



Appeal number: CR/2020/0002/V

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
COMMUNITY RIGHT TO BID**

HOPKINS HOMES LIMITED

Appellant

- and -

EAST SUFFOLK COUNCIL

Respondent

-and-

**MELTON PARK RESIDENTS COMMUNITY
SCHEME ASSOCIATION**

**Second
Respondent**

TRIBUNAL: JUDGE MOIRA MACMILLAN

**Determined following a remote hearing on 14 September 2020 and thereafter on
the papers, the Judge sitting in Chambers on 1 July 2021**

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DECISION

1. The appeal is dismissed.

REASONS

Background

2. The Localism Act 2011 requires local authorities to keep a list of ‘assets’ (buildings or 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.
3. The Appellant is the freehold owner of land to the North East of Garrod Approach, Melton Park, Woodbridge, Suffolk, IP2 1TD (‘the Land’), which is the site of a former bowls club and bowling green.
4. From 1917 – 1993 the Land was part of the grounds of St Audry’s psychiatric hospital (‘the Hospital’). The Hospital provided a range of sporting facilities, including a bowls club, football pitches and tennis courts, all of which were administered by the St Audry’s Sports and Social Club ‘the Sports and Social Club’). In 1993 the Hospital closed.
5. In 1997 the Appellant bought the Hospital site and was granted planning permission to build residential housing. This was subject to an agreement under s.106 of the Town and Country Planning Act 1990 that the development would include a ‘Community Scheme’ which would retain specified recreational facilities, one of which was the bowls club and bowling green.
6. Between April 2002 – May 2010, the Land was leased under 3 consecutive agreements by Peal Estates LLP (a company owned by the Appellant) to St Audry’s Park Bowls Club (‘the Bowls Club’). In May 2010 the Club decided not to renew the lease following an increase in rent, and the Appellant fenced off most of the Land. Until November 2019 the public were able to access the perimeter of the Land and used it as a cut through to woodland. The bowling green and pavilion are now in a state of disrepair.

7. The First Respondent is the local authority with responsibility for deciding whether to include buildings or land on the list of assets of community value. It decided to include the Land on the list on 8 November 2019 and upheld that decision on review on 30 March 2020. The predecessor local authority, responsible for planning consent, etc until 1 April 2019, was Suffolk Coastal District Council. Both local authorities are referred to in this Decision as ‘the Council’.

8. The Second Respondent (‘the CSA’) is the community interest group that nominated the Land as an asset for inclusion on the list.

9. This Decision determines an appeal against the Council’s 30 May 2020 review decision.

Tribunal proceedings

10. The Tribunal held a remote hearing of the appeal on 14 September 2020, during which it became apparent that not all relevant material was in the bundle. The Parties were provided with an opportunity to serve additional evidence and written submissions after the hearing, relating to the use of the Land between 1993 – 2002. The Tribunal also granted leave to request a further oral hearing.

11. The last of the additional evidence and submissions was served on 9 November 2020. No Party has requested a further oral hearing. Unfortunately, since the additional material was served, other commitments have prevented this Decision being finalised and promulgated, a delay for which I can only apologise.

12. The original hearing bundle ran to 517 pages. The Tribunal subsequently received 39 additional documents comprising evidence, written submissions and, in the case of some of the CSA’s documents, a combination of both. I have considered all of the material carefully, including the additional material, and am grateful to the Parties for their assistance.

13. The Appellant objects to the admission of some of the CSA’s additional material on the grounds of relevance and provenance. Having considered the objection, the issues raised by this appeal, and the CSA’s lack of legal representation, I am satisfied that it is fair and just to admit all of the additional material, including the witness statements produced by Mr Wix and the Appellant’s late statement by Mr Harvey. Where relevant I have set out what weight has been afforded to each piece of evidence.

Law

14. The Localism Act 2011 (‘the Act’)¹ provided for local authorities to maintain a list of land in their area which is land of “community value”. Land of “community value” is, pursuant to s. 88 of the Act, land where in the opinion of the local authority

¹ <http://www.legislation.gov.uk/ukpga/2011/20/part/5/chapter/3>

- (1) (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 social 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.*
- ...
- (6) *In this section—*
-
- “social interests” includes (in particular) each of the following—*
- (a) *cultural interests;*
- (b) *recreational interests;*
- (c) *sporting interests;*

15. The Act sets out the procedure for including land in the list of assets. S. 92 provides the owner of an asset with a right to request a review of the listing decision.

