

Chiltern District Council

Assets of Community Value: Internal Review of Listing Decision

Review date 3 December 2019

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| Asset Name: Land at Lye Green Farm and Land at Nashleigh Farm | Date Asset Listed: 05/07/19 | Date review request received: 9/08/2019- W J & M Mash Ltd 29/08/19- Geltex Ltd |
| Asset Address: Lycrome Road, Lye Green Chesham. HP5 3LD | | |

1. DETAILS OF THE REVIEWING OFFICER

1.1 Regulation 4 of Schedule 2 to the Assets of Community Value (England) Regulations 2012 provides that *“An officer of the authority of appropriate seniority who did not take any part in making the decision to be reviewed (“the reviewer”) shall carry out the review and make the review decision.”*

1.2 I am the Head of Legal and Democratic Services for Chiltern District Council (“the Council”) tasked with carrying out reviews of assets listed on the Council’s Asset of community Value list. I am conducting a review of the decision to list Land at Lye Green Farm and Land at Nashleigh Farm, Lycrome Road Chesham. HP5 3LD as an Asset of Community Value pursuant to section 88 (1) (a) of the Act. Part of that land is owned by W J & N M Mash, the remaining part by Geltex Ltd.

2. THE EVIDENCE

2.1 I am proceeding on the basis of the evidence before me and I can confirm that these are the materials I have;

- i. Decision Notice dated 5th July 2019
- ii. Right to bid Form and covering letter
- iii. Redacted Community statements
- iv. Petition supplied by Brown not green (BNG)
- v. Emails from Phillip Plato dated 30 April 2019 and 7 May 2019
- vi. Supplementary information from BNG 29th May 2019
- vii. Land Registry Titles supplied by BNG
- viii. Revised OS plan from BNG
- ix. Photographs supplied by BNG
- x. Phillip Plato Statutory Declaration with addendum
- xi. Phillip Plato Statutory Declaration and revised Annex

- xii. Email from Phillip Plato dated 20 November 2019
- xiii. Emails from Phillip Plato dated 29 November 2019 with attached written representations, Google earth View of listed land, Coloured OS plan, recent photographs with narrative record of observations and financial information
- xiv. Freeths LLP Representations on behalf of W J & M Mash dated 12 September 2019
- xv. Maps supplied by Freeth
- xvi. Photographs supplied by Freeths
- xvii. Crop rotation document
- xviii. Hansard report- Public Bill Committee :Localism Bill- Tuesday 15 February 2011
- xix. Title Plan
- xx. Harvey Mash statement
- xxi. Representations from Fladgate LLP on behalf of Geltex dated 19 November 2019
- xxii. Statutory Declaration M E Fitzgerald with enclosures

3. BACKGROUND

3.1 On 26th April 2019, the Council received a community right to bid asset nomination from Brown Not Green in relation to the listed land. Additionally, a statutory declaration and appendices along with petition from local residents were received in support of the nomination.

3.2 In response to the nomination, Mr Fitzgerald a surveyor on behalf of the landowners objected by submitting sworn statutory declarations from himself and H J Mash; these are dated 21 June 2019.

3.3 The Council listed the land in its Asset of community value list on 5 July 2019.

3.4 A request was made for a review of the decision to include the land in the List of Assets of Community value on the dates above, under section 92 of the Localism Act 2011.

3.5 By agreement, the Council and the landowners extended the statutory 8-week deadline for making a review decision until 3rd December 2019 pursuant to Paragraph 9 of Schedule 2 of the ACV Regulations 2012, which provides that the review period can be for a longer period as is agreed with the owner in writing.

4. SUMMARY OF RELEVANT LEGISLATION

4.1 Part 5 Chapter 3 of the Localism Act 2011, supplemented by the 2012 Regulations, deals with assets of community value listings and reviews. Under section 88(1) of the Act

... 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.

4.2 "Social interests" include cultural interests, recreational interests and sporting interests (section 88(6) (b) of the Act).

4.3 The land can also be nominated as land of community value which has furthered the social wellbeing or social interests of the local community in the recent past and it is realistic to consider that it will do so again during the next five years: see section 88(2). In the present case, the relevant provision is section 88(1), but the analysis would essentially be the same under section 88(2) on the facts of this case.

4.4 Neither the Act nor the Regulations give an express definition of what use "furthers the social wellbeing or social interests of the local community". It is for the local authority to decide depending on all the circumstances of a particular case.

