



**NCN: [2022] UKFTT 494 (GRC)**

**Case Reference: CR/2021/0008**

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

**Heard by: CVP hearing**

**Heard on: 16 March 2022  
Decision given on: 4 July 2022**

**Before**

**TRIBUNAL JUDGE FINDLAY**

**Between**

**HAWKHURST GOLF & COUNTRY CLUB JENGA (GOLF CLUB HOLDINGS) LTD  
& CEDARDRIVE LTD**

**Appellants**

**-and-**

**TUNBRIDGE WELLS BOROUGH COUNCIL**

**First Respondent**

**-and-**

**HAWKHURST PARISH COUNCIL**

**Second Respondent**

**Appearances:**

**For the Appellants  
Ms S Davies, Counsel  
Mr J Buckwell, Planning Consultant, DHA Planning  
Ms Danielle Lawrence, Associate at DHA Planning**

**For the First Respondent**

**Ms E Lambert, Counsel**

**Mr L Colyer, Director of Finance, Policy and Witness Improvement**

**Mr K Hope, Principal Planning Officer, Strategic Sites and Delivery Witness Team**

**Ms B Graham, Senior Solicitor**

**Ms H Smith, Observer**

**For the Second Respondent**

**Ms C Escombe, Chairman**

**Decision**

1. The appeal is dismissed. The provisions of s. 88(2)(a) and (b) of the Localism Act 2011 (“the Act”) are satisfied.

**Mode of Hearing**

2. This has been a remote hearing on the Cloud Video Platform (“CVP”) which has been consented to by the parties. The form of remote hearing was V: by CVP. A face to face hearing was not held because it was not practicable and all issues could be determined in a CVP hearing. I have considered an agreed bundle, heard submissions from Ms Davies and Ms Lambert, and evidence from Mr Buckwell, Mr Hope, Mr Colyer and Ms Escombe.

**Background**

3. The Act requires local authorities to keep a list of assets (meaning buildings or other land) which are of community value. Once an Asset of Community Value (“ACV”) 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.
4. The Hawkhurst Golf Club, High Street, Hawkhurst, TN18 4JS (“the Land”) is owned by Hawkhurst Gold and Country Club, Jenga (Golf Club Holdings) Ltd and Cedardrive Ltd, the Appellants. The Land consists of a nine hole golf course, clubhouse and squash courts together with ancillary buildings and sheds associated with the operation of a golf course and extends to 20.69 hectares.
5. On 23 March 2021 the First Respondent received a community nomination from the Second Respondent for the Land to be included in the list of assets of community value.
6. On 10 May 2021 the First Respondent listed the Land as an ACV. On 9 July 2021 the First Respondent received a written request on behalf of the owners for the listing decision to be reviewed. An oral hearing took place on 31 August 2021.

7. The Appellants applied for a review and a virtual hearing was held on 31 August 2021. As part of the review process the Reviewing Officer, Mr Colyer, carried out a site visit on 19 August 2021.
8. The Appellants lodged an appeal against the listing on the grounds that the membership had declined in recent years resulting in the club making a loss. There are no public rights of way over the Land enabling public access. The Land is the subject of a current planning application seeking alternative use.
9. The Land was listed as an ACV on 21 October 2021.

### **Relevant Legislation**

10. The Localism Act 2011 (“the Act”)

#### *Section 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)).

(4) The appropriate authority may by order amend subsection (3) for the purpose of substituting, for the period specified in that subsection for the time being, some other period.

#### *Section 88 Land of Community Value*

(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.