16. Regulation 11 of the Assets of Community Value (England) Regulations 2012² provides an owner with a further right of appeal to the First-tier Tribunal against a listing review decision. No grounds of appeal or restrictions on the right of appeal are specified. The Tribunal carries out a full merits review of the decision under appeal, which means that it stands in the shoes of the local authority, can make new findings and can consider material that was not available when the decision was made

17. Although the Tribunal has decided a number of appeals under regulation 11 against listing decisions, several of which are referred to in the Parties’ submissions, these are not binding authorities. They are merely illustrative of the Tribunal’s previous approach to the application of the law.

² <https://www.legislation.gov.uk/ukdsi/2012/9780111525791/contents>

18. Decisions taken by the Upper Tribunal do have precedent value and to date two appeals against listing decisions have been considered: *BHL v St Albans*³ and *ATL v CW, CC and FPC [2018] UKUT 15 (AAC)*⁴. Both provide assistance in relation to some of the issues raised in this appeal.

'Non-ancillary use'

19. The 2011 Act does not define the term 'ancillary'. There is also limited assistance to be found in the non-statutory Advice Note produced by central government in support of local authorities making listing decisions.⁵ The Glossary to the Advice note defines 'Land of community value' as '[a] *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.*'

20. The Upper Tribunal in *ATL v CW, CC & FPC* confirmed that the word 'ancillary' was an ordinary word that should be understood in light of its legislative context, and in light of the facts of any particular case. This Tribunal has previously considered whether use of the building or land for the qualifying purpose is supplemental or subordinate to another usage. Where there is evidence of more than one use, neither the quantum of use nor the status of the user is necessarily determinative of which might be 'ancillary'. There may not always be a clear, primary use of a building or land, such that any other usage must be ancillary.

'The recent past'

21. Although s. 88(2)(b) specifies a time frame of 5 years within which future use for a qualifying purpose must be realistically capable of taking place, s. 88(2)(a) does not specify a maximum length of time that can have passed after which a qualifying use will no longer be deemed to have taken place within the 'recent past'. In previous appeals the Tribunal has considered both the length of time that has passed since the asset was last used and the length of time for which previous qualifying use persisted.

Future use

22. In *BHL v St Albans* the Upper Tribunal approved an approach whereby the First-tier Tribunal had used the term 'fanciful', adopted in other regulatory proceedings, when deciding whether a future return to non-ancillary use for a qualifying purpose was realistic.

³https://assets.publishing.service.gov.uk/media/57864341e5274a0da900010c/MISC_2004_2015-00.pdf
BHL v St Albans was subsequently considered by the Court of the Appeal in relation to whether trespassory use of land could be said to further the social wellbeing or social interests of the community.

⁴https://assets.publishing.service.gov.uk/media/5a7058b3ed915d265c511f6d/MISC_1976_2017-00.pdf

⁵ 4 October 2012: Department for Communities and Local Government non-statutory advice note: 'Community Right to Bid'.

23. I note that the burden of proof in satisfying the Tribunal that the local authority's decision on review was wrong lies with the Appellant. Where evidence is disputed, the relevant standard for me to apply is the civil standard of the balance of probabilities.