4.5 If the Council is satisfied that the nomination is valid and the nominated asset is land of community value, then the Council must add the land to a list of assets of community value in accordance with section 90 of the Act.

4.6 The owner is entitled to seek a review of the decision pursuant to section 92 of the Act provided the request is made within 8 weeks of notification of the decision. The request for the review was made within this time limit and is valid.

5. REVIEW OF LISTING

5.1 The owners have made a request for a review within the statutory time frame, of the Council's decision to include the listed land in the Councils Asset of Community Value list.

5.2 I have undertaken this review on the papers, as requested by the owners. I have done so taking into account the materials listed at section 2.1 above.

6. REPRESENTATIONS FROM THE NOMINATORS

6.1 In support of the nomination, statutory declaration with appendices, photographs maps and petition were submitted. In summary the pro-forma documents claim the following uses that in my view could potentially constitute qualifying uses within the meaning of section 88 of the Act:

- hiking/rambling, dog walking, bird watching, jogging and general outdoor exercise, observing nature and local wildlife.
- kite flying, practising for Duke of Edinburgh expeditions and socialising

6.2 These activities are said to take place beyond the footpaths and on the Land itself; this is said to have happened for decades, with “full unrestrained freedom to enjoy all the land”, including woodlands on the listed Land. The periods of use vary from 5 to over 40 years, and from daily to occasional use. I acknowledge that the nominators’ materials refer to a number of other uses as well, but the only uses that could in my view potentially qualify within the meaning of section 88 of the Act are those listed above.

7. REPRESENTATIONS FROM W J & M MASH (“OWNER 1”)

7.1 A letter dated 12 September 2019 submitted by Freeths LLP on behalf of the W J & M Mash requests a review and sets out the reasons why they believe the nomination should be rejected. I do not seek to repeat the contents of the letter, as it runs to 19 pages. In summary it is submitted that;

- The submissions of the Nominator are largely irrelevant, for example as regards foot paths and prescriptive rights of way.
- Submissions made by the nominator regarding the level of particulates, air pollution etc. are irrelevant to the ACV regime, the purpose of which is to provide an achievable time frame for community interest groups to organise themselves and to raise finance to bid for property that might be sold.
- Pleasant and interesting views are not capable of engaging section 88 of the Act, and such considerations must be disregarded.
- The listed land is farmland, and has no other uses which are not ancillary.
- Given the height of crops in certain fields when fully grown, it is not possible for them to be used for activities such as kite flying etc.

8. REPRESENTATIONS FROM GELTEX LTD ("OWNER 2")

8.1 In a letter from Fladgate LLP acting on behalf of Geltex dated 19 November 2019, it is stated that the listed land is recognizably agricultural land. The alleged uses relied on by BNG are plainly ancillary. It is fanciful to suggest that a farmer's fields have some sort of mixed use by virtue of members of the public from time to time passing over the same (whether they enjoy doing so or not).

8.2 It is not argued that the farming use of the listed land can somehow satisfy the statutory test. The fact that a use is of benefit to the public does not mean that it furthers "the social wellbeing or social interests of the local community" in the statutory sense.

8.3 They cite the case of *General Conference of the New Church v Bristol City Council* [2015] UKFTT CR_2014_0013 (GRC) (16 February 2015). At [15] the Tribunal held that:

"I nevertheless consider that the expression "social wellbeing and social interests of the community" in section 88 does not encompass religious observances in a church, mosque or synagogue etc, and that such a building will not in practice fall within section 88 unless there is some other non-ancillary use being made of it, which does further social wellbeing/social interests of the local community." If religious use by congregated members of the local community does not meet the relevant test, then it is plain that a primary use as farmland by farmers cannot possibly do so.

8.4 BNG's desire to stop development (seemingly its sole purpose) gives it a vested interest in listing which is entirely distinct from the matters which the 2011 Act was established to protect. This should be borne in mind when considering the reliability of its evidence. However, the questions whether the Land is earmarked for development, whether such development is desirable, and whether the Land is "green infrastructure" are totally irrelevant to the current or recent past use tests under sections 88(1)(a) and s. 88(2)(a). As to future use of the land, as is submitted in response to the Council's questions, it is fanciful to suggest that BNG might purchase the Land and put it to some community use in the future. No other entity has been suggested as the vehicle for such a plan either.

