Appeal number: CR/2019/0001

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
COMMUNITY RIGHT TO BID

OLIVER'S BATTERY LIMITED

Appellant

- and -

WINCHESTER CITY COUNCIL

First Respondent

-and-

OLIVER'S BATTERY PARISH COUNCIL

Second Respondent

TRIBUNAL: JUDGE MOIRA MACMILLAN

Determined on the papers, the Judge sitting in Chambers on 29 November 2019

DECISION

1. The appeal is dismissed.

REASONS

Background to Appeal

2. 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.

3. The Appellant has been the freehold owner of land at Oliver's Battery, Silkstead Farm, Compton ('the Land') for approximately 14 years. It is a 46-acre greenfield site with residential property to the north west and agricultural land to the south, east and west. A combination of public footpaths and bridleways circle the boundary (public rights of way - 'PROW'). There are two historic mounds towards the centre of the north field, referred to locally and on maps as 'tumuli'. A track known as 'Texas Drive' extends from the north east corner to buildings on the east side.

4. The majority of the Land has been the subject of an agricultural lease since at least 1995. For several years this part of the Land has been 'set-aside' in accordance with EEC 1272/88. The Explanatory Memorandum of The Set-Aside Regulations 1988 explains the set-aside scheme as follows:

The Regulations, which apply to Great Britain, provide for payment of aid to farmers who undertake for a period of five years ("the set-aside period") to withdraw from agricultural production an area of land equal in size to at least 20 per cent of the area of land on the holding used in the reference period for producing relevant arable crops (as defined in regulation 2(1)). Set-aside land must be left fallow (either for the whole of the set-aside period, or as part of the arable rotation), or used for woodland or for non-agricultural purposes. In addition, farmers entering the scheme must undertake to restrict the area of land used for growing relevant arable crops during the set-aside period (regulation 3(1)).

Fallowed set-aside land and land awaiting conversion to woodland or to use for non-agricultural purposes must be managed in accordance with the requirements in Schedule 2 with a view to keeping it in good agronomic condition and to protecting the environment (regulations 7(1), 8(1) and 9(1)…

5. Since at least 2016 the Land's participation in the EU set-aside programme has been administered under the Basic Payment Scheme (p. 74). The applicable category of use under this scheme for which set-aside payments have been claimed is 'greening practices beneficial for climate and environment' (p. 88).

6. The field at the southern end of the Land is leased separately to a conservation organisation. This is the Yew Hill Butterfly Reserve. The Butterfly Reserve's website describes it as 'situated on Open Access land' (pp 235 – 239), which is a term is used by the Countryside and Rights of Way Act 2000 to describe land to which the public have a general right of access. An additional footpath runs through the centre of the Butterfly Reserve.

7. The PROW around the boundary of the Land can be accessed by the public at several points. There are no barriers between the PROW and the open fields. Over the period of a week in 2016 the Appellant erected signs between some of the residences and the PROW that read 'Private Land – No Entry' (pp. 203 and 231).

8. The First Respondent is the local authority required under the Localism Act 2011 to keep a list of assets of community value ('ACV').

9. The Second Respondent is the Parish Council for the residential to the north west of the Land, which is also called 'Oliver's Battery'. The Second Respondent nominated the Land as an ACV on 13 May 2018. It previously nominated the Land as an ACV in January 2018 but without success.

10. On 21 September 2018 the First Respondent accepted the Second Respondent's nomination of the Land as an ACV. This outcome was confirmed by a Reviewing Officer on 13 February 2019 following a review hearing on 4 February 2019.

11. This Decision determines an appeal against the Decision of the Reviewing Officer.

12. The Grounds of Appeal dated 13 March 2019 challenge the Decision on the basis that any use of the Land by the local community is ancillary to its current actual use as agricultural land because use by the public is *de minimis* and is mainly restricted to activity that takes place while passing and repassing on the PROW.

