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"Protecting the Green Belt around Chesham" Tel: 07511 000210 (ansaphone)

29 November 2019 pjp/4204

Ms Edwina Adefehinti
Locum Corporate Solicitor & Deputy Monitoring Officer
Chiltern District Council
King George V Road,
Amersham,
Buckinghamshire
HP6 5AW

Dear Ms Adefehinti,

Re: Localism Act (LA) 2011 – Land at Lye Green Nr Chesham - Asset of Community Value (ACV)

Thank you for your email on Friday 22 November timed at 15.56 and for responding as you did to my queries to the nine numbered questions raised in your previous email of Friday 16 November and for subsequently forwarding the background to this review. Although I cannot accept your comments regarding the timescale required for me to comment, this timescale has caused BNG substantial difficulties to respond fully to some of the points you have raised, but I will attempt to address your questions using the same numbering for each question for ease of reference.

Q 1 – Confirm which parts of the listed land is being used for agricultural purposes?

1.1. I attach a marked-up OS Plan of the designated area on which I have indicated the areas in green hatched shading that I believe are used periodically for agricultural purposes.

1.2. I should add that from my own observations, the agricultural uses do vary and for most of the last few years the fields have been fallow or left for grass/hay though the northern & south western fields (ie: south of The Black Cat & Henry Mash Court), has more consistently been used for grazing cattle. Rape was grown on the north & south western fields several years ago. Those areas of land that are used for agriculture are not used intensively and there have been prolonged periods where large areas of the land have lain fallow or have not been used for grazing. The agricultural uses have not prevented public access, or the informal recreational uses described and similarly to the best of my knowledge there have never been notices posted on or around the land prohibiting public access throughout the 20 years I have live nearby.

1.3. For the avoidance of doubt, I do not accept the time frames you have given us to respond to the evidence on these points are fair. It is simply impossible for even our Committee and

other Directors, let alone our wider membership, to fully review the material submitted. With more time we would review what is said specifically about certain areas of fields and what has been grown there against our community knowledge and comment on the photographs included but we are unable to do this in the time available other than to the extent we have commented here.

1.4. I also comment that I do not believe the use of this land has only been for agricultural purposes, which I set out our comments on further below.

Q 2 - Confirm which parts of the listed land is <u>not</u> being used for agricultural purposes?

2.1. On the attached OS Plan I have indicated

a. in solid brown shading, the areas that I believe are NOT used for agricultural purposes.

b. The adopted public footpaths shown in yellow are also obviously not practical to be used for agricultural crops

c. and similarly, for the informal well-trodden footpaths (aka "desire lines") that are shown in brown lines on the OS plan, one of which is shown running right beside a formal footpath to reflect the fact that many people walk on the other side of the fence to the adopted path.

2.2. As above, I do not believe the use of this land has only been for agricultural purposes, which I comment on further below, and I would need more time to comment properly on behalf of BNG.

Q 3 - Confirm what use of the parts of the listed land not used for agriculture are used for?

3.1. There are <u>three</u> substantial areas of the listed land which are effectively unused for agriculture and which represent natural woodland (in addition to the formal and informal footpaths above). These areas are marked in solid brown shading on the OS Plan attached and can be seen on the Google Earth image also attached. I have not seen any evidence of these areas being used for forestry or agriculture. These areas are accessed either by public footpaths or by informal footpaths or desire lines around and across the land.

3.2. I believe these parts of the listed land are areas used by members of the public accessing the listed land for informal outdoor recreation.

3.3. The informal outdoor recreational uses are described more fully in my Statutory Declaration dated 29 April 2019 where I describe these recreational uses on the fields and in the woods which include hiking/rambling, dog walking, bird watching, jogging, and general outdoor exercise but which has also included people just observing nature and local wildlife or picnicking with their family and children, as well as picking flowers and blackberries, kite flying, children undertaking adventurous play or practicing for Duke of Edinburgh expeditions or for children walking to or from school as well as for people to socialise with other likeminded people from the immediate neighbourhood. I have also occasionally seen people cycling upon the land.

3.4. I consider that these informal outdoor recreational uses take place across the whole of the listed land as discussed in my Statutory Declaration, but for example whilst most members of the public confine their activities either to the adopted public footpaths across the fields (shown in yellow on the OS Plan) and to informal footpaths (desire lines) that cross the land or follow around the perimeter of the fields (shown as solid brown lines on the OS Plan attached), I would highlight the obvious ways in which for example dog walking, bird watching, kite flying take place across the whole of the listed land and the activities which also take place in the woodland. See further and for more particulars, the information submitted with the application.

3.5. I comment further below on some of the evidence produced by the landowners.

Q 4 - Confirm which parts of the listed land are accessed by the public?

4.1. All the listed land is accessed by the public for informal outdoor recreational uses as previously described in my Statutory Declaration dated 29 April 2019 and illustrated by the photographs annexed therein.

4.2. Most members of the public confine their activities either to the adopted public footpaths across the fields (shown in yellow on the OS Plan) or to informal footpaths (desire lines) that cross the land or follow around the perimeter of the fields shown in solid brown lines on the OS Plan attached, or both as well as accessing the wooded areas shaded brown on the OS Plan. As stated, the public footpaths and some informal desire lines / paths cross the fields too and people will stray off both the formal & informal paths. The informal paths are often used in conjunction with the adopted public footpaths that also cross the listed land (shown in yellow on the OS Plan) (and see further comments below on "straying").