Submissions

24. The Appellant's Notice of Appeal dated 24 April 2020 challenges the Council's decision on the following grounds:

- i. There is no actual, current use of the Land for a qualifying purpose.
- ii. The Council made an error when determining whether the use of the Land as a Bowls Club before 1993 was non-ancillary. This is because, prior to the Hospital's closure, the Bowls Club was part of private, recreational facilities offered to staff and patients. It submits that the Bowls Club's use of the Land at that time was therefore ancillary to the primary use, which was use by a psychiatric hospital.
- iii. The Council also made an error when considering whether the Land had been used for a qualifying purpose in the 'recent past'. This is because:
 - a. The Land remained vacant after the Hospital closed in 1993 until 2002.
 - b. Between 2002 – 2010 the Land was leased to the Bowls Club, until the Club decided not to renew the lease. The Land has again been vacant since May 2010.
 - c. Therefore, given the Appellant's submission that use of the Land as a bowling green before 1993 was ancillary to use as a Hospital, there has only been an 8-year period of qualifying use, followed by 9- year cessation in use.
 - d. The Council's usual policy when applying the 'recent past' criterion is to look for use within 5 years of the listing decision. Therefore, in the absence of an exceptional reason, the Council made an error when it decided that a use which ended 10 years ago was use in the 'recent past'.
- iv. The Council took into account matters that were not material to the listing decision, because the listing decision considers the Appellant's conduct and why the Land may not have been used for a qualifying purpose since 2010.
- v. It is not realistic to consider that there a qualifying, non-ancillary use of the Land could resume within the next 5 years. The Land has been fenced and the Appellant has a clear intention and ability to develop the land for housing. It cites various local planning policies in support of a contention that planning permission is likely to be granted when it applies.

- vi. There has never been a time when the Land benefitted the ‘local community,’ because the Bowls Club was only for the use of the Hospital’s staff and patients. Further, it is geographically distant from other developments and therefore would not benefit the local community in the future other than residents of Melton Park, none of whom were members of the St Audry’s Bowls Club.

25. In further submissions dated 2 November 2020, and in reply to additional material served by the Respondents after the oral hearing, the Appellant has slightly moderated its position in respect of the use of the Land between 1993 – 2002. It now concedes that there was ‘*some informal use of the green during part of the period 1993 – 2002*’. which it describes as ‘*de minimis*’ and as not presenting a pattern of uninterrupted use since the 1950s. It submits that no clear findings can be made of unbroken use in the 1990s.

26. The Appellant has produced a witness statement by Mr Harvey, the Appellant’s former contracts manager, who states that the bowling green was not in use when the Land was purchased on 14 March 1997. Mr Harvey further states that the bowling green continued to be maintained by the Sports and Social Club, and that it remained vacant for ‘*a year or two*’, after which there was more activity linked with the formation of a Bowls Club.

27. The Appellant accepts in addition that the bowling green on the Land remained physically intact in the period between 1993 – 1998/9 in that it was not decommissioned, and that it must have remained in some form of order so that it was capable of being brought back into use in the 2000s.

28. In oral submissions, the Appellant accepted that there was evidence of use of the Land as a Bowls Club since the 1950s. It submits, however, that this does not constitute a sufficiently lengthy period of past use such that, following a period 9 years 4 months without a Bowls Club, the use can be described as having been within the ‘recent past’. The Appellant notes that, to date, the longest period of time without use that the Tribunal has decided still amounts to use in the ‘recent past’ was a period of 7 ½ years, and related to an asset that had been a Victorian pub, with consequentially a much longer history.

29. The Appellant contests the assertion that demand for a Bowls Club on the Land continued after 2010. It submits that this is irrelevant in any event, since the legislation asks whether an asset has been used in the recent past for a qualifying purpose, not why such a use may have stopped.

30. The Council’s Response dated 10 June 2020 responds as follows:

- i. The use of the Land by a Bowls Club was sufficiently free-standing before the Hospital closed so as not to be ancillary to any use the Hospital made of the Land. It draws attention to the fact that it is only the area occupied by a bowls club and bowling green that has been listed as an asset of community value.

- ii. There is no requirement for an exceptional circumstance to justify the Council's departure from its general policy of considering use in the 'recent past' to comprise use within the preceding 5 years. In its initial Response the Council was satisfied that the Bowls Club used the Land use from the 1950s until 1993, and then from 2002 until 2010.
- iii. It submits that the Land was used for a qualifying purpose from the 1960s until 1993 because the facilities were available to people who were not patients and staff and in any event patients and staff were part of the local community.
- iv. Any reduction in the use of the Land as a Bowls Club between 1993 – 2002 was not due to diminished demand by the local community.

