes Limited ("Banner Homes") is the owner of the Field. The listing authority is St Albans City and District Council ("the council"). Banner Homes is part of the Banner Homes Group, owned since April 2014 by Cala Group Limited. Banner Homes would like to build on the Field but, since it falls within the metropolitan green belt, it is apparent that (absent a change in planning policy concerning the green belt) such development is unlikely within the near future. Two public footpaths (nos 32 and 95 on the council's definitive map) run across the Field. Footpath 32 runs essentially along its eastern edge, whilst footpath 95 joins it at right angles, roughly at the Field's halfway point. The Field comprises 4.83 hectares.

3. Until 2014, the Field had for some 40 years been used by local residents for recreational use, such as walking, exercising dogs, informal play (by local children) and photography of local flora and fauna. Ms Debbi White, Property and Asset Manager of the council, in 2014 observed evidence of such uses in the form of "desire lines" across the Field, away from the public footpaths.

4. On 10 March 2014, the Field was listed by the council as an asset of community value under the Localism Act 2011. On 30 April 2014, Banner Homes' solicitors requested a review of the decision. That review took place on 26 September 2014. The council's decision was to maintain the listing. Banner Homes appealed that decision to the First-tier Tribunal.

5. A hearing of the appeal took place at Field House on 4 March 2015, when Banner Homes were represented by Mr Douglas Edwards QC and the council was represented by Mr Robin Hopkins. I am very grateful to them for their submissions. The council's stance was supported at the hearing by Mr Timothy Beecroft of the Residents' Association.

6. I received written evidence from Mr Paul McCann, on behalf of Banner Homes, Mr Mike Lovelady and Ms Debbi White of the council and Dr Robert Wareing of the Residents' Association.

7. 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".

8. Dr Wareing has lived in the vicinity of the Field (or Meadow, as he calls it) for over 40 years:-

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

9. Dr Wareing has produced a book of photographs depicting the Field, particularly in spring, when wildflowers and grasses are much in evidence, as well as in summer, when "floral blooms [are] typified by the rosebay willowherb, ox eye daisies, poppies and bee orchids". According to Dr Wareing, "where informal footpaths pass through areas with high density shrubs and bushes, the vegetation is carefully trimmed by residents to keep the footpaths open".

10. There is also evidence that, in the late 1990s, the owners of the Field, concerned about the activities on the land of travellers, unsuccessfully tried to interest local residents in taking a licence of the Field. Local residents apparently sought permission of the owners to go on to the Field for the purposes of hedge-planting.

11. Following the listing of the Field under the 2011 Act, Banner Homes erected a wire fence along the entire length of the footpaths, interspersed with signs stating "private land no unauthorised access". Mr McCann says this was done partly as a result of concerns regarding liability to trespassers. Also in 2014, Banner Homes applied to the council for planning permission to change the use of the Field so as to facilitate "the keeping of horses". In August 2014, the council's officers recommended refusal, owing to the absence "of a tree survey, ecology survey, detailed site layout, means of access, or any other supporting information", which meant that the local planning authority was "unable to fully or properly assess the acceptability of the impact of the proposed development on the openness and visual amenity of the green belt, the impact on ecology, the impact on existing landscape and trees and the impact on highway safety". It was also noted that Banner Homes "did not engage in pre-application discussions with the local planning authority and the form of development proposed fails to

comply with the requirements of the Development Plan and does not improve the economic, social and environmental conditions of the District". I was informed that planning permission was subsequently refused by the council and that the matter is currently the subject of an appeal.

12. The council's case is essentially as follows. Notwithstanding that the fencing off of the rights of way means local residents can no longer physically access any part of the Field other than the public footpaths, the council contends that the benefit which residents derive from looking at other parts of the Field constitutes "an actual current use" of the Field, for the purposes of section 88(1)(a). Alternatively, the council contends that, prior to the fencing off of the footpaths, the use made of the Field by local residents constituted an actual use, within the recent past, which furthered the social wellbeing or interests of the local community, with the result that section 88(2)(a) is satisfied. Notwithstanding Mr McCann's statement that Banner Homes do not intend to take down the fencing or dispose of the Field, the council submits that (a) it is, in all the circumstances, nevertheless realistic to think that there can continue to be non-ancillary use of the Field (on the basis of its first submission, in that local residents will continue to derive relevant benefit from looking at the Field from the footpaths); or (b) that, in terms of section 88(2), it is nevertheless realistic to think that there "is a time in the next five years when there could be" relevant non-ancillary use of the entire Field.