4.3. In addition, the areas of natural woodland referred to in point 3.1 above, are also accessed by the public, of which the most popular is the woodland to the west of the listed land adjoining and forming part of Gee's Spring wood, where there are numerous well-established tracks through the woods. The other large area of woodland to the north east of the listed land, is mainly surrounded by dense trees, but does have a central area that is more open (which can be seen on the Google Earth image attached - believed to have been former clay pits that have been backfilled for decades) with many informal tracks through this area too. All these areas of woodland are accessed by the public for bird watching, observing nature, jogging and walking by individuals or families with or without dogs as well as for informal play by children.

4.4. I comment further below on matters raised by the landowners which I believe support that people "stray" and other matters, see below.

Q 5 - Confirm roughly how often members of the public access the listed land?

5.1. I can confirm that to the best of my knowledge local people access the listed land every day and have done so throughout the 20 years I have lived here. From the many Statements of Truth that supported the S.88 application, it is apparent that such public access has been enjoyed for considerably longer than that and has been observed throughout that time by many other people too.

5.2. Daily access prevails despite some well-established access points into the listed land being closed off recently and some sections of fencing hastily reinstated by the landowners since the S.88 Application was submitted. This is because people can still access the land by deviating off the adopted public footpaths or accessing the land through many other openings in the unmaintained or broken fences that are found elsewhere around the boundaries of the fields.

Q 6 - Confirm roughly how many people access the listed land.

6.1. I estimate that during the period from late Spring to early Autumn, there are on average between 280 to 300 people per day using the listed land.

6.2. It is appropriate to assume that the number of people accessing the land will be somewhat reduced during the winter months most especially when the weather is inclement or ground conditions are wet & muddy although I have noticed from my own observations as a local resident in previous years, that the land is still well used by the public during periods of frost and snow. However, I have concluded that even in the winter months, it is reasonable to assume that around 100 people per day will access the land as I will explain later.

6.3. I can substantiate my estimates of the numbers of people using the listed land, from records of observations I made on 12 days between April & June this year. I had started recording observations of public use of the land when preparing evidence to submit to the council for the S.88 application in April 2019. I decided it was prudent to maintain a record of observations in subsequent months as well in preparation for the Definitive Map Modification Order applications that were subsequently submitted by BNG to Bucks County Council on 23 August 2019 – (see DMMO Ref #'s 16855CCU & CCV). My observations were undertaken over various 30-minute periods which were made at different times of day and on 12 different days of the week between 19th April 2019 and 6th June 2019. From this exercise, I created a spreadsheet summary recording my observations made during this period. I attach a PDF summary of this spreadsheet which you will note also incorporated brief comments on the weather and other matters during these periods of observation. I simply recorded the numbers of people I saw walking upon the public rights of way and the unadopted footpaths and I recorded the numbers of people that came into view during these various 30-minute periods of observation. I should add that it may be possible there were people I missed as one cannot see all the land from one vantage point. Similarly, I do not believe I could have double counted as the largest number of people I had to count in a half hour period was 21 persons and I was invariably able to track individuals or family groups as they walked round the land. From these records, I derived an average number of people accessing the listed land per half hour period and then extrapolate this to an overall daytime number. This extrapolation only assumed a 12-hour period of daylight available during that time of year though obviously periods of daylight in the summer can of course be longer. The point is I only assumed people would visit within a 12-hour period and not a full 24-hour day. These calculations revealed that approximately 280 people per (12 hour) day accessed the land.

6.4. Much of this is also supported by the photographic evidence that has previously been supplied to the Council that was annexed to my Statutory Declaration dated 29 April 2019

showing a wide variety of different people walking with friends, family & pets or, jogging or even cycling upon the land.

6.5. I have since reflected that aside from one Sunday & Bank Holiday, I did not record anything outside normal working hours namely in the early morning or later evening when it has been apparent to me that many people in late Spring & throughout Summer are more likely to be out exercising or dog walking and had I done so, I consider it highly likely that the average number of people on the land per day would have been higher hence why I think up 300 people per day visit the land during summer months.

6.6. Self-evidently, less people will use the land in bad weather or when the ground conditions are muddy and the land has large puddles and I have not undertaken (or needed t undertake) a similar exercise of observations during the late autumn and winter months, but my observations did include three days when the weather was rather inclement and more akin to winter. On one day it was very wet, and the ground was muddy from several days of rain, yet on these three days I still observed between 7 & 9 people in a 30-minute period on the listed land. This equates to at least 168 people per day on the land and from my own local casual observations, I feel this would more likely reflect the numbers using the land during the winter periods, even despite some access points into the listed land being closed off by the landowners since the S. 88 Application was submitted. Despite this, I still regularly see people on the land even during recent inclement weather and occasionally in periods of darkness, when I have seen people walking using torches & headlamps and I believe this often represents some children going to or from school or dog walkers. Throughout this week (commencing Mon 25 November) there was persistent & sometimes heavy rain but this morning (Friday 29 November), following a frost, the weather was sunny and bright though by 11.10 am, the ground had again turned muddy as the sun was out and the frost had thawed. Accordingly, on this day, I observed between the times of 11.10 am & 11.40 am, four people on the land (all except one, with dogs), two were on unadopted footpaths and two stayed on the formal paths, with a fifth person entering the land just as I concluded these observations. I attach some photographs with narrative including some showing numerous footprints in the mud upon unadopted paths and how this one-off exercise on 29 November indicates that <u>winter</u> use of the land can still be estimated at between 96 & 120 people per day.

Q 7 - Confirm what the actual current use of the land is that is relied upon to found the listing.