8.5 They comment that the express intention of BNG includes the preservation of the agricultural use of the Land. There is currently no planning permission for any use other than agriculture, and the only indication in planning terms that another use will be acceptable is the proposed allocation of the Land for residential development purposes. That is the very use that BNG finds so unacceptable, i.e. contrary to the community's interests.

8.6 The proposed plan for the Land on the part of BNG would have to have agriculture as the primary use in order not to constitute a breach of planning control. Any other use such as members of the public walking along paths would necessarily be ancillary and therefore would not satisfy the relevant test under sections 88(1)(b) or 88(2)(b).

8.7 By contrast, Geltex and Mash have a clear intention that the Land will be developed for residential purposes. If planning permission is not forthcoming, despite the nascent allocation in the development plan, then the current agricultural use will continue. There is no non-ancillary use that can conceivably be argued to meet the statutory test.

9. KEY DECISIONS

9.1 The test for listing land as an Asset of Community Value is set out in section 88 (1) of the Act (see above). Having considered the evidence, the issues which I have to determine are as follows:

- (a) Whether the nominated asset within the local authority's area: section 89(2). This is not in dispute.
- (b) Whether the nomination from a community organisation that is eligible to make a nomination: section 89(2)(b). This is not in dispute.
- (c) Whether the nominated asset is within the categories of excluded assets as set out in the 2012 Regulations. This is not in dispute.
- (d) Whether there is an actual current use of Lye Green Farm that is not ancillary. This is in dispute.
- (e) Whether that use furthers the social wellbeing or social interests of the local community. This is in dispute.
- (f) Whether the use put forward by the applicant is a trespassory use and if so what are the implications for any trespassory use on meeting the test in section 88. This is not in dispute.
- (g) If there is an actual current use of Lye Green Farm that is not ancillary, which furthers the social wellbeing or social interests of the local community, is it realistic to think that such use can continue (see section 88 (1)(b)). This is in dispute.
- (h) If the land is not of community value as a result of the above tests, whether in the recent past an actual use of the building or other land that was not ancillary furthered the social wellbeing or interests of the local community (see section 88(2)(a)). This is in dispute.
- (i) Whether it is realistic to think that there is a time in the next 5 years when there could be non-ancillary use of the building or other land that would further (whether or not in the same way) the social wellbeing or social interests of the local community (see section 88(2)(b)). This is in dispute.

9.2 Distilling those questions into the most important issues, I have approached this review by focusing on (a) whether there is an actual community use (i.e. a use that furthers the social wellbeing or social interests of the local community) which is not an ancillary use and (b) if so, whether in the future it is realistic to think that a non-ancillary community use will continue (even if it is different to the current use).

9.3 I have also consulted guidance on the application of the statutory criteria to public footpaths as set out in the ACV appeal in *Banner Homes v St. Albans City and District Council* (CR/2014/0018) (which was appealed on certain issues).

10. CONSIDERATIONS

10.1 The Council is required to consider the applications with reference to the statutory criteria. If the use of the land for community value purposes is established, the application must be accepted and the owner and the applicant must be notified of the decision. If the use is not established, the application must be refused and the appropriate parties notified of the refusal together with the grounds upon which the refusal is made.

Actual current/recent past use

10.2 The listed land is crossed by public rights of way, and I have seen no satisfactory evidence that the uses referred to in paragraph 6.1 have been carried out other than along these routes or around the edges of the listed land.

10.3 Whilst the footpaths viewed in isolation may further the social wellbeing and interests of the local community, my conclusion is that this footpath use is ancillary to the actual current use of the land, which is plainly agriculture/farming. I note that the aerial photographic layers show the listed land as agricultural land with hedgerows dividing it into 'fields'.

10.4 There are public footpaths that cross the listed land, i.e. rights of way however, it is my view that I am unable to list the public footpaths or confer rights of way on other parts. The Judge in the *Banner Homes* case noted that the footpaths couldn't be separately listed as such social use was ancillary to the legal primary purpose of footpaths (namely, to pass and repass). I take the same view here, and am thus unable to base an ACV listing of the land on the use of the footpaths themselves.

10.5 The first category in paragraph 6.1 above can all be carried on or from the public footpaths that cross the listed land, and the second category would involve trespass but in any event would not be possible while the fields were under cultivation or when animals were present. I have been provided with

evidence that supports cultivation taking place since 2011. With regard to whether trespassory use could qualify under the ACV regime, my view is that it can in light of the Banner Homes case, although in this case I note the owners have always put up borders by way of fences and gates around the land.

