



**First-tier Tribunal
(General Regulatory Chamber)**

Appeal Reference: CR/2017/0003

**Heard at
Warrington Magistrates' Court
On 26 July 2017**

Before

JUDGE JACQUELINE FINDLAY

Between

**NEWRIVER TRUSTEE 7 LIMITED
NEWRIVER TRUSTEE 8 LIMITED**

Appellants

and

WARRINGTON BOROUGH COUNCIL

Respondent

Representation:

For the Appellants: Ms V Hutton, Counsel, instructed by DWF

For the Respondent: Mr A Gill, Counsel, instructed by Warrington Borough Council

Witnesses:

For the Appellants: Captain Dodd

For the Respondent: Mr S M Smith

DECISION AND REASONS

LEGISLATION

- 1) The Localism Act 2011 (“the LA Act”) 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.

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.

89 Procedure for including land in list

(1) Land in a local authority's area which is of community value may be included by a local authority in its list of assets of community value only—

- (a) in response to a community nomination, or
- (b) where permitted by regulations made by the appropriate authority.

(2) For the purposes of this Chapter “community nomination”, in relation to a local authority, means a nomination which—

- (a) nominates land in the local authority's area for inclusion in the local authority's list of assets of community value, and
- (b) is made—
 - (i) by a parish council in respect of land in England in the parish council's area,
 - (ii) by a community council in respect of land in Wales in the community council's area, or
 - (iii) by a person that is a voluntary or community body with a local connection.

(3) Regulations under subsection (1)(b) may (in particular) permit land to be included in a local authority's list of assets of community value in response to a nomination other than a community nomination.

(4) The appropriate authority may by regulations make provision as to—

- (a) the meaning in subsection (2)(b)(iii) of “voluntary or community body”;
- (b) the conditions that have to be met for a person to have a local connection for the purposes of subsection (2)(b)(iii);
- (c) the contents of community nominations;

(d)the contents of any other nominations which, as a result of regulations under subsection (1)(b), may give rise to land being included in a local authority's list of assets of community value.

(5)The appropriate authority may by regulations make provision for, or in connection with, the procedure to be followed where a local authority is considering whether land should be included in its list of assets of community value.

BACKGROUND

- 2) This appeal concerns The Sportsman's Arms, 179 Warrington Road, Warrington, WA5 2EN ("The Sportsman's Arms"). The Sportsman's Arms has been a public house since 1850 and continues to operate as a public house. The Sportsman's Arms is a two storey public house. There is a car park and a beer garden and a piece of land variously referred to as the "Orchard", "Wild Land" and "Blue Land". For the purpose of this appeal the land is referred to as the Blue Land.
- 3) The Sportsman's Arms was nominated as an asset of community value ("ACV") by CAMRA North Cheshire Branch in a nomination form received by the Respondent on 25 May 2016. The Respondent listed The Sportsman's Arms as an ACV and entered it onto its List of Community Assets on 20 July 2016. The Appellants are the freehold owners of The Sportsman's Arms. The Appellant applied for a listing review in relation to the Blue Land only. The Respondent upheld the listing of the Nominated Land in its entirety by way of the review decision dated 12 December 2016.

THE ISSUES

- 4) The Appellants do not object to the listing of The Sportsman's Arms, the car park and the beer garden as an ACV. The Appellants submit that the Blue Land does not satisfy the criteria for listing under sections 88(1) and 88(2) and should be removed from the Nominated Land.
- 5) The Respondent submits that the decision to list the Nominated Land including the Blue Land should be upheld as the decision was correctly made.
- 6) It is not in issue between the parties and I am satisfied that the First-tier Tribunal does have the power to decide that part of a listed ACV can be removed if grounds are made out.

THE APPELLANT'S CONTENTIONS

- 7) The Appellant contends the following:
 - a. The tribunal have the power to amend the listing to remove parts that do not satisfy s88.
 - b. The Blue Land is fenced off from the beer garden and the remaining land, namely: The Sportsman's Arms, the car park and the beer garden and should be treated as a separate unit of land in its own right for the purpose of considering whether s88 criteria are met.