(6) In this section—

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

- (a) cultural interests;
- (b) recreational interests;
- (c) sporting interests;

## Grounds of Appeal

11. The Appellants submit the following points:
  - a. The Land should be removed from the First Respondent's list of Assets of Community Value because the tests set out in s. 88(2) have not been met.
  - b. There is no evidence to suggest that the Land is likely to be used as a golf course or other community facility in the near future. The Land was not viable over recent years culminating in its closure.
  - c. There is no basis on which the First Respondent can reasonably let alone realistically conclude that the Land is likely to be used as a facility to further the social wellbeing or social interests of the community in the future.
  - d. The Land is subject to a hybrid planning application for the demolition of the clubhouse, squash courts and ancillary structures and permission is being sought for a new relief road for the A268 and A229, a strategically important link to relieve the highway crossroad. Given the pressure on the existing road network and the First Respondent's shortfall in housing delivery the First Respondent cannot realistically conclude that the site is going to be used to further social wellbeing and social interests.
  - e. No community groups own or occupy any part of the Land. It is entirely within private ownership. There are no rights of way over the Land and its use has only been for paying member of the golf club. There are no permissive rights over the Land. It is not of recreational value to the general public. The golf course is nine holes rather than eighteen holes and viability has been an issue. There are several other golf courses in the local area within a ten mile radius.
  - f. If planning permission is granted the details of what the community provision would be are not secured. That cannot be relied upon as a basis upon which a community facility could be secured. This is not an appropriate site for community facilities.
  - g. Even if permission is refused it does not follow that the Land will be used for the community.
  - h. It is disputed that the golf club could be properly deeded an ACV as it was a private business. There are no plans for the Land to be used for the community in future. The Land remains in private ownership. There are no permissive rights over the Land which could be relied upon for its use for the community.
  - i. The only reason the nomination was made was to frustrate the planning application.
  - j. The planning application will benefit the village by helping to address the long-standing traffic and air quality problems.
  - k. It is necessary to consider what possible future uses there could be.

- l. There are no rights of way over the Land and there are no permissive rights. The only basis upon which the Land can be used is with the owner's permission.
- m. There is no sensible reason why this decision was made when the previous nomination was refused.
- n. The use of the golf course has ceased and there is no prospect of Mr Fattal permitting it to be re-opened.
- o. Mr Fattal has provided subsidised rent for the facility for a number of years and this is going to cease.
- p. There is a serious intention to develop the Land for a residential-led scheme. It is not the owner's objective for the Land to be used for the social wellbeing or social interests of the local community going forward.
- q. The substantial benefits of the planning application weigh heavily in favour of planning permission being granted in future. If the application fails Mr Fattal will continue to promote the Land for alternative development.
- r. The Land should be removed from the Respondent's list of ACVs

### **Grounds of Opposition**

12. The Respondent submits the following points:
  - a. The nomination was supported by 55 individual emails from members of the public the majority of whom reside locally and had regularly used the golf course, the clubhouse or both.
  - b. The Land has been used for many years as a facility for a wide range of sporting, cultural and community activities.
  - c. There is strong local support for the facilities to continue and the aim of the nominator is to retain the Land as a community led golf course based on similar village models it had researched.
  - d. The fact that a use of the Land may be unlawful, e.g. largely trespassory, does not negate whether it is used by the local community.
  - e. The application for planning permission has been refused.
  - f. In planning terms the Land is highly sensitive.
  - g. It is correct that there are no public rights of way and no permissive rights over the Land but the Land is used with or without public or permissive rights of way.
  - h. Although the Appellants have stated that the members were unable to fulfil their financial commitments to pay rent and struggled to make it viable due to the competition from other clubs members of the community appreciated the 9-hole golf course and noted the expensive fees at larger clubs.
  - i. It is not accepted that the relief road would improve conditions at the village centre crossroads.
  - j. The Council has identified alternative land to meet the need in accordance with its housing needs. Accordingly, the need to deliver housing is to a factor which would not weigh heavily in favour of planning permission being granted.

- k. The local community values the Land for playing golf, squash, going for walks, watching nature, sledging in the winter, for pilates, fitness classes, yoga classes, social groups including Art Appreciation, Craft Group, Local History, for meetings and for social functions.
- l. The appeal should be dismissed.