13. Mr Edwards QC categorises the first issue as follows:-

**Issue 1 – does use of the two public footpaths amount in law and/or fact to a proper basis to conclude in respect of the whole of the 4.83ha of the land that there is "an actual current use of …the land that is not an ancillary use…" and which "it is realistic to think …can continue" for the purpose of s.88(1) of the LA 2011?**

14. Although caution must be employed in employing statutes involving somewhat different regulatory regimes, I nevertheless agree with Mr Edwards that it is useful to note how enactments regarding town and village greens have been interpreted by the courts. In Cheltenham Builders Ltd. v South Gloucestershire District Council [2003] EWHC 2803 (Admin), Sullivan J had cause to consider section 22(1A) of the Commons Registration Act 1965:-

> "(1A) Land falls within this subsection if it is land on which for not less than 20 years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality have indulged in lawful sports and pastimes as of right, and either –
>
> (a) continue to do so, or

(b) have ceased to do so for not more than such period as may be prescribed, or determined in accordance with prescribed provisions".

15. At [29] of his judgment, Sullivan J observed that:-

> "The onus was upon the applicants for registration to prove on the balance of probability that the site had become a village green. Thus the applicants had to demonstrate that the whole, and not merely a part or parts of the site had probably been used for lawful sports and pastimes for not less than 20 years. A common sense approach is required when considering whether the whole of a site was so used. A registration authority would not expect to see evidence of use of every square foot of a site, but it would have to be persuaded that for all practical purposes it could sensibly be said that the whole of the site had been so used for 20 years".

16. I agree that the same "common sense" approach falls to be applied in the case of section 88 of the 2011 Act. Assuming for the moment that the requirement imposed by section 88 is for there to be a physical use of the land to be listed, it cannot sensibly be contended that the narrow strips forming the public footpaths are such as to entitle the council to list the entire 4.83ha Field.

17. The council, however, argues that a person's observation from the footpath of the flora and fauna of the Field constitutes a use of the entire Field, albeit that the observer is no longer physically able to wander about the Field. Mr Edwards submits that the use of the word "actual" in section 88 "strongly suggests an intention that 'physical' use was intended". Mr Edwards accepts that 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, in enacting the 2011 Act.

18. I agree. Mr Hopkins was unable to point to any example, either in case law or guidance, that might support the contrary view. Indeed, 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.

19. 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.

20. It was not suggested that the actual public footpaths have any significant flora or fauna of interest to the local community, since they are merely trodden grass paths. Any suggestion that the footpaths themselves might separately be listed is refuted by that fact, together with the finding I have just made regarding the inability of the council to pray in aid the merely visual aspects of the remainder of the Field. Such a suggestion in any event founders on the basis that the clear primary use of the footpath is, like any other right of way, for passing and repassing and that any enjoyment of views from the footpath is, on the facts, merely an ancillary use, incidental to the main use of passing and repassing.

21. The next issue is what Mr Douglas describes as:

**Issue 2 – did trespassory use beyond those footpaths in law amount to an actual current use of the land on the facts for the purposes of s.88(2) of the LA 2011?**

22. As Mr Edwards states, it is common ground that, as a matter of fact, local residents have, over at least several decades, "strayed off the public highway and onto wider parts of the land, including for recreational walking and dog-walking" before Banner Homes erected the fences in 2014. Mr Edwards contends that this use "was trespassory and therefore tortious". Such unlawful use is, according to Mr Edwards, not "an actual use of the …land" within the scope of section 88(2)(a) of the 2011 Act because Parliament cannot have contemplated conferring a benefit on those who can bring themselves within the relevant requirements only by relying upon their unlawful actions.

23. In Barkas v North Yorkshire County Council & Anor [2014] UKSC 31, the Supreme Court was concerned with whether a field that had been maintained by a local authority as a recreation ground for the benefit of those living in adjacent houses, pursuant to statutory powers, could be registered as a town or village green under section 15 of the Commons Act 2006, which provides:-

> "(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2)…. applies.
>
> (2) This subsection applies where –
>
> (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in

lawful sports and pastimes on the land for a period of at least 20 years; and

(b) they continue to do so at the time of the application".

24. The Supreme Court held that members of the local community who had made use of the field had not done so as trespassers. At [27] Lord Neuberger made it plain that a person is either a trespasser or present on the land lawfully; there is no "middle ground":-

> "[27] It was suggested by Mr Edwards QC in his argument for Ms Barkas that, even if members of the public were not trespassers, they were nonetheless not licensees or otherwise lawfully present when they were on the field. I have considerable difficulty with that submission. As against the owner (or more accurately, the person entitled to possession) of land, third parties on the land either have the right to be there and to do what they are doing, or they do not. If they have a right in some shape or form (whether in private or public law), then they are permitted to be there, and if they have no right to be there, then they are trespassers. I cannot see how someone could have the right to be on the land and yet be a trespasser (save, I suppose, where a person comes on the land for a lawful purpose and then carries out some unlawful use). In other words a 'tolerated trespasser' is still a trespasser".