31. As stated above, the Council's initial case was that evidence of use as a Bowls between 1993 and 2002 was unclear. However, in supplementary submissions dated 3 November 2020, the Council has amended its position in light of additional evidence. The Council now contends that a Bowls Club used the Land from at least the 1960s until 2010, bar some short and relatively inconsequential periods likely to have been between 1997-98 and 2001-2002, and that therefore the 'recent past' test is met when the 9 year 4 month hiatus is considered in the context of approximately half a century's use.

32. The Council submits in addition that the new evidence of continuous use by a Bowls Club after 1993 further supports the contention that this was not an ancillary use of the Land before the Hospital closed.

33. The CSA describes itself as a community group which, at the date of hearing, had approximately 100 members, many of whom live on the Melton Park estate. It submits that it is acting with the support of local authorities and environmental groups. It further describes plans to purchase and renovate the Land, were it to be made available, and to carry out fundraising for this purpose. The CSA outlines plans for development of the Land that include creating a boules ground, a community orchard, and an outdoor play area, and refurbishment of the pavilion.

34. The CSA submits there is a long history of the Land being used by a Bowls Club, and that membership was not restricted to hospital staff and patients while the Hospital was open. It has produced evidence, discussed further below, of the Bowls Club being used for both local and County wide bowls competitions both before and after the Hospital closed. It submits that the Bowls Club's use of the Land before 1993 was non-ancillary and that it furthered the social interests of the wider local community. It submits in addition that members of Hospital staff and their families were very likely also members of the local community in any event.

35. The CSA contends that the Land only stopped being used by the Bowls Club in 2010 after the Appellant required payment of £4500 on renewal of the lease, a substantial increase on the previous annual rent of £500. It states that, until November

2019, the perimeter of the Land continued to be used by the community as a path into adjacent woodland, after which the Appellant erected fences preventing all access.

36. The CSA submits that the Bowls Club was administratively and financially independent of the Hospital and has produced evidence from various individuals in support of this view, although there is little by way of signed statements. A statement has been produced from Nigel Wix, the former steward of the Sports and Social Club. The CSA further relies on the existence of the s. 106 Agreement and on other correspondence with the Planning Authority as evidence that the Bowls Club remained an active concern in the 1990s.

37. The CSA's initial case was that Land had been used informally as a bowling green between 1993 – 97. However, having obtained the statement from Mr Wix, the CSA's case now is that the Land was used continuously as a Bowls Club from the 1950s until 2010. It submits that use of the Land by a Bowls Club for 60 years of a 70-year history is sufficient to support a conclusion there has been actual use for a qualifying purpose within the 'recent past'.

Evidence and Findings

38. I have considered with care all of the evidence produced, noting that relatively little of it originates from the Appellant. Given the factual disputes between the Parties I have summarised the evidence and my conclusions in some detail.

Was the Bowls Club 'ancillary' to the Hospital before 1993?

39. The Appellant submits that, until the Hospital's closure, the Bowls Club was a private club for use only by staff and patients. It has produced no positive evidence of this arrangement, but in oral submissions described membership as being akin to a staff benefit.

40. The Council relies on the evidence summarised below to contend that, both before and after the Hospital's closure, the Bowls Club was run as a community club and that members included people from the local community who were not staff. It relies on the fact that the Sports and Social Club continued to operate without any recorded change of arrangements after the Hospital closed. The Council submits that the Bowls Club was sufficiently distinct from the Hospital before the latter closed such that its use of the Land was not ancillary.

41. The CSA contends (i) that membership of the Bowls Club was open to both members of the local community and to Hospital staff; (ii) that in any event Hospital staff lived in and formed part of the local community; and (iii) that the Bowls Club also furthered the well-being and social interests of other people in the local community who came as visitors to play matches and attend events.

42. In support of (i), the CSA has produced emails from (a) Lesley Sharman who summarises a conversation with two former members of Hospital staff; (b) Colin Frost; and (c) Jeff Airey. In general terms all three state that the Sports and Social Club was used by persons other than Hospital staff, although only Mr Airey, who was Chair of

the Football Club part of the Sports and Social Club, had personal involvement at the time. Given the second-hand and general nature of the statements by Ms Sharman and Mr Frost, I have afforded only limited weight to their evidence. I have afforded greater weight to Mr Airey's evidence as he is speaking from his personal knowledge of the identity of 'players' at the Sports and Social Club. Even if Mr Airey is only referring to players at the Football Club, there is no basis to assume that different parts of the Sport and Social Club operated different membership rules.