The Law

13. The Localism Act 2011 (part 5 chapter 3)[1] provided for local authorities to maintain a list of land in their area which is land of "community value". Land of "community value" is, pursuant to s. 88 of the Act, land where in the opinion of the local authority

(1) (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

[1] http://www.legislation.gov.uk/ukpga/2011/20/part/5/chapter/3

(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.

…

(6) In this section—

….

"social interests" includes (in particular) each of the following—

(a) cultural interests;

(b) recreational interests;

(c) sporting interests;

14. The 2011 Act does not define the term 'ancillary'. There is also very limited mention of the approach to be taken deciding whether a use is 'ancillary' in the non-statutory advice note produced by central government for local authorities.[2] The Glossary to this guidance defines 'Land of community value' as '[a] *Building or other land whose main (i.e. "non-ancillary") use furthers the social wellbeing or social interests of the local community, or has recently done so, and is likely to do so in the future. See section 88 of the Act.*'

15. The Tribunal's approach in other cases has included consideration of the dictionary definition of 'ancillary,' which is 'supplemental or subordinate'.[3] Where a building or land has more than one use, neither the quantum of use nor the status of the user will necessarily be determinative of which is ancillary. In some cases there may be a clear primary use of land, such that its use for any other purposes must be ancillary. In other cases there may be a relevant functional relationship between two or more uses that indicates a subordinate relationship. Each set of circumstance must be considered on its own facts. There will not always be one primary purpose for land to which every other use must of necessity be ancillary.

16. The Localism Act sets out the procedure for including land in the list, imposes a moratorium period on certain disposals of land which has been included in the list, and provides at s. 99 for a compensatory regime to be established.

17. Regulation 11 of the Assets of Community Value (England) Regulations 2012 provides a right of appeal to the First-tier Tribunal against a listing review decision.

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[2] 4 October 2012: Department for Communities and Local Government non-statutory advice note: 'Community Right to Bid'.

[3] See for example: Dorset County Council v Purbeck District Council (CR/2013/0004);

Idsall School v Shropshire Council (CR/2014/0016); and

The General Conference of the New Church v Bristol City Council (CR/2014/0014)

18. Regulation 14 provides a right to claim compensation where

> *"the person making the claim has, at a time when the person was the owner of the land and the land was listed, incurred loss or expense in relation to the land which would be likely not to have been incurred if the land had not been listed."*

19. Although there have been a number of Decisions in relation to this part of the 2011 Act by judges of this Chamber, these of course have no precedent value. Two Community Right to Bid appeals have been decided by the Upper Tribunal (Administrative Appeals Chamber), which do have precedent value. These are *BHL v St Albans*[4] and *ATL v CW, CC and FPC [2018] UKUT 15 (AAC)*[5] . Both of these cases concern listing decisions.

20. *BHL v St Albans* was subsequently considered by the Court of Appeal and has some factual similarities to this appeal. It concerned the unlawful use of private land for activities that further the social wellbeing or social interests of the local community. The Court confirmed that the term 'actual use' in s. 88(1)(a) is not limited to lawful actual use, and approved the approach taken by the First-tier Tribunal:

> '*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."*

21. I note that the burden of proof in satisfying the Tribunal that the local authority's decision on review was wrong lies with the Appellant. Where evidence is disputed, the relevant standard for me to apply is the civil standard of the balance of probabilities.

Chronology

22. The chronology of events is as follows:

> **11 January 2018** – 1st nomination of the Land by the Second Respondent.
>
> **13 March 2018** – First Respondent declines to list the Land as an ACV on the basis that the land is used for agricultural grazing and any use by the local community is ancillary.

[4] https://assets.publishing.service.gov.uk/media/57864341e5274a0da900010c/MISC_2004_2015-00.pdf

[5] https://assets.publishing.service.gov.uk/media/5a7058b3ed915d265c511f6d/MISC_1976_2017-00.pdf

13 May 2018 – Second Respondent submits a second nomination with additional supporting evidence.

21 September 2018 – First Respondent accepts the nomination and adds the Land to the list of ACVs

4 February 2019 – Review Hearing.

13 February 2019 - Reviewing Officer's Decision.

13 March 2019– Appeal lodged with the Tribunal.

Evidence

23. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended[6]. I have considered carefully the agreed bundle comprising some 520 pages, including submissions made by all parties, for which I am grateful.

