



**First-tier Tribunal
(General Regulatory Chamber)
Community Right to Bid]**

Appeal Reference: CR/2016/0007

**Heard at York House Leeds Decided without a hearing
On 30 December 2016**

Before

JUDGE JACQUELINE FINDLAY

Between

**THE TRUSTEES OF THE DUKE OF NORTHUMBERLAND'S CHARITY,
THE TRUSTEES OF THE TENTH DUKE OF NORTHUMBERLAND'S WILL
TRUST AND
THE TRUSTEES OF THE TENTH DUKE OF NORTHUMBERLAND'S WILL
TRUST
(EARL PERCY'S APPOINTED FUND)**

Appellant

and

LONDON BOROUGH OF HOUNSLOW

First Respondent

and

THE ISLEWORTH SOCIETY

Second Respondent

DECISION AND REASONS

LEGISLATION

- 1) The Localism Act 2011 requires local authorities to keep a list of assets (meaning buildings or other land) which are of community value. Once an asset is placed on the list it will usually remain there for five years. The effect of listing is that, generally speaking, an owner intending to sell the asset must give notice to the local authority. A community

interest group then has six weeks in which to ask to be treated as a potential bidder. If it does so, the sale cannot take place for six months. The theory is that this period, known as “the moratorium”, will allow the community group to come up with an alternative proposal – although, at the end of the moratorium, it is entirely up to the owner whether a sale goes through, to whom and for how much. There are arrangements for the local authority to pay compensation to an owner who loses money in consequence of the asset being listed.

2) For present purposes, the relevant provisions are:-

Localism Act 2011 (“the LA Act”)

87 List of assets of community value

- (1) A local authority must maintain a list of land in its area that is land of community value.
- (2) The list maintained under subsection (1) by a local authority is to be known as its list of assets of community value.
- (3) Where land is included in a local authority’s list of assets of community value, the entry for that land is to be removed from the list with effect from the end of the period of 5 years beginning with the date of that entry (unless the entry has been removed with effect from some earlier time in accordance with provision in regulations under subsection (5)).

88 Land of community value

- (1) For the purposes of this Chapter but subject to regulations under subsection (3), a building or other land in a local authority’s area is land of community value if in the opinion of the authority—
 - (a) an actual current use of the building or other land that is not an ancillary use furthers the social wellbeing or social interests of the local community, and
 - (b) it is realistic to think that there can continue to be non-ancillary use of the building or other land which will further (whether or not in the same way) the social wellbeing or social interests of the local community.
- (2) For the purposes of this Chapter but subject to regulations under subsection (3), a building or other land in a local authority’s area that is not land of community value as a result of subsection (1) is land of community value if in the opinion of the local authority—
 - (a) there is a time in the recent past when an actual use of the building or other land that was not an ancillary use furthered the social wellbeing or interests of the local community, and
 - (b) it is realistic to think that there is a time in the next five years when there could be non-ancillary use of the building or other land that would further

(whether or not in the same way as before) the social wellbeing or social interests of the local community.

(3) The appropriate authority may by regulations—

(a) provide that a building or other land is not land of community value if the building or other land is specified in the regulations or is of a description specified in the regulations;

(b) provide that a building or other land in a local authority's area is not land of community value if the local authority or some other person specified in the regulations considers that the building or other land is of a description specified in the regulations.

(4) A description specified under subsection (3) may be framed by reference to such matters as the appropriate authority considers appropriate.

(5) In relation to any land, those matters include (in particular)—

(a) the owner of any estate or interest in any of the land or in other land;

(b) any occupier of any of the land or of other land;

(c) the nature of any estate or interest in any of the land or in other land;

(d) any use to which any of the land or other land has been, is being or could be put;

(e) statutory provisions, or things done under statutory provisions, that have effect (or do not have effect) in relation to—

(i) and of the land or other land, or

(ii) any of the matters within paragraphs (a) to (d);

(f) any price, or value for any purpose, of any of the land or other land.

(6) In this section—

“legislation” means—

(a) an Act, or

(b) a Measure or Act of the National Assembly for Wales;

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

(a) cultural interests;

(b) recreational interests;

(c) sporting interests;

“statutory provision” means a provision of—

(a) legislation, or

(b) an instrument made under legislation.