43. Mr Wix, the former steward, states that members of '*the Club*' comprised '*ex-workers at that time and a wide variety of people from...the wider community*'. From the context of his statement, 'the Club' is a reference to the Bowls Club, since Mr Wix states that the Sports and Social Club stayed open continuously from 1993 – 2000, whereas the Bowls Club had a '*one-year gap*' from 1997 – 1998, and he also refers to 'the Club' as being fully operational between 1993 – 1997. Therefore I conclude that membership '*at that time*' should be taken to mean membership of the Bowls Club between 1993 – 1997.

44. In relation to contention (i), I am satisfied on the basis of Mr Airey's and Mr Wix's evidence that, from 1993, membership of the Sports and Social Club, including the Bowls Club, was not restricted to former Hospital staff but was open to other members of the local community. Further, given the references to the Sports and Social Club staying continuously open from 1993 until closure, and in the absence of any evidence supporting a view that the nature of the membership changed after the Hospital closed, I conclude that membership of the Sports and Social Club, at the time the Hospital was open, must also have been open to and included people from the local community who were not staff and patients.

45. I find by extension that some of the people who were members of the Bowls Club while the Hospital was open were people from the local community who were non-staff.

46. In relation to contention (ii) I find, as a matter of common sense, that members of Hospital staff and their families must have lived within and formed part of the local community. To conclude otherwise would be to ignore the likelihood that the Hospital provided welcome employment opportunities for local people.

47. In relation to contention (iii), I note that there are several references in supporting documents to other bowling clubs playing at the 'St Audry's Club' and to the facilities being used to host important games. For example, the Council has produced a bowls club fixture list for 1978 and a Melton Bowls Club fixture list for 2001, both of which record arrangements for matches to be played at 'St Audry's'. The Council has also produced a 2003 programme from a celebration dinner which records 'St Audry's' as winners of a local bowls league.

48. The CSA has also produced a letter from the Secretary of the Woodbridge and District Bowls League confirming the presence of a bowls club on the Land for many years, which states that 'St Audry's' was the last winner of a local league that ended during the 1950s.

49. I conclude from this evidence that both before and after the Hospital closed the Bowls Club took part in competitions against other bowls clubs and participated in the local bowls leagues. I find as a consequence that the Bowls Club must have been used as a venue for sporting events by others in the local community.

50. I am therefore satisfied that the Bowls Club's use of the Land while the Hospital was open was a non-ancillary use. I conclude that the Bowls Club was a distinct organisation from the Hospital with a membership that was open to non-Hospital staff. I am satisfied that it operated as a distinct, active and distinguished sports club within the local community while the Hospital was open and without any apparent change of structure or organisation when the Hospital closed. On the basis of the available evidence, I find that the Bowls Club's use of the Land while the Hospital was open was the primary use of the Land.

Time used as a bowling green

51. The Parties agreed at the hearing that the Bowls Club had last used the Land in May 2010 and that this was 9 years and 4 months before it was included on the list of assets.

52. The Appellant does not dispute that the Land was used as a Bowls Club before the Hospital closed, and suggests in later submissions that it was used as such from the 1960s.

53. A number of the documents submitted to the Tribunal support a conclusion that a Bowls Club was using the Land from at least the 1950s. These includes an archive photograph said to have been taken in that decade [B102] and the letter from the secretary and treasurer of the Woodbridge and District Bowls League referred to above, which is dated 2 January 2009, which describes the Bowls Club as having been the last winners of a league that ended in the 1950s [D236]. I conclude from the latter that the Club must have been an active participant in local leagues before the 1960s.

54. There is also an extract from the East Anglian Daily Times, dated January 2009, [B104] which describes the 'St Audry's' as being '*one of Suffolk's oldest bowls clubs*' and states '*bowls at St Audry's dates back to the 1920s, although a new club was started in 1997*'. Although these statements are not provenanced, the focus of the article is an interview with the then treasurer and chairman of the Bowls Club. I infer from this that the information about the history of the Bowls Club either originated from, or was approved by, these individuals.