24. I have considered witness statements by Gabrielle Moffatt and Christopher Weatherstone, as well as emails and letters written by some of Mr Weatherstone's business associates, which have been filed on behalf of the Appellant.

25. Mr Weatherstone is Director of the Appellant company. He has visited the Land at least 50 times in the past 17 years. He states that on the majority of these occasions he has not seen anyone else on the Land apart from occasional dog walkers and horse riders. He provides evidence from 2 business colleagues who confirm that they too have seen very few people on the Land when visiting the site. He describes the Land as being overgrown, so that public cannot generally walk off the PROW.

26. Mr Weatherstone states that he has twice made arrangements to erect signs warning the public to keep off the private land. Both attempts were made within a week of each other in 2016. Each time the signs were removed in apparent acts of vandalism.

27. Mr Weatherston explains that it is not realistic to think that any use of the Land by the public could continue as he intends to obtain planning permission to build houses. He confirms the existence of 'shortcut paths that cut across the land'. Two footpaths in addition to the PROW are shown on plans for the proposed development (p. 81), running from the north west PROW towards the tumuli and described as 'existing paths'. Texas Drive is shown extending towards the Butterfly Reserve,

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6 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779790/tribunal-procedure-rules-general-regulatory-chamber.pdf

28. Ms Moffatt has searched for and produced photographs of 'Oliver's Battery' on Instagram. The Appellant suggests these support the view that relatively few people use the Land and those that do so use the PROW.

29. I have seen a series of agricultural leases and related documents that confirm the Land has been designated as set-aside agricultural land under the applicable schemes for several years.

30. I have considered the anonymised responses to a 'snapshot survey' of local residents carried out during February 2018. This is described as the comments of 40 local residents who were approached at the time of the 1st nomination. Those who responded report taking part in a range of activities on the Land including: running, walking, dog walking, horse riding, cycling, flying kites and fitness classes. The reported frequency of use varies from daily to weekly. Various estimates are given of the number of people who use the Land for similar purposes. These range from seeing 5-20 people each time they go, to estimates of up to 100 people using the Land each day.

31. Most respondents state that they have been using the Land for these purposes for several years. Some state that public use of the Land was restricted to the PROW when the fields were cultivated but that this has changed since the Land was set-aside. Several have provided photographs to illustrate their activities on the Land. Four of these show walking and running other than on the PROW. Some show children playing.

32. Following the unsuccessful 1st nomination and in response to an additional request, 15 of the residents answered a further question, confirming that they walked across the fields as well as using the PROW.

33. I have also considered witness statements by Wendy Bramall, Fabrizio de Liberali, Diane Smith, Constance Leach, Colin Stride and Maeve Marks, filed on behalf of the Second Respondent. These witness statements were not available to the Reviewing Officer.

- Ms Bramall states the Land was last ploughed in 2006. She describes walking her dog around and across the fields where she meets other regular walkers and riders.
- Mr di Liberali describes walking, cycling and running around along the paths around and across the fields, as well as running off the paths. He describes seeing other people do the same. He produces maps and data from Strava which shows multiple uses of the footpaths across the field.
- Ms Smith describes the tumuli as a natural curiosity in the middle of the field that many people visit.
- Ms Leach states that she administered the snapshot survey and the follow up question. She provides the names and addresses of those who responded. Ms Leach says that she regularly walks around and across the field and that multiple paths have developed.

- Mr Stride states that he has been walking on the PROW for several years and has been walking across the Land since crop cultivation ended 10-15 years ago. He produces a Google earth map of the Land showing the footpaths that have developed. Mr Stride explains that since the field has been set-aside 3 of the PROW have become overgrown and parallel paths have developed 10 metres in to the field.

- Ms Marks states that she is often in the fields twice a day and is never there alone.