- c. The public have no access to the Blue Land through the gate from the beer garden or any other part of remaining land.
- d. Enjoying a view of the Blue Land across a fence is not sufficient to satisfy the “actual” use test.
- e. There never has been and is no current use of the Blue Land to satisfy s.88 listing requirements.
- f. There is no evidence before the Tribunal to suggest that the Blue Land at any time in the recent past has been used by the public in the sense of walking on the Blue Land or for purposes connected with the public house or for other purposes.
- g. Captain Dodd the joint licence holder of The Sportsman’s Arms has been drinking in the pub for 34 years and knows it well. The rear of the pub was wasteland up until 2013 when it was cleared and the beer garden was created. To his knowledge over the last 34 years including the 8 during which he has been the licence holder he has never known any member of the public access the Blue Land for any purpose.
- h. The grass and undergrowth on the Blue Land from the picket fence to the boundary wall is strimmed every two months. Captain Dodd employs 2 brothers who regularly attend The Sportsman’s Arms to undertake this work. The work takes approximately 2 days and he pays between £250 and £300 a time. Captain Dodd maintains that the grass is kept down in order to prevent the creation of a habitat for vermin and, in particular, rats and the maintenance is for that reason only and not for the visual amenity.
- i. The Blue Land represents more that 50% of the size of the overall site as shown on page 67.
- j. The Appellant’s position is supported by the case law. In particular Judge Lane in *Newriver Trustee 7 Ltd and Newriver Trustee 8 Ltd v Wyre Forrest District Council and the Friends and Residents of Blakedown* (pages 174 to 180) stated that the fact the woodland was included in the same Land Registry Title was not determinative (paragraph 11). Judge Lane in *Banner Homes Limited v Saint Albans City and District Council and Verulam Residents’ Association* (pages 163 to 173) considered it significant in that there was no “physical” use of the disputed land.
- k. The Blue Land is contiguous to the beer garden and is segregated by a boundary fence of the sort which is regularly used to demark a boundary. The beer garden is as described in the Delegated Officer’s report (page 83), namely; “The land is currently unused, overgrown and of no visual quality.”
- l. The beer garden covers approximately 413 square meters of the 5120 square meters which represents about 8% of the whole area behind The Sportsman’s Arms (page 86).
- m. The planning permission contained conditions in relation to the use of the beer garden and the size of the beer garden (pages 71 to 75).

- n. Although the fence between the beer garden and the Blue Land is a picket fence it is an efficient boundary marker and the nature of the fence is no different than the demarcation bollards as shown in page 50 between The Sportsman's Arms car park and the public highway.
 - o. It is not unusual for a demarcation fence to have a gate. Captain Dodd and his maintenance workers would not be able to access the land without a gate. On the request of legal advisers a sign and lock has now been put on the gate.
 - p. There is no public access to the Blue Land. Captain Dodd has no knowledge of any access and the Tribunal is invited to accept his evidence that he is likely to know this. If people were entering the Blue Land area Captain Dodd would be aware of it and it would be a matter of concern. The Blue Land is not used in relation to the pub, is not used for storage and there is no signage or advertisement directing people to the Blue Land.
 - q. It is irrelevant that it may be more pleasant sitting in the beer garden with adjacent green area in the same way a country pub is more pleasant when surrounded by fields but this is not a ground for including the Blue Land in the listing in the same way that it would not be a good ground for including the fields in a ACV for a country pub surrounded by fields. The beer garden was carved out of the Blue Land and there is no sufficient physical and functional relationship between the Blue Land and beer garden and rest of The Sportsman's Arms.
 - r. In relation to noise the evidence about complaints does not support the suggestion that users of The Sportsman's Arms ever used the Blue Land. The effect of the trees in attenuating (reducing) noise is tentative and irrelevant to the questions for determination.
 - s. The Tribunal should amend the listing of The Sportsman's Arms to remove the Blue Land from the nominated land and leave just the remaining land listed as an ACV. The Blue Land is not currently and has not been used in the recent past in such a way that furthers the social wellbeing or social interest of the local community and the criteria of s.88 are not met in relation to the Blue Land.
- 8) The Respondent contends as follows:
- a. The Blue Land is not a separate unit of land for the purposes of s.88 of the LA Act.
 - b. The public have had easy access between the beer garden and the Blue Land and as such the enjoyment of the Blue Land was not merely by way of view.
 - c. It is not necessary that the community use extends to every part of the Nominated Land and it is not appropriate to "salami slice" the land by delisting or amending the list to remove the Blue Land regardless of whether the community use extends to them.
 - d. It is neither fanciful nor unrealistic to think that there can be future relevant non-ancillary use of the Nominated Land which will further the social wellbeing or social interests and s.88(1)(b) is satisfied.

- e. The fact that the beer garden (prior to 2013) and Blue Land has not previously been in use with the pub does not prevent the Blue Land from having become sufficiently related to the pub since 2013 to be listed.
- f. Captain Dodd's knowledge of the use of the Blue Land should be taken in the context that his presence has not been continuous and has been punctuated by periods of time away.
- g. The Blue Land is not overgrown or of no visual quality.
- h. The Blue Land has been maintained in the past and kept in an attractive state and 'dressed' with an attractive picket fence.
- i. Even if not accessible the beautifying of the Blue Land shows it to be functionally related to the public house and its community use.
- j. The Blue Land is physically related to the rest of the Nominated Land and the picket fence does not act as a physical barrier and has an ornamental character and landscaped path.
- k. The Blue Land is a component of the public house's offer (semi-urban pub with beer garden with pleasing orchard aspect) and functions to assist in providing a pleasant and attractive venue at which to sell alcohol. It has been actively improved and managed since the establishment of the beer garden in 2013 to entice custom and improve the pub's offer.