25. Banner Homes have, for years, been well aware of the use made by the local community of the Field. As I have already noted, in the relatively recent past the owners contemplated formalising that use. The local residents have also sought permission for hedge-planting. None of that, according to Mr Edwards, makes the use of the Field (other than the footpaths) non-trespassory.

26. Mr Edwards invoked the principle of statutory interpretation known as construction *in bonam partem* (in good faith). According to *Bennion on the Statutory Interpretation* (Sixth Edition):-

> "It is the basic principle of legal policy that law should serve the public interest. The court when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. It should therefore strive to avoid adopting a construction which is in any way adverse to the public interest".

27. *Halsbury's Laws of England* (Fifth Edition) has, at paragraph 1152, a passage along very similar lines, followed by this:-

> "Where a literal construction would seriously damage the public interest, and no deserving person would be prejudiced by a strained construction to avoid this, the court will apply such a construction.

> …If a statutory benefit is given only if a specified condition is satisfied, it is presumed that the legislature intended the benefit to operate only where the required act is performed in a lawful manner".

28. Mr Edwards submits that the application of the *in bonam partem* principle means that the references in section 88 of the 2011 Act to "an actual use" cannot be construed as encompassing any unlawful use. As a recent authority for the application of this principle at the highest level, Mr Edwards draws attention to the judgment of the Supreme Court in Welwyn Hatfield Borough Council v Secretary of State for Communities and Local Government and another [2011] UKSC 15. A builder who had deliberately deceived a planning authority by applying for planning permission to construct a barn, when in reality he was constructing a residential dwelling, sought a certificate of lawfulness of existing use, relying on an enactment which provided for a four year time limit for enforcement action against a breach of planning control consisting in the change of use of any dwelling to use as a single dwelling house. In finding in favour of the local authority, the Supreme Court (per Lord Mance) invoked (albeit on an *obiter* basis) the principle set out in *Bennion*, refusing to confine that principle to situations where there has been the commission of a crime:-

> "[53] …The principle described in the passages cited from *Halsbury* and *Bennion* is one of public policy. The principle is capable of extending more widely, subject to the caution that is always necessary in dealing with public policy. …
>
> [54] Whether conduct will on public policy grounds disentitle a person from relying upon an apparently unqualified statutory provision must be considered in context and with regard to any nexus existing between the conduct and the statutory provision. …Although the principle was not mentioned in Counsel's submissions and my conclusions have been reached independently of it, it is not uninteresting also to recall the way in which, before the enactment of section 26 of the Limitation Act 1939 (the predecessor of section 32 of the Limitation Act 1980), the courts held that the apparently general wording of the limitation statutes could not be relied upon in cases where the cause of action had been fraudulently concealed or, later also, was itself based on fraud. …"

29. Mr Edwards submits that, applying the *in bonam partem* principle, the phrases "actual current use" and "actual use" in section 88 of the 2011 Act must mean actual *legal* use. Clear words would, he says, be required before it could be held that section 88 encompasses unlawful use.

30. In this regard, Mr Edwards draws a distinction between the 2011 Act and enactments relating to the registration of town or village greens. In the latter, as we can see from section 15 of the Commons Act 2006, Parliament

expressly uses the phrase "as of right", which – somewhat counter-intuitively – has long been held to mean as *if* of right; that is to say, that the activity in question has been carried on in a trespassory manner otherwise than by force or stealth (in latin, *nec vi, nec clam*).

31. Submissions along those lines were advanced by Banner Homes at the council's review hearing. Mr Mike Lovelady, who conducted the review, had this to say:-

> "7.9 …I observe that although Banner Homes claim that there has been trespass by local residents on Bedmond Lane Field they do not appear to have particularised this allegation apart from making the general submission that all use (other than on the two public rights of way) amount to unlawful acts of trespass. The use of the site as described in the evidence before me in the Hearing Agenda…alleged to have been trespassory appears to have been minor. The evidence before me suggests that Banner Homes was aware of such use and until September this year never did anything to stop it. In my view even if such use was strictly unlawful it does not disqualify the land from being listed as an Asset of Community Value. Such use does not in my opinion undermine the primary use via the public footpaths which is non-trespassory.
>
> 7.10 Overall, whilst I accept that generally use for section 88 purposes must be 'lawful use' it seems to me that this general Rule is not entirely inflexible. Suppose for example that due to an oversight an owner failed to obtain the appropriate premises licences before opening an entertainments facility whose use subsequently delivers social wellbeing without anyone ever complaining about the licensing deficiency. Would it automatically be said that because some of the features of a community's enjoyment of that facility are tainted by a form of unlawfulness section 88 can never be fulfilled? It seems to me at least arguable that the answer is no.
>
> 7.11 In other words, I consider that it may be argued that some uses could qualify for the purposes of section 88 notwithstanding a taint of technical unlawfulness, especially where that use has caused no harm and had been condoned for many years. Therefore, my overall view is that there has been sufficient purely lawful use to satisfy the conditions under section 88 in this case, and that such technical unlawful conduct – if there has been any – which has formed part of the overall pattern of use of Bedmond Lane Fields does not disqualify it from being an Asset of Community Value".