34. I have considered all of the photographs submitted by the Appellant and Second Respondent, as well as a variety of maps, plans, and images of the Land taken from Google Earth. These include a map at p.488 described by the Second Respondent as 'the definitive legal map' of the Land, which is based on the Ordinance Survey map. This shows a footpath running from the north west PROW, past the tumuli towards the Butterfly Reserve.

35. The Land Registry map at p. 195 does not show any paths from the PROW to the tumuli but shows Texas Drive extending much further on to the Land and on the other side of the tumuli. Images from Google Earth (e.g. p. 257) show two distinct paths running from the north west PROW past the tumuli, after which they form a single pathway leading to the Butterfly Reserve.

Submissions

36. It is not disputed between the parties that part of the Land is used by members of the public for purposes that further the social wellbeing of the local community. The issue to be decided is whether such use is largely confined to the PROW and whether it is non-ancillary use.

The Appellant

37. The Appellant submits that the Second Respondent has not sufficiently established the s. 88 criteria for the whole of the Land other than the PROW. It says that the evidence of actual use by the local community other than on the PROW is de minimis and therefore ancillary.

38. The Appellant challenges the First Respondent's findings that there is current, actual use of the Land by the local community which is 'significant'. It submits it is not sufficient to show some actual use. The statutory requirement is actual use that is not ancillary.

39. The Appellant calls into question the reliability of the evidence from the 'snapshot survey'. It argues that the overwhelming weight of the Second Respondent's evidence relates to use of the PROW and there is insufficient evidence of use of the private areas of the Land to amount to non-ancillary use. The Appellant submits that any such use by the public has been de minimis and incidental to use of the PROW; the public have trespassed on the private land by necessity because the PROW has been obstructed. The

Appellant suggests any desire lines across the field may have been caused by a single walker or an animal

40. The Appellant submits that the actual, non-ancillary use of the Land remains agricultural, even when the Land is set aside under EEC 1272/88.

41. The Appellant submits it has made numerous efforts to exclude the public from general use of the Land and that it is not realistic to think that the disputed use could continue as it intends to develop houses. It contends it has been put to continuous recurrent expense in order to assert its private rights to the land, having erected signage and planted hedgerows that were removed in acts of vandalism. It argues that such acts must have a negative impact on the social wellbeing of the local community.

42. The Appellant distinguishes its position from the landowner in *Banner Homes*. It states it has been unaware that the public were using parts of the Land other than the PROW. It had erected signs to warn of trespassing as a matter of precaution. The Appellant submits that the landowner in *Banner Homes* did not challenge the current, actual use of the land, whereas it does.

First Respondent

43. The First Respondent relies on *BHL v St Albans* to submit that actual use need not mean lawful use and therefore unlawful use does not prevent the Land being listed as an ACV. It relies on the evidence from the snapshot survey as showing regular use by a cross-section of the local community, not restricted to use of the PROW.

44. The First Respondent submits that the desire lines are evidence of established routes at various points across the Land, including pathways leading from the PROW to the tumuli. It states that the Appellant's efforts to exclude the public from the private fields have been 'soft touch', amounting to two attempts over the course of a single week in 2016.

45. The First Respondent submits that there is sufficient evidence to support listing the whole of the Land rather than a part. It submits that there is no statutory requirement to show 'significant' use and that the threshold to show actual use for the purposes of s. 88(1)(a) is not high. It contends that, if there is some evidence of public use on parts of the Land other than PROW, it can be properly inferred that this use extends to the whole of the Land

Second Respondent

46. The Second Respondent challenges the description of the Land as agricultural because it is not being used for crop cultivation or to support livestock. It defends the accuracy of the snapshot survey and states that any apparent disparities in this evidence are due to the range of perspectives of those who responded.

47. The Second Respondent submits that two of the PROW have become overgrown and that new parallel paths on the Land have been created by walkers, runners, riders and cyclists, but that this does not account for all of the desire lines. It supports the First

Respondent's assertion that there are established desire lines across the Land. It submits that the public's use of the Land is not restricted to the PROW, the desire lines or the Butterfly Reserve.