FINDINGS OF FACT AND REASONS

- 9) It is not in issue between the parties, and I find, that the First-tier Tribunal has the power to list part of the Nominated Land. Such a power is not expressly excluded by the LA Act or the Regulations but the power is implied as does not go against the legislation and is fair and just taking into account that the Tribunal can make a decision which the Respondent could have given. There is nothing in the legislation to prevent the Respondent from listing only part of a nominated asset. I consider this to be the sensible approach.
- 10) I have approached the task of determining this appeal by looking at the physical and functional relationship between the pub, the beer garden and the Blue Land. I find that the Blue Land has a sufficient physical and functional relationship with the beer garden and the public house to be considered as part of the Nominated Land. I find that the physical and functional relationship has always existed before and since 2013.
- 11) I find that the beer garden was and still is part of the Blue Land. The picket fence does not make it a separate piece of land. The picket fence is a demarcation line not a dividing or boundary line.
- 12) Since 2013 the Blue Land has been strimmed and maintained for periods of time and at others left to grow. The beer garden contains a yellow resin gravel path with a central spur which leads to the Blue Land. This enhances the beer garden even if users are not specifically invited to enter the Blue Land. I find that it is likely that users of the beer garden have at times opened the gate and gone into the Blue Land. I do not accept that the

area is covered in broken glass. It is highly unlikely that it would have been possible to trim the grass safely if this were the case.

- 13) I find it likely that people will have gone onto the Blue Land both before and since 2013 when the beer garden was created. Until recently the connecting gate could be easily opened. The gravel path leads from the beer garden into the Blue Garden. The design and geography invites people to go through the picket gate. The gravel leads up to the Blue Land gate. The positioning of the gravel path and gate invites anyone in the beer garden who wishes to do so to go through the picket fence and into the Blue Land. Though not explicitly invited onto the Blue Land until very recently there was nothing, save natural reticence, to stop patrons opening the gate and going onto the Blue Land. There was no lock and no sign to indicate access was prohibited or even discouraged. It is not possible to estimate how many patrons will have gone onto the Blue Land since the beer garden was created but I find that patrons would have inevitably used the area because it was there, because it was easily accessible, because it was not forbidden and because to do so would have been pleasant.
- 14) Due to the position of the Blue Land it would be impossible for Captain Dodd to have known at all times during opening hours whether patrons of the beer garden went onto the Blue Land. I consider it likely that until the gate was locked patrons did enter the Blue Land because the gate was easily opened and there were no signs forbidding entry. If the Blue Land was covered in broken glass as suggested by Captain Dodd he would have kept the gate locked and made sure it was clear to his patrons that access to the Blue Land was not allowed. Captain Dodd due to army commitments was away from the pub for periods of time.
- 15) The Blue Land is more than just a view for the users of the beer garden. The Blue Land comprises an open area bordered on three sides by predominantly mature deciduous tree stock the majority of which are both substantial and subject to an active tree preservation order. All the trees save the pear tree are in good health. The trees are likely to provide a natural habitat for a large number of birds of different species and diverse wildlife. With the presence of the bird table in the beer garden it is likely these birds will come into the beer garden and their presence will add to the enjoyable experience for those in the beer garden. The beer garden is substantially enhanced as an outdoor area from the close proximity to this active and thriving wildlife area.
- 16) Without the Blue Land the beer garden due to its moderate size would be little more than a yard particularly if surrounded by a high fence. It would not be the attractive or popular place it is for people to relax in to eat, drink or smoke. Even without accessing the Blue Land the physical proximity of a wide open natural environment would be part of the physical enjoyment of being in the beer garden and not just because there is a view of trees and grass. The whole enjoyment of being in the beer garden is because of the adjacent unspoilt space.
- 17) If the original intention had been to exclude all users a maintenance gate would have been located in a less prominent place, locked and appropriately marked. I consider the positioning of the gate very significant and it was specifically designed to invite users to go through the gate and into the Blue Land.