- 10.6 I have considered the case of Trustees of Sundorne Estate v Shropshire CC (CR/2016/0015) concerning a green in the middle of a housing development with a path crossing it, but the whole of which could be accessed and was used by children to play on. This is distinguishable from this case as the whole of the listed land in that case could be accessed. I am not satisfied in this case that the whole of the listed land can be accessed.
- 10.7 Leaving aside the stated uses of the listed land (see paragraph 6.1 above) outside the use of the footpaths themselves, my view is that any such uses are plainly ancillary. This is because the evidence clearly shows the listed land to have been in consistent and thorough use as agricultural land. That is the overwhelmingly dominant use; my view is that any other uses of the kind referred to at paragraph 6.1 above would be minor, in terms of how much of the listed land was used and how often. In other words, the only potentially relevant qualifying uses were in fact ancillary in this case. Agricultural use is in my view not a qualifying use for section 88 purposes.
- 10.8 In Bay Trust v Dover DC CR/2016/0002, an argument that use of land by scouts was only an ancillary use failed, as did an argument that the use was a trespass. The use had been significant and importantly the predominant and non-ancillary use of the land until 2015 was for recreational purposes. The judge accepted that it was used as a recreational amenity by local children and use was not limited to the footpaths.
- 10.9 Further, I considered the case of Haddon Property Development Ltd v Cheshire East Council & Anor CR/2015/0017, in which the Tribunal held that the fact that two parcels of land are in common ownership is not in itself sufficient to make them both the subject of a combined nomination for listing. The Tribunal said: *"In all the circumstances of the present case, there is, I consider a significant functional difference between the country park and the golf course. Each is a separate unit"*. I considered this case as I explored whether the parts of the listed land at issue in this case could be assessed separately, but find I am unable to separate the listed land, as the whole of the current actual use of the listed land is agricultural, even though owned by two separate landowners. I also considered the case of *C, S & D Trough v Shropshire Council and another [2015] UKFTT CR/2015/0002* on this point.

10.10 For the above reasons, my view is that the listed land does not satisfy the tests under section 88(1)(a). For the same reasons, it would not satisfy the tests under section 88(2)(a). This is because the listed land is used for agricultural purposes, and any other uses beyond the footpaths of the kind described at paragraph 6.1 above are or were sufficiently minimal in the context of this listed land as to be ancillary.

11. Realistic Prospect of Continued Use

11.1 Even if (contrary to my conclusion above), the test under section 88(1)(a) (or 2(a) as the case may be) was satisfied, my view is also that the other limbs concerning continuing or future use would not be satisfied on the facts of this case.

11.2 The owners' intention is to obtain planning permission and to redevelop the listed land:

11.2.1 The owners have indicated that the listed land has been identified in the Local Plan for potential removal from the green belt for a housing led development of circa 600 homes. This has resulted in a number of financial proposals for housing redevelopment. They state that there is an option agreement with Countryside Properties UK Ltd.

11.2.2 I also note that the listed land has been allocated for housing in the Council's Draft Chiltern and South Bucks Local Plan 2036 published in May 2019. The listed land is currently in the Green belt. The Council accepts that in light of the Local Plan, there is a possibility that the listed land may in the future be developed. However, I do not find that a proposal to remove the listed land from the green belt is conclusive of the listed land being developed; the Draft Local Plan is subject to a public examination by an Independent Planning Inspector. The Chiltern and South Bucks Local Plan 2036 was submitted for independent examination on 26 September 2019. Even if the Local Plan is adopted as currently proposed, the listed land must obtain planning permission from the Local Planning Authority and I bear in mind that on two previous occasions, planning permission was denied.

11.3 The owners state that if planning permission is not forthcoming, the listed land will continue to run as a farm. It is stated that this is the only use that will be accepted in planning terms. I see no basis for rejecting that evidence here.

11.3.1 The owners state that the farm is divided into arable and grazing Land. The listed land is stated to have gates preventing members of the public from using it. Geltex ltd also states that there was a recent adverse possession matter that was settled and that when they have been made aware of members of the public trespassing onto the listed land, they have politely informed them to leave. I acknowledge that the owner's stated intention to maintain the fencing should be given some weight and that it does weaken to

some extent the case put forward Brown not Green that it is realistic to think that there can continue to be or could be non-ancillary qualifying use.