### **The Second Respondent's Case**

13. The Second Respondent submits the following points:
  - a. Hawkhurst Golf Club has been described as a gem in the Weald. It is a woodland golf course in the historic rolling hills of West Kent within an Area of Outstanding Natural Beauty ("AONB"). The site is located on the western edge of Hawkhurst, with the main entrance off the A268. Slip Mill Lane abuts the western/southern edge of the golf club and the eastern side adjoins the edge of the housing in Hawkhurst.
  - b. The Golf Club closed in April 2020; a decision that left many Golf Club members distraught, leaving many residents with reduced opportunities to be active. However, the Hawkhurst Squash Club, which is on the site, re-opened after the pandemic.
  - c. The site and facilities have for many years been part of the very fabric of the village. It contributed to each of the four main criteria for designation as an ACV: well-being, cultural, recreation, and sport. It is fair to say that the site has been a key component of the social well-being of the local community. Indeed, at 20.69 hectares it is the largest cultural, recreation and sporting asset in the area.
  - d. The Hawkhurst Golf Club clubhouse, which the owners have allowed to remain open is a well-used venue for community activity – indeed the largest community group in the village the U3A regularly used it for their talks, film nights, exercise classes and the like. There are also Yoga classes; birthday parties; christenings, Hawkfest, the village football club meet there, as do the Hawkhurst Bridge Club. In addition, a Hawkhurst Market is held there each month - and is hugely popular and has grown to be a significant part of the community bringing a variety of people together with local family businesses. Although, golf has been the main paid-for use of the grounds, it has in effect been used as a publicly open space for walkers, dog walkers who have used the site without challenge for more years than people can remember.
  - e. The prospect of losing for all time this significant open space and other facilities through the largest proposed development in an AONB nationally, has been devastating for those that have used and currently use it, as is the thought that future generations will miss out on the cultural, sports and recreational facilities near the heart of the village.
  - f. With this in mind, it is no wonder that this has provoked the largest Parish mailbag of any issue faced by the village.
  - g. The Parish Council is not backward-looking, rather it looks forward to engendering a future where the site and its various facilities are better used. For example, the Parish Council contends that clubhouse could be refurbished and extended to further its current use by the community and could also support an environmental centre in the AONB.
  - h. The bulk of the land could be reinstated as a community golf club; along the lines of the Village Golf course in Staplehurst. There have been initial discussions with KCC Landscapes regarding the costs of re-instatement and a specification for ongoing maintenance. If successful the Second Respondent would work with the community to form a community led management team setting prices, rules and regulations and organising competitions. So, there is a genuine prospect of an affordable community-run public golf course.

- i. There is also strong demand from the community for an additional central village location for a public allotment – which is a legal requirement for a local authority to meet – and are faculties operated on a full cost-recovery basis.
- j. There is demand for allotments and there are waiting lists for the existing two sites.
- k. The routes for jogging, cycling and other outdoor recreation would enhance and widen the site’s appeal. A children's playground and outdoor gym have been identified as necessary additions to the central village facilities. Consultation with the community has already illustrated the importance of extra car parking for Hawkhurst to enable the village to be the place to meet and socialise.
- l. There would be a viable fundraising campaign given the strength and depth of connection this site has with the community and the potential to achieve other sources of funding, also the Parish Council is uncapped and so could, if necessary, increase the precept in order to fund the operation and seek Public Works Loan Board (“PWLB”) funding for the capital cost.
- m. The designation of the Land as an ACV is correct because of the long usage of the Land for community, social and recreation and furthermore that plan to use it as such if it came into public ownership are realistic and will further enhance the wellbeing and social interests of the local community.
- n. The appeal should be dismissed.