32. Attractively put as Mr Edwards' submissions are, I am in no doubt that they should be rejected. As Lord Neuberger has counselled, caution must be employed when invoking public policy as an aid to statutory construction. The town and village green legislation is, in my view, a clear example of Parliament legislating to confer community rights on those who

have, over time, engaged in socially valuable activities ("lawful sports and pastimes") in a "trespassory" manner, which did not involve force or deception. As Mr Hopkins submitted, the effects of listing under the 2011 Act are considerably less burdensome on the land owner than is registration as a town or village green.

33. It is also noteworthy that the courts have been willing to recognise rights, such as easements by prescription, in respect of persons who have carried on activities during the relevant limitation period, where those activities have constituted offences (Bakewell Management Ltd v. Brandwood & Ors [2004] UKHL 14); or rights of registration as proprietor, notwithstanding the fact that for part of the limitation period the occupier has been committing criminal trespass (Best v Chief Land Registrar & Secretary of State for Justice [2014] EWHC 1370 (Admin)).

34. Mr Edwards asks rhetorically how it could be said that the 2011 Act can confer a benefit on persons who, for example, had committed criminal damage so as to enter land (for example, by destroying fences). In this regard, I should record that there is some evidence of Banner Homes' fences along the footpaths being damaged since their erection in September 2014. There is, however, no evidence whatsoever that the use upon which the council relies for the purposes of section 88(2), prior to the erection of fencing, was carried out in a way that involved the commission of criminal damage or other criminal activity. On the contrary, as the evidence (especially that of Dr Wareing) makes perfectly plain, the uses made of the Field by the local community were entirely peaceable in nature, at least equivalent in value to the sorts of games and pastimes envisaged by the town and village green legislation. In this regard, the facts of the present case are similar to those in Higgins Homes Limited v Barnet LBC [CR/2014/006].

35. The fact that I decline to interpret section 88 so as, in effect, to insert the word "lawful" after "actual" does not give *carte blanche* to use that section in ways that would violate the *in bonam partem* principle. The inherent requirement that the use of the land in question must further social wellbeing or social interests will, in practice, preclude many unlawful activities, for the simple reason that unlawful activities are, by their nature, unlikely to satisfy the tests of furthering social wellbeing/interests. Thus, for example, premises used for "raves", at which illegal substances are consumed, violence is prevalent and noise nuisance frequent, would not fall within section 88. Furthermore, it would be in any case be wrong to rule out any application of the *in bonam partem* principle to section 88, merely because, on the facts of this case, I have concluded that a particular technically unlawful use of land is not *per se* outside the ambit of the section.

36. I therefore turn to the final issue, as articulated by Mr Edwards:

**Issue 3 – on the evidence, can it be concluded, given the purpose behind the erection of fencing and prohibitory notices, that, in respect of trespassory use of the land beyond the footpaths, it is realistic to think that, in the next five years, such use could occur again (s.88(2)(b))?**

37. I have fully taken into account the "statutory declaration" of Mr McCann; and in particular, the following:-

> "4. In view of the continued promotion of the Land for development it is not the intention, and has never been the intention, of Banner Homes Group PLC or, latterly, Cala Group Limited to grant rights of access to or use of the Land to any persons other than employees of Banner Homes Group PLC and/or Cala Group PLC or their respective agents or contractors. Further, neither Banner Homes Group PLC or Cala Group Limited are prepared to accept liability for any injury to those unlawfully accessing the Land, particularly given its overgrown condition and therefore, the decision to fence the Land was taken to prevent trespassory access".

38. I nevertheless find, as a fact, that the requirements of section 88(2)(b) are satisfied. Given the long history of peaceable, socially beneficial (if formally unauthorised) use of the Field, and of the previous views of its 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 restored the *status quo* or by entering into some form of licence arrangement with the Residents' Association or similar grouping.

39. I accordingly find that the requirements of section 88(2) of the 2011 Act are satisfied. This appeal is dismissed.

**Judge Peter Lane**

**Chamber President**

**Dated 16 April 2015**