7.1. I confirm the uses by reference to my Statutory Declaration dated 29 April 2019 where I describe these in greater detail.

7.2. However, the use by the community relied upon to justify the listing can be summarised as informal outdoor recreation and exercise which includes hiking/rambling, dog walking, bird watching, jogging, and general outdoor exercise and also includes people observing nature and local wildlife or picnicking with their family and children, as well as picking flowers and blackberries, kite flying, children undertaking adventurous play or practicing for Duke of Edinburgh expeditions or cycling or for children walking to or from school as well as for people socialising with other likeminded people from the immediate neighbourhood.

Q 8 – "Provide evidence of how realistically your organisation could purchase the land if it were marketed <u>without</u> planning permission. We understand the value of part of the land owned by W J & M Mash without planning permission would be in the region of £545,000. It is unclear yet what the value of the whole of the listed land will be without planning permission".

8.1. As previously stated, I am unsure why this question (and the subsequent question #9) is relevant or appropriate at this time having regard to what BNG have already submitted to the Council together with the requirements of the Localism Act 2011, where the test for listing an Asset of Community Value found in Section 88(2)(a) Localism Act 2011, is :-
" *there is a time in the recent past when an actual use of the building or land... ... that was not an ancillary use, furthered the social wellbeing or interests of the local community*".

8.2. I respectfully suggest <u>that</u> test should be the focus of whether a nomination is approved or maintained at any review of the decision, as thereafter the effect of any listing is that, 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. Indeed the foreword to the non-statutory guidance provided by the Council in one of your earlier emails states in the concluding sentence of the second paragraph, "*the scheme will give communities the opportunity to identify Assets of Community Value and have them listed and when they are put up for sale more time to raise finance and prepare to bid for them.*" (by Don Foster former Under Secretary of State for Communities and Local Government.) Conversely, there is nothing in the guidance indicating that the Local Authority needs to consider evidence of a community groups ability to fund a purchase with or without planning permission.

8.3. When seeking the nomination, BNG considered whether it was practical to seek a "Right to Bid" and how the asset would be managed and whether it was realistic to fund any bid.

8.4. I consider that the value of £545,000 that has been quoted in your email for the land owned by W J & M Mash Ltd frankly does <u>not</u> sound unreasonable and broadly accords with our own approximation of values that BNG contemplated in April. However, it should be stressed that BNG has not commissioned a formal valuation of the land as we envisaged that would be done at the commencement of any "moratorium" that itself might (or might not) occur anytime in the next five years and as such felt it was premature to incur costs on such an exercise at this time. Any valuation of such an agricultural asset would need details that could only be conducted by a survey to appraise the soil, any contamination or invasive species on the land and the exact areas of usable agricultural land and a review of crop yields etc, to establish an accurate value and any offer by BNG would need to consider these and other matters.

8.5. Nevertheless, I can confirm that BNG always anticipated that an offer for the <u>whole</u> of the listed land may have to be in the hundreds of thousands of pounds, and informal

discussions at the time with a number of BNG members had indicated that there were individuals of high net worth who advised BNG in April that they would give serious consideration either to donating substantial funds or to lending money on interest free terms to BNG so that a collective arrangement could be assembled to acquire the land for long term community use. This would raise substantial sums of "core funds". It was also anticipated in such discussions that BNG would also seek to supplement the donations from certain individuals by:

i) a wider "crowdfund" to enable the purchase of this asset to maintain the community use. Our appraisal at that time and discussions with various members indicated that it was realistic to consider that an average donation of £100 from each member could realistically be achieved, which would generate at least a further £180,000. These figures were based on having regard to the success that BNG has enjoyed from "crowdfunding" to cover specific outlays at specific times associated with separate ongoing representations that it is currently making regarding the Draft Local Plan, where specific campaigns were successful in reaching their targets. The directors of BNG felt that with circa 1,800 supporters, it would clearly be practical to supplement the core funding from those able to donate or lend large amounts given the high level of community support received to date and which would enable the security of this important community asset in perpetuity for our community.

ii) Considering the potential to raise money, which I discuss further below, but which is likely to be good with seeded core support from several high net worth individuals and a wider "crowdfund" campaign.

8.6. Again, for similar reasons to those stated above, BNG did not seek any firm written undertakings or attempt to raise supplementary funds through "crowdfunding" as any such work would necessarily be undertaken during a "moratorium" period, which itself is not assured to be triggered during the subsequent 5 year listing period as such a period is only initiated when the landowner notifies the Local Authority of an intention to sell.

8.7. However, considering your express request for "evidence" of such matters, I have attempted in the limited time available, to contact some of those who had previously indicated they might contribute core funds to this project. This information is commercially sensitive and personal and I will therefore send it to the Council in a separate confidential annex. This is highly confidential as it relates to particular named individuals and shares sufficient information about their personal financial position to enable there to be confidence that a significant donation or financial contribution could be provided. It is also commercially sensitive as BNG hopes to be able to enter into commercial negotiations with the landowner to purchase this asset should it be offered for sale. Accordingly, it is not appropriate for such personal financial information to be shared beyond the Council but is hopefully sufficient for the Council to be satisfied of BNG's ability to perform. However, the evidence attached together with the evidence referred to above and below, **plainly** demonstrates BNG's ability to raise money in principle sufficient to satisfy you in this case that it is realistic we can do so, and I consider it would be unreasonable of the Council to conclude otherwise given the caselaw.