### **Evidence**

14. Mr Fattal is the Director of the three companies who are the Appellants and the owners of the freehold interest in the Land. Mr Fattal did not attend the hearing and submitted a witness statement. He stated that since the nine hole golf course was established in the 1960s it has struggled to be viable. Mr Chandler took over the management of the Land in 2010 and no rent has been paid. Mr Fattal has paid the annual insurance and since January 2021 has paid Mr Chandler £800 per month to maintain the Land.
15. It has been difficult for the business to survive as there are several other golf courses in the local area. The golf course closed in March 2020 due to the pandemic and closed permanently in March 2021.
16. Mr Fattal instructed Mr Buckwell of DHA Planning to manage the redevelopment of the Land. Mr Fattal’s intention is to develop the Land for a residential led scheme through the planning process. An application was made in 2019 for outline planning permission for 374 dwellings, a C2/C3 care home, class D1 facilities such as a doctor’s surgery and/or community all, public car park, public park and associated parking, servicing utilities, footpath and cycle links, formal and informal open space and recreation facilities, drainage, ground and infrastructure work.
17. The application for planning permission was made against the context of a shortfall in the minimum housing delivery in the Borough which he says militates in favour of planning permission being granted and the Land development will be an important contributor to the supply of housing in the area.
18. Even if the application for planning permission is not successful he will not be maintaining the Land for a community facility. The land is privately owned and he does not intend for it to be used for the community.
19. There is congestion on the nearby crossroads and the development of a relief road would be an important relief facility.
20. It is Cedardrive Ltd who intends to redevelop the Land.
21. Mr Buckwell, on behalf of the Appellants, stated that Mr Fattal was very serious about the intention to develop the Land.. He stated that the use of the golf course had been very

limited prior to closure. He stated that he had never observed anyone walking on the Land or walking dogs on the Land and only once when visiting the Land did he see someone playing golf. He stated the clubhouse was in a dilapidated state and there were a number of maintenance issues. He thought there might be personal liability insurance and Mr Fattal was unhappy about people walking on the Land.

22. Mr Buckwell submitted that the value of the Land was so high as to make purchase by the Second Respondent unrealistic. He said that a similar piece of land and golf course had sold for £1.7 million.
23. Mr Buckwell submitted that despite Mr Fattal's financial support of the golf course and business it has been trading at a loss and it is wholly unrealistic to imagine that the golf course can be financially viable in the future. He pointed out that the support and use of the golf course has been very limited.

### **Conclusions**

24. I find that the nomination was valid having been made by a Parish Council.
25. In reaching my decision I have taken into account that decisions of the First-tier Tribunal have no precedential value. I am not bound by any previous decisions of the First-tier Tribunal but previous decisions have persuasive value.
26. The task before me is to make a fresh decision standing in the shoes of the First Respondent. I am able to take into account events occurring between the date of listing and the date of the appeal and accept additional material. The fact that I do not refer to a particular piece of evidence or evidential matter is not to be taken as indicating that I have not had regard to the same.
27. In reaching my decision I have borne in mind that the purpose of the community right to bid regime is to provide a tool and means for communities to be given the opportunity to identify assets of community value, have them listed and when they are put up for sale have time to raise finance and be prepared to bid for them. It was recognised that throughout the country there were buildings and amenities that were integral to the communities that use them. The closure or sale of such buildings and amenities can create lasting damage to communities and threaten the provision of services. The intention of the regime was to provide greater opportunities for communities to keep such buildings and land in public use to ensure they remained a social hub for those communities.
28. The Land is situated on the western edge of Hawkhurst and extends to 20.69 hectares and is located within an AONB.
29. I find there was an earlier application for listing which resulted in the Land being added to the unsuccessful list of nominations. It was decided on 21 October 2020 that the Land should not be listed as an ACV on the basis that s. 88(2)(a) of the Act was not satisfied. The present listing decision, and the subject of this appeal, was made on more extensive information.
30. The golf course was established in the 1960s and until April 2020 it was regularly used as a golf course and by the local community and their guests. Although the Land was privately owned it was used by the community for regular community and cultural events and activities including squash, table tennis, fitness classes and function rooms for the use of the community for meetings and events such as weddings, birthday parties and other celebratory events. The Hawkhurst Market took place on the first Saturday in every month and was advertised with a banner attached to the entrance sign. Until its closure in April 2020 the Land was the largest a cultural, recreational and sporting asset in the area.