BACKGROUND

- 3) On 3 November 2015 the first respondent received a nomination form from the second respondent in relation to Park Road Allotment Gardens (“the Land”). On 22 December 2015 Brendan Walsh, Executive Director of Regeneration, Economic Development and Environment conducted an assessment of the nomination and determined that the Land should be listed as an asset of community value (“ACV”).
- 4) By a letter dated 11 February 2016 the appellant requested a review of the decision. A review was conducted by Barbara Richardson, a Managing Director of Property Development for Lampton 360 Limited, a wholly owned trading company of London Borough of Hounslow. The outcome of the review was issued to the appellant in a letter dated 18 March 2016.
- 5) The appellant submitted a planning application on 16 February 2016 for the development of the Land comprising “the erection of eight blocks of three and four storey buildings to create 119 flats and 8 houses with car parking at basement and street level and associated works.” No decision has yet been made on the application.
- 6) The Land is broadly triangular and is surrounded on each side by either a brick wall or a 5/6 foot chain link fence. The access to the Land is from Park Road through gates which provide vehicular and pedestrian access.
- 7) The appellant gave notice of repossession of the Land by posting notices on the Land.
- 8) The gates to the Land are padlocked and allotment holders have individual keys for access. The keys were changed by the appellant in October 2015 and new keys issued only to those allotment holders who had signed a new agreement with the appellant for their continued use of the allotments. Access to the Land is restricted to those who have a key or to those who are authorised or who accompany those who have a key. Tenants are required to keep the gates locked. Tenants are required to comply with the allotment rules.
- 9) Agreements have been entered into with 46 people in respect of 38 plots comprising 19 full plots, 10 half plots and 9 quarter plots. There are 11 vacant plots of varying size which represents 22% of the available plots.
- 10) The Land was leased to the first respondent by a lease dated 28 September 1917. The Land has been used for allotments since 1917. The lease was terminated in September 2015.

THE ISSUES

11) The appellant and the respondents are content for the appeal to be decided without a hearing. In all the circumstances, I am satisfied that I can justly do so. In reaching a decision in this appeal, I have had regard to all the written evidence and submissions, comprised in the appeal bundles numbered 1 to 208. The fact that I do not make specific reference to any particular document or submission does not indicate that I have not taken account of the same.

12) The appellant relies the following grounds:

- a. The first respondent has failed to conduct a genuine review in that it did not provide clear reasons for the decision or deal in detail with the extensive grounds of review and no “assessment of nomination” form was provided.
- b. The review was not conducted by an “officer of appropriate seniority” as required. The first respondent’s procedural guidance states that a review will be considered by the Director of Corporate Resources who is Mr Anthony Kemp.
- c. The Land fails to meet the statutory test as set out in section 88(1)(a) of the Localism Act 2011. The Land is not available for community use and, in particular, “there are no parts of the allotment which are open and available for general community use. The land is enclosed by a perimeter fence/hedge and access is taken to the Land through gates which are locked. Only allotment holders have been provided with a key to access the Land and, therefore, the land is not available for wider community use.” As there is no requirement for the allotment holder to be from the local community there is no link between the Land and Isleworth or any other defined community.
- d. Insufficient evidence has been provided to show that the Land should be an ACV. The information provided about relates to the general benefits of allotments but there is little information which is specific to the Land.
- e. It was wrong to attach weight to the signed petition as it is likely that the motivation for the support shown by the petition was as a consequence of a wish to thwart the development proposals. There is no evidence of the methodology used when arranging the petition and whether there was any mention on the proposed residential development of the Land. It is unclear whether any of the signatories to the petition have used the allotments on the Land. The second respondent referred to the development plans in a letter dated 11 October 2015 (page 160).
- f. Although the planning application has not been determined the appellant has invested significant time and resources in the development proposals for the Land and is committed to completing the development. The appellant formed the development proposals for the Land in May 2014, had met with the allotment holders and arranged for notices to be posted about the development intentions in September 2015 and no inferences should be drawn from the fact the planning application was submitted after the ACV decision was made.
- g. An inference should be drawn from the fact that the application for the Land to be listed as an ACV at a time when the second respondent was aware of the appellant’s development intentions for the Land.