- 18) I find that it would be false and contrived to separate the Blue Land from the whole area at the back of the public house.
- 19) The physical closeness of the beer garden to the Blue Land enhances the experience of using the beer garden to the extent that the two areas must be considered as one complete area of land. The low picket fence means that a person standing or sitting in the beer garden gets the additional advantage of the feeling of space and the sensation of being in the open air.
- 20) Although at the date of the site visit the Blue Land was somewhat neglected in that the grass had not been cut for some time this has not always been the case and even in its overgrown state it has a function of enhancing the experience of being in the beer garden.
- 21) When the beer garden was originally carved out of the Blue Land part of the Blue Land was levelled with a view to improving the outdoor facilities and to attract more customers for commercial reasons. The function of the Blue Land in this respect has not changed. The beer garden remains part of the Blue Land and relies on the Blue Land for its sense and feeling of openness and space. The beer garden is an integral part of the whole. Had the intention not been to include the Blue Land as part of a feature and added attraction to the beer garden a higher fence would have been built and no obvious access would have been provided.
- 22) I find that the trees on the Blue Land are unlikely to act as any physical barrier to noise emanating from the beer garden. However, it is likely that the Blue Land does act as a “virtual barrier” as described by Mr Smith. The nuisance factor of any noise from the beer garden will be reduced by the physical distance between the source and the recipient. I make this point for completeness only. I consider that no substantial weight can be attached to this additional use of the Blue Land by the pub and beer garden in finding there is a physical and functional connection.
- 23) The Land Registry Title and the insurance provision for the Sportsman’s Arms, the beer garden and the Blue Land are not determinative or relevant.
- 24) The present case can be distinguished from the decision in *New River Trustee 7 Ltd v Wyre Forest District Council [2016] UKFTT CR/2015/0013 (GRC)* where the Tribunal held that “The fact that members of the local community, sitting in the garden of the pub, might enjoy looking at the woodland is ... insufficient.” Patrons sitting in the beer garden at The Sportsman’s Arms are not just “enjoying looking at the Blue Land” because the Blue Land is in effect an extension of the beer garden. The enjoyment and amenity of the beer garden would be minimal without the adjacent Blue Land. The present case can be distinguished because the patrons of the beer garden make use of the Blue Land as an additional feature to the beer garden. The Blue Land is much more than just a view.
- 25) I have considered *Gullivers Bowls Club Ltd v Rother District Council [2014] UKFTT CR/2013/0009 (GRC)* in which the Tribunal refused to consider the idea that the fact land offers a pleasant or interesting view cannot by itself qualify it as an ACV. In that case it was argued that the bowling greens were a visual amenity for the local community which furthered the social wellbeing of the community. The Tribunal rejected this submission and stated “It may be wrong to say that something which is merely looked at can never satisfy the test for listing. It is conceivable, for example, that a mural or statue might do so.

In the circumstances of this case, however, I am doubtful whether as a matter of fact I would describe the care home residents overlooking the bowling greens as being a ‘use’ of them; and if it were, it would surely be ancillary.” For the reasons as stated I find that the Blue Land is significantly more than just a view. The advantages to be gained from close proximity to a large space with statuesque trees and active wildlife are considerably greater than the advantages to be gained from viewing a “mural or statue.”

26) In *Haddon Property Development Ltd v Cheshire East Council* [2016] UKFTT CR/2015/0017 (GRC) the Tribunal stated that for the purposes of the LA Act the “land is not used by the local community, merely as a result of people looking at that land from a right of way.” The present case is distinguishable for the reasons stated above.

27) In *Banner Homes Ltd v St Albans City and District Council* [2015] UKFTT CR/2014/0018 (GRC) the Tribunal held that looking at a view did not satisfy the requirements of section 88 of the LA Act. The Tribunal gave the opinion that the use of the word ‘actual’ in section 88 suggested that the physical use of the land was required and it was not enough to have a view of it. In my view for the reasons as stated the patrons of the beer garden do actually use the land when using the beer garden.

28) In *Astim Ltd v Bury Council* [2016] UKFTT CR/2015/0022 (GRC) it was argued by the Council that the use of the bowling green furthered the social wellbeing or social interests of the local community because it formed an integral part of the town’s civic area with historic and architectural interest and as such furthered the cultural interests of the community. The Tribunal in rejecting this argument stated that “to extend the term “cultural interests” as used in section 88(1) to embrace the enjoyment of the historic environment from public vantage points extends the term beyond the intention of the legislation. The present case is distinguishable for the reasons stated above.

29) *Kicking Horse Ltd v London Borough of Camden* [2016] UKFTT CR/2015/0012 (GRC) was concerned with the listing of various constituent parts of a building. The present case can be distinguished for the reasons set out above although I have considered it appropriate to carry out a fact specific investigation as suggested.

30) I find that The Sportsman’s Arms is operating as a public house and although the use has declined in recent years it satisfies the criteria of s.88(1) and although profits have declined it is likely that it can and will continue operating as a public house.

THE DECISION

31) The appeal is dismissed. I find that there is an actual current use of the Nominated Land as a whole including the Blue Land that is not an ancillary use that furthers the social wellbeing or social interest of the local community and it is realistic to think that there can continue to be non-ancillary use of the Nominated Land including the Blue Land which will further the social wellbeing or social interests of the local community. The listing criteria of s.88(1) of the LA Act are satisfied.

Signed J R Findlay
Judge of the First-tier Tribunal
Date: 18 September 2017