31. I find that some local residents used the Land for walks. The Land has been used by walkers and dog walkers without challenge or interruption for many years notwithstanding that there was no right of way or permissive rights over the Land.
32. I find that there was a sign stating that the Land was private and there was no right of way but there was nothing physically preventing members of the public from using the Land. I find that Mr Fattal was unhappy about walkers, with or without dogs, walking over the golf course but he took no active steps to prevent the activity.
33. I find that there was community use of the Land notwithstanding that a payment was required for some of the use of the facilities.
34. I find that the use of the Land satisfies the test set out in s.88(2)(a) of the Act, namely that there is a time in the recent past when an actual use of the Land that was not an ancillary use which furthered the social wellbeing or interests of the local community.
35. In reaching my decision I have taken note of the decision of *Banner Homes Limited v St Albans* [2018] EWCA Civ 1187 applied in *Oliver's Battery Ltd v Winchester City Council* CR/2019/0001. I find that a use if unlawful does not prevent the use being taken into account as use by the local community.
36. In reaching my decision I have attached weight to the emails from local residents. I find that the emails corroborate the description by the Second Respondent of the use of the Land in the recent past.
37. In reaching my decision I have borne in mind that s. 88 of the Act defines 'social interests' as including cultural, recreational and sporting interests. I find that April 2020 is in the recent past taking into account the length of time over which the Land has been used by the community.
38. In considering the requirements of s. 88(2)(b) I have borne in mind that the construction of that provision set out by Judge Warren has been consistently followed and approved and in my view is the correct one.
39. In reaching my decision I have followed the direction of the High Court which approved the approach previously adopted by the First-tier Tribunal. The legislation does not require that there be only one "realistic" future use of the Land and several possibilities may be realistic. The legislation does not set out a requirement for it to be more likely than not that a potential use might come into being for it to be realistic. The fact that the most likely enterprise would not satisfy the conditions of s. 88(2)(b) does not mean that any other potential enterprise is unrealistic. In this appeal the direction of the High Court that "*It is only if the non-compliant scenario is so likely to occur as to render any compliant scenario unrealistic, that the non-compliant scenario will be determinative of the nomination.*"
40. I have borne in mind that the term 'realistic' is not defined in the Act or in the Regulations. It is likely that Parliament chose this expression deliberately and it would not be appropriate to define the term further. I have borne in mind that the word "realistic" in the ACV regime bears its normal meaning and means "having or showing a sensible and practical idea of what can be achieved or expected."
41. I find that a decision was made on 2 February 2022 to refuse the planning application for planning permission for demolition of the existing clubhouse, squash courts and ancillary structures, and redevelopment of existing golf course for a new relief road and associated earthworks and junctions with A268 and A229 (applied for in full), and residential

development, a C2/C3 care home, class D1 facilities such as a doctors' surgery and/or community hall, public car park, public park and associated parking, servicing, utilities, footpath and cycle links, formal and informal open space including woodland planting and recreation facilities, ground and infrastructure works (applied for in outline with all matters reserved), in accordance with the terms of the application dated 11 November 2019.