- h. The appellant has the right to terminate the allotments holders' licences to use the Land on giving 3 months' notice. The appellant has informally agreed with the allotment holders that they can continue to use the Land up until the grant of planning permission to enable a smooth transition to the new allotment site which is to be provided within the grounds of the Syon Park Estate.
- i. There is legal precedent to determine that the Land should be removed from the list of ACV and reference is made to the decision in Haddon Property Developments Limited v Cheshire East Council (Reference CR/2015/0017).
- j. It is irrelevant that the Land has been used for allotments since 1914 and it is the current use of the Land that is relevant.
- k. There is no definition of "local community" in the 2011 Act but when determining the appeal a reasonable interpretation should be applied and, in particular, "local suggests a much smaller area than ... is comprised within the Borough of Hounslow" and that the definition attributed to "local community" for the purposes of the 2011 Act should be people from within the Borough. As there is no defined community to link the individual allotment holders the test set out in s.88(1) cannot be met.
- l. There are no allotment plots that are available for general community use. Each allotment holder has entered an agreement with the appellant to permit them to use the Land.
- m. There has been no use by the All Saints' Church pre-school for "a significant period of time." Any part of the Land that may have been used by the All Saints' Church pre-school was overgrown and derelict in September 2015. Any previous use by the pre-school group should be ignored as the Act requires consideration of the actual current use.
- n. The appellant intends to terminate the current allotment holders' use of the Land and will not enter into any further agreements in respect of the use of the Land. This is the situation whether or not planning permission is granted.
- o. The Local Plan is irrelevant to the appeal.
- p. Inadequate details have been provided as to how the Land furthers the social wellbeing or social interests of the local community.
- q. There is no evidence of benefits to the wider community although it is acknowledged that the limited class of individual allotment holders will benefit from the usual advantages of gardening.
- r. If the local community did feel strongly about the listing of the Land as an ACV there would have been evidence demonstrating this and it is significant that there is none.
- s. The planning application comprises the residential development of the Land, however, the application also includes the relocation of the allotments to an alternative nearby site at Lion Gate within Syon Park.

- t. The allotment holders have been informed that their use of the land will terminate in due course and that the appellant intends to progress with the development. Accordingly, it cannot be said that it is realistic to think that the use of the Land for allotments or any community use can continue.

13) The first and second respondents rely on the following grounds:

- a. The Land together with the All Saints' Churchyard and the Park Road Cemetery "provides an historic open space with a woodland of mature trees, shrubs, hedges, allotment spaces and due to the limited footfall, a much valued wildlife haven."
- b. The Council's Local Plan states "We will encourage continued use of allotments" ...And Achieve This by "retaining existing allotments and resisting their loss unless in accordance with the Borough's Allotment Strategy."
- c. "The Allotments Strategy acknowledges a high percentage of usage of plots available at Park Road and the fact Section 23 of the Allotments Act 1908 makes it a duty of the Local Authority to provide allotments where there is sufficient demand for them by residents living in the area. These statements reinforce the merit of according Asset of Community Value to this site."
- d. Weight should be attached to the evidence of the strong local support evidenced by the large number of people who signed the petition.
- e. The Land has since 1914 contributed to social wellbeing with benefits not just confined to individual plot holders and which include: a major role in biodiversity; the potential to promote and facilitate composting; provide for a healthy lifestyle; provide a haven for wildlife and provide open space and gardening with the increasing propensity for apartments with no gardens.
- f. Although the Land is part of the Syon House Estate it has no direct connection to an existing residence as evidenced by the fact that from 1914 until very recently it was leased as allotments.
- g. The current use of the Land is not an ancillary use, and that this use furthers the social wellbeing and social interests of the local community and that the land is of community value.

FINDINGS OF FACT

14) The parties have consented to this appeal being determined without a hearing and I am satisfied there is no injustice in so doing and that it is fair and just to do so.

15) The review was undertaken by an appropriate person who took no part in the original decision. Ms Richardson was nominated to undertake the review and I find no error in her lack of seniority which could lead to the decision and review being invalid. Any concerns about the way in which the first respondent ran the process under the 2011 Act do not give rise to matters which fall within the scope of this appeal.