48. The Second Respondent argues that the Appellant's attempts to erect signage undermines the Appellant's argument that the use of the Land by the public is de minimis. It accepts that the public's use of the Land other than the PROW is trespassory but submits no force or deception is employed. It submits there is no evidence to suggest that the desire lines have been caused by a single walker or animals. It describes these paths as broad and well established.

49. The Second Respondent notes that the Appellant accepts that the public activities on the Land further the social wellbeing and social interests of the local community. It submits that these activities are not restricted to PROW or to the perimeter of the Land.

Conclusion

50. The Land has been used for agricultural purposes for many years. More recently it has been designated as set-aside land under successive government schemes which allow grants to be paid when agricultural land is left uncultivated, planted as woodland or used to cultivate specified crops. The Land has qualified for set-aside grants on the basis that it has been left uncultivated. I find that, even when left uncultivated, agricultural use remains a current actual use of the Land that is not ancillary.

51. I find that the activities for which the Land is used by the local community as described in the bundle are clear examples of the recreational and sporting interests envisaged by s. 88(6) of the 2011 Act. These activities are an actual current use of the Land and further the social wellbeing and social interests of the community.

52. It is agreed between the parties that members of the local community use the PROW around the boundary of the Land for these activities. I find that, when the Land was cultivated as agricultural land, these activities were by necessity largely restricted to the PROW, other than on the Butterfly Reserve which has an established history of unimpeded access by members of the public.

53. I note that since the Land has been set-aside additional paths known as desire lines have developed, running from the PROW towards the tumuli and the Butterfly Reserve. I find that some of these are sufficiently well established to be visible on images from Google Earth and to have been recorded on local maps and plans, including on the Ordinance Survey map and on the Appellant's plans for a housing development. Additional desire lines have also developed around the edges of the Land due to the PROW becoming obstructed through lack of maintenance.

54. I find that the degree to which these are visible and established is such that the additional paths and desire lines must have developed following repeated use. Having considered the evidence from the snapshot survey and the witness statements, I have concluded that this must have occurred in the course of the various activities for which the Land is used by members of the local community. I therefore find that these

activities are not restricted to the PROW and that a much more extensive part of the Land is used by the local community for activities that are not de minimis and which further their social wellbeing and social interest.

55. I have considered whether the unlawful aspect of the public use of the Land is such that the activities cannot be said to further social wellbeing. I note that, other than on the 2 occasions when signage was unlawfully removed, the public's use of the Land has been peaceful and is described as having a range of beneficial effects. Applying the approach of the Upper Tribunal and the Court of Appeal in *Banner Homes*, I consider that there is no requirement for actual current use pursuant to s. 88(1) to be lawful use. I therefore find that the actual current use of the northern part of the Land by the local community is a qualifying use for the purposes of s. 88(1)(a) notwithstanding that this use is largely trespassory.

56. I have considered whether the purposes for which the Land is used by members of the local the community is ancillary to its agricultural purpose. I find that it is not. Since being designated set-aside, the only agricultural activity carried out on the Land has been an annual mowing, whereas public use has increased over time and is now well established. Both the northern and southern fields are used for recreational and leisure activities on a daily basis. It can no longer be said that the use by the public is subordinate to the Land's agricultural purpose.

57. I have concluded that it can no longer be said that agricultural use of the Land is the main or primary use, such that the use by the local community must be ancillary. The evidence supports a view that the use of the Land has changed over time as a consequence of its having been set-aside as agricultural land. The public's use of the Land is now, in effect, use as a recreation field. It cannot be said that this is incidental to the public's use of the PROW. I find that the public's use of the Land other than on the PROW is sufficiently frequent and well established to be an actual current use that is not ancillary.

58. I have considered whether it is realistic to think that the public's use of the Land might continue and have concluded that it is. Although the Appellant intends to develop the Land for housing, it is not certain that planning permission will be granted and that the scheme will go ahead. It is therefore not fanciful to think that the local community's use of the Land may continue for some time.

(Signed)

MOIRA MACMILLAN **DATE: 29 November 2019**

TRIBUNAL JUDGE