

Community Right to Bid

Review of Listing Decision – Lagoon View Community Orchard (“the Land”)

Listing Decision (“original decision”) Date – 24th July 2024

Date of Review Request – 2nd September 2024

The original decision focussed on three main considerations:- (1) has the nomination been made by an appropriate body, (2) Is the nomination complete, and (3) does the asset qualify as being of “community value”. The request for a review of the original decision has been made by the owners’ solicitors and the reasoning behind that request is set out in the letter dated the 2nd September 2024. That letter makes reference to a number of factual inaccuracies but doesn’t raise any dispute as to the reasoning or conclusions drawn in the original decision in relation to the first 2 considerations referred to above.

For the sake of brevity, this review will therefore focus on the third main consideration:- does the area of land known as Lagoon View Community Orchard qualify as being of “community value”.

Legislation

Section 87 of the Localism Act 2011 states that local authorities must maintain a list of land in the area that is land of “community value”.

Section 88 of the 2011 Act provides the definition of land of community value. The relevant section is repeated here:-

“(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”.

Where, as in this case, the land is currently being used for the claimed community purpose, to qualify as land of community value, the land must be used for a purpose that furthers the “social wellbeing or social interests of the local community”.

There is no definition of “social wellbeing” within the 2011 Act but s88(6) provides a definition of “social interests”. It states that social interests includes cultural interests, recreational interests and sporting interests.

The legislative provisions set out above also make clear that the use can not be ancillary to another use.

Finally, it must also be realistic to think that there can continue to be a non-ancillary use of the land which will further the social wellbeing or interests of the local community.

Representations

The nomination was originally made by Mr Peter Thorn who is a trustee and Chair of the Lagoon View Community Orchard Association. There are facts set out within the nomination with which the owner takes issue and these are set out within the review request. They relate to issues such as whether the land was designated as a children’s play area when the estate was built, whether it was or should have been handed to the council and the length of the original lease. Further points are made about how the land was always intended to come forward for development at some point in the future and that it is at present the subject of assessment for housing under the Housing and Economic Land Availability Assessment (HELAA), currently being conducted by North Devon Council to assess sites for its forthcoming Local Plan. My view is that the factual errors, if they are errors, are not relevant to my determination as they do not challenge the point about whether the current use has a use that furthers the social wellbeing or interests of the area. In relation to the planning situation, it is my view that this is again not relevant to determining whether the current use is a “community use” but is relevant to the issue of whether that use will continue into the future.

The representations made by the Association are set out in the original application and relate to how the community orchard came into being and its

current use as an amenity area for local residents. There is a description of various events that have been held on the Land and how residents can, for instance, pick fruit and enjoy the space.

Reference is made to the wish to remove the development option for the land. It should be made clear that whilst the listing as an Asset of Community Value would be a material planning consideration on any future planning decision, listing the asset does not entirely stop the potential for future development of the land.

Conclusions

From the representations made, it is clear that the Land does currently further the social wellbeing or interests of the local community.

There is no evidence of any other uses of the Land and so my conclusion is that the community use of the Land is not an ancillary use.

That leads to what I think is the main issue which is whether, using the wording under s88(1)(b) "it is realistic to think that there can continue to be non-ancillary use of the ...land which will further (whether or not in the same way) the social wellbeing or social interests of the local community".

In this regard, the Lagoon View Community Orchard Association is clearly set up as a constituted body. It is a registered charity and community interest company and there is nothing within the evidence to suggest that the group is not well supported. The work carried out to the land has a substantial degree of permanence and so there is nothing to suggest that the use of the land for community purposes would not be supported into the future. The issue here is that the freehold owner of the site is making it clear that the current 3 year lease will not be renewed when it expires on 26th October 2026 and that the site will be promoted for development through the HELAA and Local Plan process. In further representations received from the solicitors acting on behalf of the owner, it has also been made clear that the site will be fenced off and all access will be denied, presumably once the lease has expired.

As set out in the original determination letter, the test is whether it is realistic for the use to continue and there is no need to prove that it is more likely than not to happen. It is important to point out that unlike s88(2) there is no period during which the community use must continue

It is also clear that the owner's intentions, whilst relevant, are not determinative as it is still necessary to consider whether a community use

could continue or resume even if the owner has taken steps to cease the use or has said that it will no longer be permitted.

Case law does show however that there are circumstances where the evidence would show that the owner's proposals for the site will clearly not permit community use. The decision in *New Barrow Ltd v Ribble Valley BC* CR/2016/0014 is such a case where an area that was being developed for 504 dwellings included an area of land used as allotments. A decision was taken to list the allotment land as an Asset of Community Value and the decision was appealed. By the time that the appeal was heard, notice to vacate the land had been given to the community group but this had not yet expired. On the date of the hearing, a new 5 year licence was entered into by the owner which would allow the land to be used as a construction site compound for the overall development which would take around 6 years to complete. There was also a strong expectation that at the completion of the development, the 504 houses permitted by the planning consent would not have been reached, which would increase the likelihood that the allotment land would be built on.

In that case, the judge concluded that although it was realistic to expect the land to be used for community use even though notice had been served on the community group, the grant of the licence to use the land as a site compound together with the likelihood of future development removed that realistic prospect.

In this case, the Community Orchard Association have a lease which, at the time of decision, has just over 2 years remaining. Given that s88(1)(b) contains no time period for expected community use, it could be concluded that as there is certainty that a community use will continue for the next 2 years at least, this requirement under s88(1)(b) is met. Even taking into account potential use beyond the next 2 years, whilst it is acknowledged that the owner intends to not issue any further lease and to promote the land for residential development, there is no certainty that this will occur. The HELAA process feeds into preparation of a new Local Plan which has not yet commenced and so there can be no certainty that the land will be allocated within that Plan. Neither can there be certainty that planning permission would be granted if an application were submitted before that process had been concluded.

On that basis, my conclusion is that at the present time, it is realistic to think that there can continue to be a use of the Land for a purpose which furthers the social wellbeing or social interests of the local community.

It follows that my overall conclusion is that the Land has been correctly listed.

Ken Miles

A handwritten signature in black ink, appearing to read 'Ken Miles', with a stylized, flowing script.

Chief Executive

15th October 2024