55. The CSA has also produced what is said to be an aerial photograph of the bowling green taken in 1945. However this is without provenance and I have discounted it as evidence of earlier activities.

56. I am satisfied on the available evidence that the Bowls Club was using the Land from at least the 1950s. It is not in issue that this use continued until the Hospital closed in 1993.

1993 - 2002

57. The Appellant contends that the Land remained vacant, other than de minimis use, between 1993 and 2002. It submits, possibly in the alternative, that any persisting use for a qualifying purpose was broken for a period of four or five years after 1993.

58. The Appellant relies upon the statement of its former contracts manager, Mr Harvey. He states that the bowling green was not in use when the Appellant bought the Land in March 1997 and that it remained out of use “*for a year or two*”, during which time it was maintained by the Sports and Social Club. Mr Harvey does not comment on the use of the Land before purchase or after the year or two was over.

59. His evidence is consistent with that of Mr Wix, who was steward of the Sports and Social Club from 1993 until 2000. Mr Wix’s evidence is that the Bowls Club closed between 1997 to 1998 due to a lack of a water supply, that it was ‘fully operational’ from 1993 – 1997 and that as part of the Sports and Social Club it remained open from 1993 – 2000 other than the hiatus caused by the absence of a water supply.

60. The Appellant submits that Mr Wix’s evidence should be afforded only limited weight on the basis that he may not have understood what he was saying. I am not persuaded that there is any reason to discount Mr Wix’s evidence and I have afforded it the same weight as I have that of Mr Harvey.

61. The Council and CSA have produced several documents that also support, to some extent, Mr Wix’s statement that the Bowls Club remained open from 1993 – 2000 other than for a temporary hiatus during 1997-1998. This includes:

- i. A statement from David Schofield dated 4 October 2020, reporting conversations with ‘bowlers’ who confirmed playing at the club in the 1990s, as well as the Bowls Club having been used for county competitions. I have placed little weight on the first part of this due to the comments being unattributed and expressed in general terms. The 2nd part of Mr Schofield’s account is corroborated by other pieces of evidence.
- ii. An article from the Eastern Daily Press dated 7 August 1996, which says the site of the former Hospital ‘*has a golf club and sports and social clubs*’ that will ‘*stay in business.*’ As this was an interview with the Appellant’s founder, it presumably reflected his understanding of the situation on the ground. I infer from this language that clubs (plural) remained active at that time.
- iii. An email reproducing a ‘statement’ by Theresa Andrews, described as the ‘Bowls Club Head’ during the period commencing 1997. This states that the bowling green was brought back to standard by a Mr Clements in 1997, was re-established in the Suffolk Bowls League by 1998, and continued to compete and to host competing clubs from 1998 to 2000 [D262]. Since, in January 1997, a Mr Clements wrote to the Council as a member of the ‘St Audrey’s Social Club Committee’, this also provides support for Mr Harvey’s evidence that the Sports and Social Club maintained the bowling green during 1997 when it was not used by the Bowls Club ‘*for a year or two*’.

- iv. The letter written by Mr Clements to the Council, dated 25 January 1997, which refers to a conversation with the Appellant about '*retaining the existing bowls club and pavilion.*' It is unclear whether the temporary closure of the Bowls Club had begun at this date, but the language does not suggest facilities that had been left unused for 4 years.
- v. Non-attributed comments about the bowling green being used informally between 1993 and 1997 [D263]. I have placed little weight on this evidence because it is general in nature and unattributed. It does, however, offer limited support for Mr Wix's account that the bowling club remained open from 1993 to 2000.
- vi. Mr Airey's evidence that '*football, cricket and bowls continued until the closure of the social club but not tennis.*' I have afforded greater weight to this evidence because Mr Airey appears to have been heavily involved with the Sports and Social Club at the time.
- vii. A one-page account document relating to the 'St Audrey's Bowls Club Open Drive', held on 19 July 1998 [D222]. I conclude from this that any temporary hiatus in use by the Bowls Club, referred to by both Mr Harvey and Mr Wix, must have come to an end.
- viii. The East Anglian Daily Times article referred to above, which describes a new Bowls Club having started in 1997. This is also consistent with the Appellant's own chronology, which describes the Sports and Social Club as closing in 1997.
- ix. Bills and invoices presented to the 'St Audrey's Bowls Club', including invoices from the Suffolk County Bowls Association, for the years 1999, 2000 & 2001 [D226; D229; D231]. I conclude from these documents that an active Bowls Club continued to use the Land beyond the dates given by Mr Wix, and that it continued to operate under the name by which it was previously known.
- x. An invoice for the supply of bowls equipment to the St Audrey's Bowls Club dated 22 June 2000 and an invoice for servicing the green roller dated 29 February 2000 [D228; D230].
- xi. A letter to the Council from the 'Bowls Club Committee' dated 13 September 2001, which refers to the Club's negotiations with the Appellant to obtain a tenancy agreement, and which states '*I am aware that if our club ceases to exist the bowls green reverts to the Residents Association*' [D111]. This is further evidence that the Bowls Club remained active in 2001.
- xii. The Melton Bowls Club fixture list for 2001 which shows a match being played at 'St Audry's'.