42. I find that there are a number of realistic future uses of the Land. The Appellant may further pursue an application for planning permission in an amended form and be successful and proceed to develop the Land with or without some provision for community use of part of the Land. The Appellant may decide to consider other options for the Land which may include future community use. The Appellant may decide to dispose of the Land to the Second Respondent or otherwise join with the Second Respondent to promote a scheme involving a mix of community and other uses and work towards a community use of the Land. In these uncertain economic times, I find that all the above are realistic future uses of the Land.
43. In reaching my decision I have taken into account that what is realistic is a matter of judgement and it is not a matter of veto by the Appellants and that it is important not to confuse commercial viability with what community enthusiasm and effort can achieve and the legislation does not require a detailed financial analysis or business case at this stage.
44. The Second Respondent's aim is to retain the Land as a community led golf course. It is the intention to refurbish the clubhouse and extend its use and possibly support an environmental centre in the AONB. There have been initial discussions regarding the costs of re-instatement and a specification for ongoing maintenance. The intention is to work with the community to form a community led management team. There is a strong demand for a public allotment to operate on a cost-recovery basis. The intention is to develop routes for jogging, cycling and other outdoor recreational activities together with a children's playground and outdoor gym and extra car parking. In short, the intention is to retain the Land as a site to enable the community to meet and socialise. It is anticipated that there will be financial support from the Parish Council and income from the use of the facilities.
45. I find that the provisions of s.88(1)(b) of the Act are satisfied in that it is realistic to think that there is a time in the next five years when there could be non-ancillary use of the Land which will further (whether or not in the same way as before) the social wellbeing or social interests of the local community.
46. In reaching this decision I have taken into account that The Hawkhurst Golf Club Ltd was wound up under the provisions of the Insolvency Act 1986 on 15 December 2009, the profit and loss accounts from 1999 to 2009 show trading losses and Mr Fattal has been subsidising the club in the past. However, I find that this does not mean that in the next five years the Land could not be run in a different way with new management, imaginative ideas, enthusiasm and community hard work to become financially viable. The use of the Land has been limited in the past. It is clear that there is a strong desire and commitment to expand the uses of the Land and the potential to increase the use and income is realistic.
47. I find that there could be a viable fundraising campaign given the strength and connection the Land has to the community and the potential to achieve sources of funding. I find that

some sources of funding have already been identified, e.g. an increase in the precept by the Parish Council and capital funding from PWLB. I find that it is not necessary to identify all the potential sources of funding, the precise amounts of funding available or exact details of the costings at this stage.

48. I have considered the decision of *Haddon Property Development Ltd v Cheshire East Council and Wychwood Community Group* CR/2015/0017. I find that the present appeal can be distinguished from the facts of that case because in the Haddon case there was an existing temporary grant of planning permission and in the particular circumstances of the case Judge Lane found that the requirements of s. 88(2)(b) were not satisfied because the existing clubhouse was an unauthorised development that should have been demolished in compliance with the planning condition and he concluded that in these circumstances “its future must be viewed as highly precarious.” I find that the facts of Haddon are not comparable or applicable to the present case where no planning permission has been granted.
49. I have considered the decision of *Spirit Pub Co Ltd v Rushmoor Borough Council and Another* CR/2013/0003. I find that the present appeal can be distinguished on the facts because in the present appeal planning permission has been applied for and refused.
50. The Appellants submitted that even if a decision were made to sell the Land the market value would be so high as to make the purchase by the Second Respondent an unrealistic option. Different figures were put forward about the possible valuation of the Land. It was submitted that it was likely that the Land would be placed on the market for at least £1.7 million on the basis of other similar sales.
51. No professional valuation has been lodged and I am unable to make a finding as to the valuation of the Land on the basis of speculation. The Appellants have not indicated that there is a present intention to sell the Land and the Second Respondent has not put forward any plans for raising any finance. However, this does not mean that this is not a realistic option. Ms Escombe submitted she was confident that with the level of local support and enthusiasm it would be possible to raise the necessary finance and if the ACV were confirmed the Second Respondent would have sufficient time to do so. I find that the ability of local communities to raise funds and the enthusiasm to do so cannot be underestimated.
52. Ms Davies invited me to consider confirming the listing of the clubhouse only and separating it from the Land as a whole. I consider this would not be appropriate on the basis that the requirements of s.88(2)(a) and (b) are satisfied in relation to all of the Land and, in particular, there is a realistic future use for the whole of the Land.
53. The appeal is dismissed. The Land was correctly listed as an AVC.

**Tribunal Judge J Findlay**

**DATE: 16 March 2022**