- 16) The nomination was valid in that the activities of The Isleworth Society are wholly or partly concerned with the local authority area in which the Land is situated.
- 17) I find that the aim of The Isleworth Society is to promote interest in the local area, preserve and enhance the unique character as well as initiate and support community activities, events and projects.
- 18) The nomination contained all the information as required.
- 19) It is not in issue and I find that the Land is within the administrative area of the London Borough of Hounslow.
- 20) Tenants of the Allotments are bound by the allotments rules in relation to their tenancy agreement. The allotment rules dated 1 October 2010 and appendices appear at page 143 to 150 of the bundles. Tenants are allowed to bring dogs onto the allotment site if on a lead and under proper control. No livestock can be kept on the site with the exception of hens and rabbits and then only with the permission of the First Respondent or its managing agent.
- 21) Access to the Land is not limited to allotment holders. Subject to allotment rules allotment holders are entitled to bring friends, family, children and dogs onto the site. Allotment holders are entitled to engage in social activities with their friends, family and children on the Land.
- 22) Visitors are allowed onto the site and are the responsibility of allotment holders who have the responsibility of explaining the allotment rules and explain that other plots were off-limits. Allotment holders, people authorised by allotment holders and people accompanied by allotment holders are allowed on to the site. They are all able to enjoy the Land subject to the allotment rules.
- 23) Allotments can be shared with the permission of the first respondent.
- 24) Social gatherings on the site are not prohibited and it is expected that allotments holders will be “good neighbours” (page 147). Allotment holders are asked to be aware that things such as social gatherings may impact negatively on neighbours’ enjoyment of their plot.
- 25) Children are allowed on the site if accompanied by an adult although not allowed to go onto adjacent plots.
- 26) In relation to section 88(2)(a) and the past use of the Land, I find that the actual current use of the Land is not an ancillary use and furthers the social wellbeing or social interests of the local community. People are able to go onto the Land and enjoy it. They are able to meet, enjoy the outdoors and grow produce for their own use and the use of others. The Land provides the facility for people to meet not just to garden. The Land provides the facility for those authorised to be out of doors and enjoy nature.
- 27) In the past there were no restrictions and anyone could apply to be an allotment holder. If they agreed to the terms of the tenancy agreement and the allotment rules they could be an allotment holder. Allotment holders now have temporary licences which can be terminated

at will. The Land is not available to the general public or the community at large. The use of the Land is restricted and there are rules governing its use. However, there is nothing in the 2011 Act which suggests that a facility has to be equally valuable or equally accessible to all sectors of the local community. It is wrong to assume that the Land is used only by allotment holders. The allotment rules allow others to use the Land and no doubt the land is used by allotment holders and their families and friends in accordance with the allotment rules.

- 28) The Land provides habitat for birds and insects which will by way of nature benefit the wider community.
- 29) It is clear that the Land is valued highly by the community despite that fact that not all the allotments have been taken. It is more likely than not that the 429 people of the community who signed the petition understood what they were signing. They have come forward to be counted and have provided their names and addresses. It is likely they understood what they were signing. The Petition is headed "PETITION TO SUPPORT RETENTION OF PARK ROAD ISLEWORTH ALLOTMENT SITE." It is more likely than not that the signatories wished to offer their support of the retention of the Land as an allotment site.
- 30) A community garden was established in 2011 with funding from the BAA community grant scheme. Two plots are now worked by 7 people or couples who have their own small areas plus a shared area of fruit trees and a composting area.
- 31) 78% of the Land is occupied, used and enjoyed by allotment holders who wish to continue to enjoy the Land.
- 32) The alternative site within the grounds of Syon offered by the appellants is inferior in that it is not easily accessible, has facilities more limited than those available on the Land and would not be able to offer the same conditions as the Land for the purposes of allotment gardening.

CONCLUSION

- 33) The question of principal versus ancillary use is not a live one in the present appeal. It is common ground between the parties that the Land is used to provide allotments.
- 34) The phrases "social wellbeing", "social interests" and "local community" are not defined in the Act. I take the approach that they must be given their natural meaning in the English language.
- 35) The issues to be decided concern the interpretation and application of s88 (1) of the LA Act. It is essential to the Respondents' case that the Land in question must be of "community value" as defined in the subsection. This resolves into two questions in the present case. (1) Does the actual current use of the land further the social wellbeing or social interests of the local community? (2) Is it realistic to think that there can continue to be a use of the Land which will further the social wellbeing or social interests of the local community?
- 36) In relation to question (1) I find a continuing use by local people making use of the Land not just as a place to garden and grow vegetables and fruit but to take others namely their

friends and families to enjoy the outdoors and to meet with others. The allotment rules specifically make provision for this. These uses furthered social wellbeing in an urban area. Although the number of allotments holders has reduced under the new regime there is still continuing use of the Land. It is, in my view, irrelevant that allotment holders do not have to come from a defined local area or that the land does not serve a particular community. It would be wrong to interpret the word “local” to mean that there must be a link between the Land and Isleworth or another “defined community.” It is likely that allotment holders and their friends and family come from the local community. In addition the wider community will benefit from the wildlife that will thrive in this green area and natural habitat. The birds and insects that will live and thrive on the Land will be enjoyed and benefit the wider local community beyond the gates and the fence.