8.8. In further support of our ability to also raise money, I would refer you to the evidence supplied by Fladgate LLP, which is that Geltex purchased part of the Land for £400,000 in 2010, and Mr Mash purchased part of the Land in 2008 for over £1 million. There is no evidence supplied to indicate that either of these purchases were other than for Land in agricultural use and there will have been an agricultural revenue from that Land in such use which was considered sufficient to support the outlay on the investment, although such information is not provided (or at least not to BNG, however I note there has been a claim for compensation which you have not disclosed to us, and that claim may give further information as to the current yields on the land). If the return to the investment has declined for some unstated reason, the value of the Land in agricultural use will also have declined. There is no reason to consider that a solvent organisation (which BNG is) with purchasing power that is capable of being raised by donation, is not able to purchase the Land as an asset, which can be let to an agricultural tenant, backed by such guarantees as a commercial lender may or may not require, and the community uses which take place continue to take place, precisely as they do currently. In other words, if Geltex and Mash currently run the land at a profit, there is no reason why BNG cannot also do so, and if they run it at a loss, the price will be correspondingly reduced.

8.9. Accordingly, if BNG were granted more time, such as the 6-month period that any moratorium would provide, combined with the potential for supplementing funds via crowdfunding, that a bid for acquiring the listed land at the sort of agricultural value indicated is highly achievable and realistic.

8.10. In conclusion on this point, I highlight ***Worthy Developments Ltd v Forest of Dean District Council and Save our Sun Committee*** [2014] UKFTT CR-2014-0005 (GRC) where upon upholding the Decision to retain the listing as an Asset of Community Value when considering the assertion that the community may not have the resources to buy the asset, it was stated,. *"My conclusion in this respect is reinforced by the pledges of support and petitions gathered by our Save our Sun Committee. It is true that they have not yet made an offer with a firm completion date but their proposals are not fanciful.... It is important, however, not to confuse commercial viability with what altruism and community effort can achieve"* (paras 18 – 21).

8.11. Taken together there is **strong evidence** that BNG could **readily** purchase this land if offered at agricultural value

Q 9 – "Provide evidence of how realistically your organisation could purchase the land if it were marketed with planning permission. We understand the value of part of the land owned by W J & M Mash with planning permission would be in the region of £4 million. It is unclear yet what the value of the whole of the listed land will be with planning permission".

9.1. Again, I reiterate my comments above on the relevance of this question generally and the evidence in support provided.

9.2. Furthermore, I submit that seeking "evidence" to purchase a development site with a hypothetical planning permission for an, as yet, unspecified scheme is itself fanciful and hardly relevant to the decision in hand.

9.3. I would highlight the following points to support this assertion;

a) The listed land does not have any planning permission for development at this time and is still currently designated Green Belt (contrary to an assertion that I note was made by solicitors acting for the landowners).
b) Whilst I acknowledge the land is allocated in the draft Local Plan, for removal from Green Belt with an aspiration for provision of 500 homes (not 600 homes as again was incorrectly recited by solicitors for the landowners), the Local Plan is facing opposition and has not yet even commenced the Examination in Public process and may yet still be subject to major modification.
c) Proposals for the land have already been scaled back by the LPA from 900 homes originally proposed and may yet be further reduced given advice by one of the LPA's own third-party consultants, who recommended only circa 100 homes and on only part of the land.
d) The LPA have yet to publish the "masterplan" for the site detailing what facilities, planning gain or infrastructure is necessary for the land.
e) As such, no detailed Residual Valuation or appraisal for the land value could be realistically undertaken at this time without some knowledge of (amongst other things), the level of CIL payments or contributions under S.106 or S.278 as well as any accurate estimate of Gross Developed Value when the scale of development is still far from clear.
f) Indeed, at the time of writing the CIL Charging Schedule is still awaiting approved by an independent examiner.
g) One must also consider the planning history of this site and the fact that previous applications to seek consent have been unsuccessful. (see appeal decision letter in respect of applications ref's CH/1825/81/R and 85/1406/CH) indicating that planning permission is far from assured.

9.4. Respectfully, I should add that, if it is being suggested that BNG must prove it can fund a purchase under a hypothetical scenario for a future development scheme, that this is not a proper material consideration for the Council when deciding whether to list (or not) at this time when such any planning permission is uncertain in both principle and detail. In my view to consider whether a community could fund buying an asset that might get planning permission, undermines the very purposes of the Localism Act and the intentions of the Asset of Community Value scheme which is to enable a community to seek to purchase an asset before a sale takes place.

9.5. In so far as the question is relevant (which I do not accept), its relevance can only be whether it is *"realistic"* that in such a scenario the community has the ability to raise sufficient monies. In response to the question itself, if such a hypothetical scenario were to arise, given that the community wishes to preserve the land or acquire it for community use, the sum of money then involved is very substantial, and whether or not we could raise it is likely to depend on "crowdfunding", grant applications, the extent to which we can leverage

core donated money to raise further money by way of mortgage or by setting up a call for funds from members towards a future scheme, as others have done. **However, I can state this is a scenario BNG would still give serious consideration to**. We would call upon all the experienced resources of others in our community. We would also need to consider the nature of the permission gained and how the community might envisage securing the current community uses of the land for the future in a way which permitted us to raise money. Again, the recital from ***Worthy Developments Ltd v Forest of Dean District Council*** regarding community effort is relevant. BNG is not constrained in its constitution to borrow money (as was demonstrated when submitting the S.88 application); it could raise a mortgage or some other loan with Metro Bank & TSB Bank (being the two banks BNG has connections with) or from another lender. It is impossible to comment more specifically at this time, however there are many leading examples of successful crowd-funding across a wide range of projects, for example:

a. The Glenwyvis Distillery raised £2.5 million with 2456 investors in 77 days https://www.crowdfunder.co.uk/glenwyvis-distillery

b. A purchase in Southwold purchased a hospital through a "community share" purchase in excess of £800,000, of which about half was through crowdfunding and raised nearly £400,000 with 446 investors in only 38 days. https://www.crowdfunder.co.uk/southwoldhospital.