62. I have also given weight to the Appellant's correspondence with the Council during 1997 in the context of obtaining planning consent. This refers at various points to 'retention' of the bowling green [e.g. B68; D206], a term which again suggests something more than facilities that not been used for 4 years. Were that to be the case,

I would expect reference to be made in at least one document to plans that would bring the bowling green back into use.

63. Having regard to all of the evidence, and having afforded weight to Mr Harvey, Mr Airey, and Mr Wix's first-hand knowledge of events, I am satisfied that the Bowls Club continued to be the primary use of the Land between 1993 and 2001, other than between 1997 – early 1998 when there was a temporary hiatus caused by a lack of water supply.

64. Although there is limited evidence of the Bowls Club's activities between 1993 – 1997, I am satisfied from Mr Airey's and Mr Wix's evidence that bowls continuing to be played after the Hospital closed in 1993, and from references in various documents during 1996 - 1997 to the bowling green being 'retained' rather than 'reopened', that this use must have continued to some extent.

65. I find that, until at least 1997, the Bowls Club's activities operated to some extent under the umbrella of the Sports and Social Club, since it was Mr Clements, on behalf of the Sports and Social Club, who took responsibility for the upkeep of the bowling green during the temporary hiatus, at least part of which post-dated the Appellant's purchase and development of the former Hospital site.

66. I conclude in addition that the Sports and Social Club remained an active organisation within the local community until at least 1997, and that by 1998 a Bowls Club using the St Audry's name was using the Land and had resumed participation in the Woodbridge and District Bowls League.

67. I am satisfied that the 1999 – 2001 invoices from the Suffolk County Bowls Association, the 2001 fixture list and the September 2001 letter from the Bowls Club Committee all support a conclusion that the activities of the Bowls Club continued into 2001. It is accepted that thereafter the Bowls Club's use of the Land continued by virtue of leasehold agreements between 2002 - 2010.

68. In conclusions, therefore, I find that the Land was being used as Bowls Club from the 1950s until 2010, with a temporary hiatus of uncertain length between 1997- 1998, during which time the Land could not be used but continued to be maintained by the Sports and Social Club.

Consideration

69. It is a matter of concern that some of the Appellant's submissions may not reflect its full knowledge of events. In particular, the contention that "[t]he Land remained vacant from 1993 until 2002," later amended to a suggestions that there had been 'de minimis use' is a matter about which the Appellant might have been expected to provide further assistance.

70. Having reached the conclusions set out above on the basis of the available evidence, I have considered each of the Appellant's grounds of appeal in turn.

Current use

- i. It is agreed by the Parties that there is no current use of the Land for a qualifying purpose. It is not in dispute that the last qualifying use ended 9 years and 4 months before the Land was included on the list.

Ancillary use

- ii. For the reasons already given I am satisfied that, both before and after the Hospital closed, the Bowls Club's use of the Land was non-ancillary. Given my conclusions in relation to the membership and involvement of the local community throughout, I am also satisfied that the requirement in s. 88(2)(a) that the use of the Land furthered the social wellbeing and social interests of the local community is also met.