37) I reject the argument that because the Land is not available to all the community or to only a limited section of the community it cannot have any community value.

38) I have no doubt that the use of the Land as allotments does in fact further the social wellbeing and social interests the allotment holders. I am further satisfied, however, that these ends are furthered for a much wider community, and that it would not be excessive to find, as I do, that the current use of the Land furthers the relevant ends for the community consisting of all the inhabitants of Hounslow. It has long been recognized that the use of land for allotments has served the community generally and not merely those who rent allotment space. The social utility of allotment land was recognized by Parliament as long ago as the Allotments Act 1925, and generally community benefits were clearly discussed in the Thorpe Report of 1971, of which I take judicial notice although it has not been adduced to me by either party. It is a document of such authority and cogency that I have no hesitation of taking notice of it. I should say, however, that the contents of that report are not determinative of my decision, which is based on the facts of the case, but I am fortified by it in reaching the decision I do. I am satisfied that allotment land not only provides recreation and food for its direct users but also provides community benefits as green space with concomitant benefits to air quality and visual amenity. This is particularly so in a heavily built up area like Hounslow. Further, and importantly, it is widely recognized, and I find, that allotment land contributes very considerably to biodiversity in respect of both flora and fauna. Birds and insects thrive on such land and it is recognized habitat for, in particular, rare plant species. I do not need to dwell on the benefit to the local community in general of such biodiversity.

39) I am satisfied that both in this respect and in respect of visual amenity and air quality the current use of the land furthers the social wellbeing and social interests of the local community extending to the whole community of Hounslow.

40) In relation to the future and whether the requirements of section 88(2) (b) are met; namely, whether it is realistic to think that there can continue to be non-ancillary use of the Land which will further the social wellbeing or social interests of the local community? I find that it is realistic to think that there can be non-ancillary use of the Land which will further (whether or not in the same way) the social wellbeing of social interest local community, I bear in mind that whether something is realistic does not mean that it must be more likely than not to happen. A use may be “realistic”, even though it is one of a number of possibilities or, as in the present case, one of two possibilities. Neither of the possibilities needs to be the most likely outcome.

- 41) I am satisfied that the support evidenced by the Petition indicates a level of community intent, which makes it more than fanciful that the Land could continue to further the social wellbeing or social interests of the local community. The local community has indicated that it values the Land and what it offers to the community. There is no reason to expect that the demand for allotments will decrease and on the basis of the expressed support it is likely to increase.
- 42) For the purposes of determining this appeal, it is unnecessary for me to prefer one possibility over another. I am not required to speculate or offer an opinion as to whether planning consent will or will not be granted. On the basis of the evidence before me I find that both outcomes are possible. In relation to question 2, and the application of paragraph (b) of the subsection, what is realistic may admit more than one answer. Accordingly, if permission is not granted it is realistic that the Land will continue its present use as allotments on terms to be agreed.
- 43) I have had regard to the stated intentions of the appellants that they have the right to end the temporary licences at will and intend to do so. However, they have not yet done so. Mr Roderick Charles St. John Wilson on behalf of the appellant states “in the event that the Council refuse the Planning Application, the Estate would appeal the decision and continue to pursue its development proposals until planning permission has been granted.” A stated intention cannot be determinative of the question to be answered in s 88(1) (b).
- 44) The second respondent has put forward no plans for my consideration for the future of the Land in the event of planning permission being granted or not being granted. This is not significant and does not prevent me determining the appeal on the basis of the evidence available.
- 45) The appellant has invited me to consider that there is an alternative site which can be used by the allotment holders. It has not been submitted but the suggestion is that an alternative site might deter the second respondent or another community group from taking an interest in the Land. On the basis of the evidence I am not satisfied that the available alternative site for allotments is so superior that it would deter present or prospective allotment holders from wishing to retain the Land and continue its present use. This is particularly so taking into account the strength of support evidenced by the large number who signed the petition to retain the present use of the Land.
- 46) I find that the provisions of s 88(1)(b) of the LA Act are satisfied and 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.
- 47) I conclude that the requirements for listing as an asset of community value are satisfied.

DECISION

- 48) The appeal is dismissed.

Signed Judge Jacqueline Findlay

Judge of the First-tier Tribunal

Date: 30 December 2016