c. One of the ACV pub purchasers raised just under £350,000 with 25 investors in 35 days https://www.crowdfunder.co.uk/save-the-new-inn-norton-lindsey. Similar crowd-funding schemes include https://www.crowdfunder.co.uk/gardenersrest, https://www.crowdfunder.co.uk/save-the-bromley-cross, etc.

d. A car park has been transformed into a community garden raising a little under £100,000 - https://www.crowdfunder.co.uk/hcgc

9.6. I therefore believe that it is **realistic** that the community, through a sustained effort, could raise sufficient funds, but this would require significant effort and it is not reasonable nor lawful of the Council to require us to attempt to prove we could raise very substantial sums now ahead of any 6 month moratorium and well ahead of any planning permission even being gained for us to consider, when we are also seeking to resist this important local asset being lost from the greenbelt .

10. Having addressed the 9 questions that you raised, to the best of my ability in the limited time available, I would probably make further comment in the hope it might assist you with your review. Unfortunately, in the time permitted, I cannot provide you with a fuller response, and I would urge you to give BNG the opportunity to address you specifically on any further points which might be concerning the local authority. I have tried to identify key points and concentrate on those, but I do not think half of the time period we sought is reasonable. However, I hope what I have done assists you and BNG urge the Council to maintain this Listing in its review.

Ancillary use

11. Many of your questions appear to be raised in response to suggestions from the landowner's solicitors that as the use of the fields is as private farmland and any use by local residents is only an **ancillary use** and therefore does not qualify under Section 88 (1) of the Act. It further draws an inaccurate analogy with planning law and its case-law derived consideration of "ancillary" use. This is wrong. BNG do not agree with these suggestions.

12. Firstly, the fundamental point to consider is the statute, which does not restrict it in such terms. It is the statute which must be understood and interpreted.

13. Guidance is not definitive when interpreting statute, however as previously referred to, the Department for Communities and Local Government issued guidance dated October 2012 on the Assets of Community Value Scheme. The Guidance is entitled "***Community Right to Bid: Non-statutory Advice Note for Local Authorities***". In the Glossary of Definitions of the Guidance, Land of Community Value is described as "*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.*"

14. Recent First-Tier Tribunal decisions consider the use of "ancillary". In the aforementioned case of ***Worthy Developments Limited v Forest of Dean District Council and the Save our Sun Committee*** (also Tribunal reference CR/2014/0005), Judge Warren considered the meaning of the term ancillary use under Section 88 (2)(a) of the Localism Act 2011. The past use considered in that case was a former use of the Rising Sun pub at Woodcroft, outside Chepstow. The pub served the local community as a pub. It was also used as a meeting place by the Women's Institute and the Parent Teachers' Association. Judge Warren found that the actual use of the Rising Sun as a Public House had furthered the social wellbeing and interests of the local community. He rejected a submission that the community use must necessarily be for a substantial amount of the recent past. He stated that no doubt trivial or very temporary use would be disregarded as "ancillary" to a main use but that there was no warrant for reading the words "substantial amount" into the statute.

15. I comment that the number of people using the Lye Green land (as supported by the many statements from the public and my own observations summarised herein) cannot rationally be categorised as trivial or temporary.

16. In the case of ***Firoka (Oxford United Stadium) Limited and Firoka (Oxford) Limited v Oxford City Council*** (see Tribunal reference CR/2013/0010). Judge Warren considered a submission by Firoka that in considering applications to list a building or land under Section 88 (1) of the Localism Act 2011, the Act should be applied in respect of any planning unit only in respect of the primary use of that unit. The Judge rejected that submission and said that the Act was not restricted "*to primary uses*". The case concerned the Kassam Stadium which since 2001 had been the home ground of Oxford United FC. Part of the Stadium was fitted out for conferences and hospitality which were hired out by the owner. The Stadium was also used by the London Welsh Rugby Club. Oxford United FC used the Stadium for just 25 match days a year. The Judge

held that use of the Stadium by Oxford United FC was not an ancillary use. The level and degree of use in this case is plainly such that it is not an ancillary use.

17. Judge Warren in the Oxford Stadium case also did not accept that the Community Right to Bid regime should be read and interpreted as part of general planning law. Clearly material planning information would form an important part of the factual context but planning concepts such as "planning unit" should not be imported.

18. It took some time to source the case "***Williams v IRC* [2005] UKSPC SPC00500**". The case is in fact correctly cited as "***Williams v IRC* (2005) Sp C 500".** It is a case about inheritance tax law in an agricultural context. It is well known that inheritance tax law is a "lex specialis". The case appears to be about whether broiler houses (in which birds were actually being reared) were agricultural property, such that they could benefit from a particular type of tax relief available under the Inheritance Tax Act of 1984, section 115 and section 116, following the deceased's death where different parts of the land were used by different tenants for different purposes, and whether they were in connection with the "blue land", the "orange land" or the "green land" in that case to which certain tax reliefs were attracting. In that context the Special Commissioner decided that the occupation of the broiler houses was not ancillary to the agricultural use of the relevant coloured land, so that therefore agricultural property relief was not available. It is wholly irrelevant to this case. BNG think it is misleading to cite this case in this way, without drawing any proper attention to its very different context.