- 11.3.2 Although there is evidence of use of parts of the listed land as referred to in Paragraph 6.1, I am satisfied that that the use has been occasional as the listed land is a working farm. Evidence has been provided of the crop rotation submitted to Defra since 2011 and when there is livestock on the other parts of the listed land, there is no access to the public during these periods. I have also considered the use of the land that has been retained in accordance with Defra regulations around the edge of the listed land and I am satisfied that this land is agricultural land that is being farmed as Defra requires that this land is left to create a buffer zone. I am therefore satisfied that the listed land cannot be used for anything else but for agriculture.
- 11.4 I considered the case of Henthames Limited v South Oxfordshire DC CR/2015/0028 and note the Tribunal's comment that *"there is no legal requirement for the nominating body or the respondent to produce a worked out business plan. It is not necessary for KHA to provide "factual evidence to suggest that they would be able to take on this facility" as suggested by the appellant in the letter of 15 March 2016. It is sufficient to be realistic."* I note the contents of the financial information provided to me, which clearly shows that members are willing to loan or donate up to £1.3 m to BNG for purchasing the listed land in addition to BNG being able to access finance. However, if planning permission is obtained, it is likely that the value of the listed land would be considerably higher. I am therefore satisfied that it is not fanciful but possible for BNG to raise sufficient funds required to purchase the listed land if no planning permission is obtained. However, the evidence shows that if no planning permission is obtained, agricultural use would continue. In my view, any suggestion to the contrary as regards continued agricultural use would be fanciful.
- 11.5 In short, my view is that no future qualifying uses are realistic here. If the landowners do not obtain planning permission for the listed land, the listed land would continue to be used for agriculture as this is the only authorised land use. Conversely, if planning permission were to be obtained as intended by the landowners, the listed land would be developed and I note there is already an option agreement in place with Countryside Properties UK Ltd. It does not appear realistic to think that there can continue to be non-ancillary use of the listed land which will further (whether or not in the same way) the social wellbeing or social interests of the local community as required by section 88 of the Act (either under section 88(1)(b) or section 88(2)(b)).
- 11.6 I have noted the fact that the nominators seem not to wish there to be any development on the Green belt. However, I have not given any weight to this as I do not consider it to be a relevant factor under the Act and the Regulations.

12. CONCLUSION

12.1 I am satisfied that, based on the matters referred to above, the current actual use of the listed land is agricultural (associated with a working farm) and that this use is not a qualifying use for section 88 purposes, i.e. it does not further the social wellbeing or social interests of the local community. The uses relied on to meet the test are, in the circumstances of this case, ancillary. The listed land therefore fails to meet the test in sections 88(1)(a) or alternatively 88(2)(a).

12.2 I am also satisfied that the listed land will either be redeveloped or remain in agricultural use in the future. On neither scenario would the section 88(1)(b) or alternatively 2(b) test be satisfied. All other envisaged uses are, on the evidence, unrealistic.

Accordingly, I conclude that the listed land should not have been included in the Council's list of Asset of Community Value and that it should be removed from the Council's list of Asset of Community Value.

13. RIGHT OF APPEAL

If the owner of the land is not satisfied with the outcome of this review they may appeal against the decision to the General Regulatory Chamber of the First Tier Tribunal.

The deadline for appealing is within 28 days from the date on which the decision was sent. Appeals may be on points of law and on findings of fact.

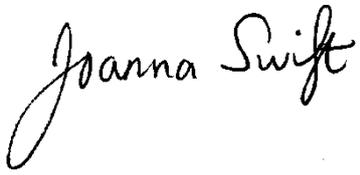
Notice of appeal should be made in writing to:

Tribunal Clerk
Community Right to Bid Appeals
HM Courts & Tribunals
First-tier Tribunal(General Regulatory Chamber)
PO Box 9300
Leicester LE1 8DJ

Or by email to: GRC. CommunityRights@hmcts.gsi.gov.uk

Classification: OFFICIAL-SENSITIVE

Signed: 3 December 2019

A handwritten signature in black ink that reads "Joanna Swift". The signature is written in a cursive style with a large initial 'J' and 'S'.

Joanna Swift
Head of Legal and Democratic Services
Chiltern District Council

Classification: OFFICIAL-SENSITIVE