Recent past

- iii. The Appellant accepts that the term 'recent past' in s.88(2)(a) a relative concept and falls to be determined having regard to the circumstances of each case. It submits, however, that a use which ended 9 years 4 months previously cannot be said to have taken place 'within the recent past'
- iv. For reasons already given I have concluded that the Bowls Club was the primary use of the Land from at least the 1950s until 2010, other than during the 1997 – 1998 hiatus. Although there is insufficient information to establish a more accurate of first use, I infer from the description of the Bowls Club as the last winner of a league that ended during the 1950s that it must have been established before the end of that decade. This results in a history of continuous use by the Bowls Club of between 60 to 70 years, other than for a temporary hiatus between 1997 - 1998.
- v. The concept of the 'recent past' is different to that of 'recent use'. I am satisfied that the Bowls Club's activities can be properly described as having taken place in the 'recent past' when the 9 years and 4 months since it last used the Land is considered in the context of the 60 – 70 years of use that preceded it. Even assuming the Bowls Club did not start using the Land until 1959, which is probably later than it did given its description as a '1950s league winner', then at the date of the listing decision use as a bowls club had been the primary use of the Land for approximately 61 of the previous 70 years. It is not beyond the natural meaning of the term for such a pattern of use to be described as having taken place at a 'time in the recent past'.
- vi. I conclude, as a consequence, that the 'recent past' requirement of s. 88(2)(a) is also met.

Consideration of non-material matters

- vii. I am persuaded by the Appellant's submission that it would be an error of law for a local authority to consider why an asset stopped being used for a qualifying purpose when deciding whether it should be included on the list. This cannot be a relevant consideration for the purposes of s. 88(2)(a), although in some cases

it could be relevant when deciding for the purposes of s. 88(2)(b) whether it is realistic to consider that a qualifying use could resume.

- viii. I have therefore considered in accordance with the principle set out by the Court of Appeal in *R (Hope and Glory Public House Limited) v City of Westminster Magistrates' Court* [2011] EWCA Civ 316, which was approved by the Supreme Court in *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] UKSC 60, what weight to attach to the reasons put forward by the Council when making the listing review decision. I have decided not attached any weight to the reasons set out at paragraphs 16 – 19 of the written decision, nor to any evidence served by either Respondent relating to why the use of the Land came to an end, on the basis that these are not relevant considerations.
- ix. I have afforded appropriate weight to the other reasons put forward in the written decision, having had regard to Parliament's decision that local authorities should be given responsibility for deciding which buildings or land should be designated assets of community value. I have also given weight to evidence that was not available to the Council at the date of decision where it is relevant to the Bowls Club's use of the Land.

No realistic future use

- x. Although the Appellant currently intends to apply for planning consent to build on the Land, and is confident in the merits of its application, it is by no means certain that consent will be given. This would apply to any planning application, but in this case I have also had regard to the strength of the CSA's opposition to further housing development, as well as the existence of the community scheme and the s. 106 Agreement. It is therefore not fanciful to contemplate that planning consent might be refused. Neither is it fanciful to consider that the Appellant might contemplate selling the Land in such a circumstance, notwithstanding its current firm intention.
- xi. The CSA is a well-organised community group with more than 100 members, at least some of whom live geographically close to the Land. It is entirely possible that, should it be offered for sale, the group might succeed in raising funds to purchase and develop the Land for community use in line with the proposals it has outlined. I note that there is reference in the papers to the success of other local schemes.
- xii. I therefore conclude that, notwithstanding the Appellant's current intentions, it is not fanciful to consider that there could be a non-ancillary use of the Land for a qualifying purpose within the next 5 years. As a consequence I am satisfied that the requirements of s. 88(2)(b) are met.

Use for the benefit of the community

- xiii. S. 88(2)(b) allows the qualifying future use of an asset to be either the same as or different to the past qualifying use. There is therefore no requirement for the Land to return to use as a Bowls Club, or for members of the former club to be

involved in the nomination. Neither does the Act require the qualifying future use to benefit a local community of a specific size. Given the description of the CSA's membership, I am satisfied that any qualifying future use would meet the requirement of being for the benefit of the local community.

Conclusion

71. Accordingly, the appeal is dismissed.

(Signed)

JUDGE MOIRA MACMILLAN

DATE: 2 July 2021