19. The Tribunal has also explained (see ***Admiral Taverns v Cheshire Waste and Chester*** [2018] UKUT 15 (AAC)) when urged to give more guidance as to what "ancillary" means that it *"seems to me that "ancillary" is an ordinary word to be understood in the context of the relevant legislation and in light of the facts of any particular case, and any further comment by the Upper Tribunal on its meaning would lead to more confusion rather than less".* The applicant does draw attention to this case, but without explaining in that case it was being argued that the use of the bar in a destination restaurant and hotel was a minor and ancillary use – this was rejected. The point was not whether the premises in question were a public house or restaurant, but whether the use to which it was being put satisfied the statutory listing requirements, which it did. The same applies here, as is shown by the evidence in support, in that the use to which the community is putting the Lye Green Fields satisfies the statutory listing requirements and is plainly not an ancillary use.

20. Section 88 requires an applicant to establish that an actual current use of the land is not an ancillary use. In my view, one use of the Lye Green Fields by W J & M Mash is as private agricultural land. However, the use by local residents is a separate non-ancillary use of Lye Green that has prevailed for decades. The Act does not require a use to be a main or primary use in order to qualify for listing under the Act, let alone require a use to be a main or primary use having regard to how those terms are understood in planning law (where, in any event, were this to be relevant, which I do not consider it is, I would submit that this land has a "mixed use" considered fairly and as a whole when taking into account the level of uses by the local community and the nature of those uses). This accords with the approach followed by Judge Warren in the First-Tier Tribunal decision concerning ***Firoka (Oxford United Stadium) Limited.*** It

also accords with his decision in the case of ***Worthy Developments Limited*** where he commented that a trivial or very temporary use will be disregarded as ancillary to a main use.

21. The term ancillary is defined by Oxford dictionaries as *"something which functions in a supplementary or supporting role"*. The use of the land at Lye Green by local residents (as described in my Statutory Declaration) for recreational walks, jogging, dog walking, bird watching and appreciating the fauna and flora etc is not trivial or temporary. It is not minor or negligible, and it is not supplementary to the agricultural uses nor is it merely supportive of some other use. Rather, it is a <u>separate</u> use of the land which is not ancillary to its use as private farmland.

22. I respectfully submit that the Council need to apply the statutory wording to the particular facts that have been presented. I contend that the guidance and the facts recited by evidence submitted by so many members of the public as well as those points raised herein and those accompanying the ACV application are persuasive and will hopefully assist you in your decision that this use is a qualifying use under Section 88(1).

23. I do not agree with how the applicant for this review has then used the matters set out in paragraphs 30 – 37 to say that *"the main (i.e. "non ancillary) use of the Property is as agricultural land..."*. This is a mis-reading of the Tribunal's decisions and the guidance they refer too. A similar misunderstanding likes behind sentences such as *"As discussed, "ancillary" uses of ACV nominated land are not capable of engaging the s.88 criteria for community value. Given the main use of Mushroom is clearly as agricultural land... the few remaining uses to which the Nominator alludes are clearly ancillary to the main use of Mushroom as agricultural land..."* This is confusing different concepts, as above. The uses being relied upon are non-ancillary. The incorporation of planning unit /planning terms is not helpful or instructive.

<u>Time periods</u>

24. I also note the various comments about time periods. In ***Crostone v Amber Valley DC*** *[CR/2014/0010)* Judge Lane stated that what constitutes the "recent past" will depend on all the circumstances of a particular case as *"the expression is a relative concept"*, and he referred to in that case that the length of time the public house had been a public house was relevant – which was nearly 200 years, and in ***Astim v Bury Council*** *(CR/2015/0022)* which was about a bowling green dating from the 1840s, but which had been last used in 2011, the Judge said that that was *"in the recent past when seen in the context of a use which commenced in the middle of the nineteenth century"*. There are a variety of cases which show that adopting a "three-year rule" would be inapt as each case must turn on its own facts. In any event in this case, I submit that the evidence shows that the community use of outdoor recreational uses is current, and is in the context of such community uses across the Land having been continuing for a very long time indeed, as is demonstrated by the totality of the evidence in support and including the evidence of cricket matches in the 1930s and the community accessing the land for decades. There have been many years of uninterrupted use for outdoor recreational use.

Footpaths and desire lines

25. There are many and various points made about footpaths and prescriptive easements and it is not possible for me to comment on all of them. With more time, I would have liked to annotate the photographs and respond in detail to the statutory declarations, but in the time available I make the following points:

26. I disagree that prescriptive easements and footpaths are *"simply irrelevant"* for many reasons, most notably because it is indicative of level of use and evidence of use over time. As you are aware, BNG have also submitted an application for a Modification of the Definitive Map. The fact that the evidence of use by individuals and the public is this extensive is plainly relevant as to the evidence of the use of the Property. In our view the level of evidence to obtain rights by prescription and a modification of the definitive map is above that which is required for an ACV and therefore the fact that such rights are, or are likely to be, or may be acquired because of the evidence, is relevant; and remains relevant even if such applications were to be unsuccessful in due course. Further, these rights would impact upon both the value of the land and its development potential. We strongly disagree that this is *"completely irrelevant to the question of whether the Property should be listed as an ACV and should have been disregarded by the Council".*

27. There are various comments made to the effect that the use of a footpath is an ancillary use. The arguments do not seem to me to be clear. BNG do not rely only on the use of public footpaths, but on the use that is made of the Land by members of the public accessing the Land for outdoor recreation by means of both public footpaths **and** informal tracks **and** making use of the whole of the Land for **a range of** outdoor recreation purposes including dog walking, jogging, and bird-watching, and other uses as set out in my Statutory Declarations dated 29 April 2019 and other evidence. We note that this is not evidence of *"enjoyment of view from the* [public] *footpath... merely an ancillary use, incidental to the main use of passing and repassing"* in the manner quoted. That use that BNG claim is not incidental to a main use but the purpose.

28. There are numerous footpaths or desire lines around and over the land that are additional to the adopted footpaths. These are well illustrated in the nomination papers and aerial photographs now including some photos provided by the landowners. The suggestion that these are all created by farmers vehicles or cattle is misleading and plainly wrong. The tracks around the perimeter are clearly not created by any vehicle. I consider they are clear evidence of people walking, which is supported by the written evidence from BNG that is before the Council. I acknowledge some tracks within the field are or may be created by farmers vehicles, but these are <u>not</u> claimed as desire lines in BNG's nomination. Similarly, any suggestion that all the perimeter tracks are created by cattle also does not stand up to examination. It has been several years since cattle were in the north or south western fields and in that time, as has been stated, the fields have been ploughed for crops and for understandable reasons of practicality, both the adopted & unadopted footpaths are similarly ploughed up as was done only recently by the farmer. Whilst the farmer may be under an obligation to restore the public adopted footpaths, he would have no obligation to restore the unadopted desire lines yet

these tracks have always reappeared despite the absence of cattle in those areas for a number of years which the landowner statements confirm. I would submit this is itself evidence to the number of people accessing the land and repassing over these areas which re-establishes the informal paths. We also note that whilst the landowner relies on photographs taken at particular times as asserted to be not showing footpaths, there are many other photographs which do show footpaths and other evidence in support. It is not surprising that e.g. a very recently ploughed field does not or may not show a footpath but that does not mean the "desire line" does not re-create, nor that a photograph if it were to be taken from a different angle would not show such a line and we consider many of the photographs produced do in fact show footpaths. Some photographs taken only today and attached herewith, show numerous footprints in the mud upon the re-emerging desire lines despite the fields being ploughed only a few weeks ago.

29. I note from the statutory declaration of Mr Mash that he says (para 6) when he sees people *"straying"* from the PROW, he states they are informed by him or his staff of their trespass. I am not aware of anyone being informed they were trespassing until recent weeks. Indeed, local people tell me the only occasions they can recall of being told they were trespassing was shortly after the S.88 Application was submitted to the Council which then prompted a sudden display of diligence by the farm staff, who only in the subsequent months started not only telling people they were trespassing but attempting to block their progress too. I have received numerous complaints from people in recent weeks who say they felt intimidated by some behaviour they experienced, and all said they had walked the fields for years and had <u>never</u> been challenged or told they were trespassing. We note that Mr Fitzgerald confirms that he has seen people *"straying"* off the adopted footpaths even by his own admission he only visits periodically and that on several occasions he *"politely"* told people to *"observe normal courtesy and act responsibility"* - which is not the same as telling someone they are trespassing. There is therefore clearly good evidence that people do *"stray"* - even from the landowners – and this is over the whole of the Land.

30. We also note that Mr Mash says *"**the extent of** outdoor recreation that is claimed is simply incorrect"* and *"People flying kites or carrying on many of the activities now claimed ... **whilst the field has a crop** of 2-6foot wheat.. or equivalent.... Would not be possible – without causing noticeable damage and disruption. I can confirm that I have not seen any parties **using the land in the way it has been suggested in the Nomination**"* lacks clarity as to what he accepts he has seen. From my own observations and having regard to the scale of evidence submitted by the community in support of the application, I consider that his statement does not say that he has never seen such uses. There are very many times of the year when (to use his example) flying kites is possible (and there is plenty of space away from electricity lines to do so safely!) and other activities such as bird-watching is not restricted by say crop growing. I similarly note that Geltex state that *"it is fanciful to suggest that if one would to attend the parts of the woodland that are accessible, one would **regularly find** members of the public there"*, and also assert that *"any use by the public is rare and trifling"* and qualified by *"much of the woodland is similarly inaccessible"*. I do not agree the use is rare and trifling and I consider that members of the public regularly use the woodland and other parts of the Land as is shown in the evidence supplied in the application and from physical evidence that is apparent on the land. I disagree

that it is *"simply not possible for any use of the fields as a whole for activities such as kite flying or football"* and refer to the evidence in support of the Nomination. Whilst at times some fields are cropped, it is self-evident that at other times they are not.

The heading *"Planning concerns and the Green Belt designation"* & *"Pleasant or Interesting Views"*

31. There are a variety of matters raised under this heading. I disagree that this is "irrelevant".

32. The land's status as green belt land is not, or not simply, "amenity" or about "views" and the reasons why the land is green belt and green belt purposes are themselves capable of being assets of community value, as is the importance of green infrastructure and access to suitable green outdoor space. Green infrastructure is commonly a source of crowd-funding, see for example https://www.theguardian.com/lifeandstyle/gardening-blog/2017/mar/23/five-garden-crowdfunding-projects-to-back-this-spring. Indeed, I am also aware of a variety of crowd funding projects which as part of their goal have been to improve the biodiversity value of agricultural land.

33. I agree that part of the purpose of ACV is to enable a community to purchase for themselves assets which are of community value. This is precisely what BNG is preparing to do. However, I disagree that *"BNG's desire to stop development (seemingly its sole purpose) gives it a vested interest in listing which is entirely distract from the matters which the 2011 Act was established to protect. This should be borne in mind when considering the reliability of its evidence".* BNG is protecting the site because of its community value – BNG are not "anti-development", indeed we are publicly supportive of more sustainable local schemes (ie Chesham Renaissance CIC) but we are against development on this site which has an important community value that supports and improves the wellbeing of hundreds of local people. This is also illustrated by the numerous public responses to this site's proposed removal from green belt designation. We are therefore widely supported within the local community. If there is any party with a "vested interest" in the production of evidence, it is obviously the landowners, whereas the community is seeking to protect its assets!

34. The comments made about ***General Conference of the New Church v Bristol City Council*** **are** extracted out of context. The case was about a church, where a local group wished to prevent development and were concerned that somebody might buy the church to turn it into development, where the church happened to have a garden and so the local group relied on aspects connected with the garden (inter alia). The use made of the property had in essence always been as a church. That is entirely different from what is being sought to be protected here, which is the current actual use made by the community and the current actual use as evidence in the statutory declarations is of outdoor recreation in a variety of forms.

35. It follows that I also therefore disagree that the statements about the *"level of support"* are wrong for the Council to take into account. The level of support is very good evidence of the degree of actual current use made by the community, good evidence of the fact that this use furthers social well-being and social interest, and good evidence that there is a realistic continuation of the community use.

36. I further note that the heading "*pleasant or interesting views*" is misleading and erroneous as to the contents of the statutory declarations. The three quotations are cherry-picked. This is not individuals seeking to protect "views" per se but people expressing the social well-being and social interest which they derive from the land, such as bird-watching, enjoyment of the natural environment in its flora and its fauna, etc. I am at a loss to understand why "*around the fields*" has been underlined. Self-evidently dogs and children wander from paths, as do kites and birds! The same points as made above for ***General Conference of the New Church v Bristol City Council*** apply to ***Guillivers Bowls Club Ltd*** and ***New River Trustee 7 Ltd***, all of which are taken out of context. BNG are seeking to protect the actual current use and that current use for outdoor recreation includes visual aspects but those are part and parcel of the recreational use. ***New River Trustee 7 Ltd*** was about woodland adjacent to a pub which had been listed where there was not a current use of the woodland. ***Gullivers Bowls*** is a complex case which in due course ended up in the Court of Appeal on a related planning decision, and the planning decision was quashed by the Court of Appeal (on other grounds than this one) but the point is (in this context) that visual amenity can be taken into account. The Court of Appeal held (in ***Loader v Rother District Council***) [2016] EWCA Civ 795 that *"I see no force in Ms Wigley's submission that the council misunderstood the scope of the policy in paragraph 74, and thus misapplied it, by failing to have regard to the "public value" in the site's "visual amenity" and as an "asset of community value", which furthers the "social well-being or social interests of the local community". This consideration was specifically taken into account in paragraph 6.8.4 of the officer's main report. I do not accept that it impinged significantly, if at all, on the application of the relevant tests in Policy CF2 and paragraph 74 of the NPPF. Tests framed in terms of open space, buildings or land being "surplus to requirements" and alternative or equivalent or better "provision" of such facilities are not, I think, germane to a site's "visual amenity". However, in so far as "visual amenity" and "the social well-being or social interests of the community" contributed to the "public value" of the open space on the site, their protection was, in my view, inherent in the application of the Policy CF2 and paragraph 74 tests, and were dealt with appropriately in this case by the application of those tests. To the extent that these considerations went beyond the ambit of those tests, they were taken into account and given due weight in the council's decision".*

Locks on gates etc

37. I also note the comments regarding locks being cut off gates and fences being torn down. I have no personal knowledge of this, and having made some enquiries, I have not heard of anyone in the community seeing such activities either. The gate into the northern field has until recently (since the ACV application) been unlocked for many years and indeed has occasionally been left open, sometimes for days. The gate at the south western field accessing Lye Green Road has more often been locked, which I consider was likely to be to prevent vehicular access, but there has been a wide opening beside the gate that provided comfortable pedestrian access for years. That opening has only recently been closed off this summer shortly following the ACV application. I commented on this observation to the Council shortly after the Decision Notice was issued. We are also aware that after the ACV application was submitted, a post & wire fence was hastily put up in the summer beside the public footpath

near to where it enters the fields at the southern end of Deer Park Walk. Several people have commented that a length of this fence was subsequently removed by persons unknown.

Summary

38. I hope all the information included herein addresses your questions and will assist you in your review. **However, I request that you contact us if there are any points upon which we have not satisfied the Council and we will provide further comment**. It has been simply impossible for us to address everything in 5 working days, however we are anxious to assist to the best of our abilities.

39. For the avoidance of doubt, I must emphasize that BNG only has consent from the individuals referred to herein to share their personal details and bank/financial records with the Council. Therefore, I must point out that BNG is bound by data protection legislation (as presumably is the Council) and for the avoidance of doubt require that any personal data especially relating to names addresses and financial details of donors etc is kept confidential and is not disclosed to any third party. Similarly, the financial information regarding BNG's ability to fund any offer for the land is commercially sensitive and I must request it remains confidential and that specific details about the scale of funds available to BNG or what we have indicated we can raise, is not disclosed to any third party without our prior written consent.

I would be grateful if you could advise me when you hope to conclude this review; and that you will keep me informed of any developments?

Yours faithfully,

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