



NCN: [2022] UKFTT 495 (GRC)

Tribunal Reference: CR/2022/0002

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

Before

TRIBUNAL JUDGE SIMON BIRD QC

Between

**(1) WAQAS SHAHID ALI
(2) SAMINA SHAHID ALI**

Appellants

and

ROTHER DISTRICT COUNCIL

Respondent

Representation:

For the Appellants:

Mr Waqas Shahid Ali

For the Respondent:

Mr Christopher Cant instructed by Mr Christopher
Crichton solicitor to Respondent

Mr Martin Johnston the Respondent's Chief
Executive

DECISION AND REASONS

A Introduction

1. The Localism Act 2011 (“the Act”) requires local authorities to keep a list of assets (meaning buildings or other land) which are of community value. 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, a sale cannot take place for six months. The intention is that this period, known as “the moratorium”, will allow the community group to come up with an alternative proposal. However, at the end of the moratorium it remains up to the owner whether the asset is sold, to whom and at what price. There are arrangements for the local authority to pay compensation to an owner who loses money in consequence of the asset being listed.

B Legislation

2. Section 88 of the Act provides, so far as is material to this appeal:

“(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 a non-ancillary use of the building or other land which will further (whether or not in the same way as before) the social wellbeing or social interests of the local community”.*

C The Nomination and Listing

3. This appeal concerns woodland at Kites Nest Wood and Wet Wood, Bexhill-on-Sea TH39 4RH (“the Woodland”).
4. On 22 April 2022 the Little Common Woods Association nominated the Woodland for inclusion on the Respondent’s List of Assets of Community Value (“LACV”).

5. On 9 September 2021 the Respondent determined that the Woodland should be included on its LACV and this decision was affirmed, following a review, on 31 January 2022.
6. The Appellants appealed to the Tribunal by notice dated 24 February 2022.

D The Appeal Hearing

7. I conducted a remote hearing on 28 July 2022.
8. As to my approach to this appeal, in accordance with decision of the Upper Tribunal in Admiral Taverns v Cheshire [2018] UKUT 15 (AAC), it has taken the form of complete reconsideration of whether the Woodland should be included on the LACV.
9. In reaching a decision, I have had regard to all the written evidence and submissions comprised in the appeal bundle, the supplementary bundle and the oral evidence of the First Appellant and of Mr Malcolm Johnston on behalf of the Respondent. I have also had regard to a Memorandum dated 18 August 2021 (“the Memorandum”) from Mr Samuel Batchelor, the Council’s Officer responsible for administering applications for listing of assets of community value, to Mr Johnston, which was supplied at the hearing having been referred to in evidence. I have also had regard to the planning history of land at Barnhorn Green, Bexhill which was supplied by the Respondent at my request, that land having been referred to by the First Appellant in his submissions.

E Background

10. The property as included on the Respondent’s LACV, comprises woodland at Kites Nest Wood and Wet Wood. The Woodland is the subject of an area tree preservation order, The District of Rother (West Wood & Kites Nest Wood, Cooden, Bexhill Tree Preservation Order 1990 (“The TPO”). The TPO provides that except with the consent of the Respondent and subject to the limited exemptions provided by it, no person shall cut down, top, lop, uproot, wilfully damage or wilfully destroy or cause or permit the cutting down, topping, lopping, uprooting, wilful damage or wilful destruction of any tree comprised in a woodland as specified in the First Schedule.
11. The use of the Woodland is also the subject of obligations and restrictions contained in an agreement entered into on 24 January 1983 between the

Respondent and the then owners of the land. This agreement was entered into under section 52 of the Town and Country Planning Act 1971 and section 33 of the Local Government (Miscellaneous Provisions) Act 1982 (“the Agreement”) and it was expressly made with the intention that its covenants would be enforceable by the Respondent against successors in title to the then owner (Clause 3). The owners covenanted that the Woodland would be permanently subject to the restrictions and provisions in Schedule 2 to the Agreement namely:

“(a) At all times hereafter to conserve as woodland the said property in accordance with established good forestry practice substantially in its existing form

(b) The public shall have full and free rights of access at all times on foot only within the said property provided always that subject to the prior written consent of the Council such areas as may in the interests of good forestry management be required to be closed off from public access may be so closed temporarily from time to time for reasonable periods

(c) All existing fences or hedges as are now within the said property shall forthwith be removed so that there shall be no impediment to the exercise of such rights of public access

(d) Public access shall be gained by way of entry from the west at point ‘A’ on the said plan and by way of entry from the east at point ‘B’ on the said plan and also at such other points as may within twenty-one years from the date hereof be defined by the Council having regard to the layout of the future development of adjacent land

AND such public entry points shall be formed or re-formed by the Owners and thereafter maintained in proper condition to the approval of the Council”.

12. The Little Common Woods Association (“the Association”), which nominated the Woodland for inclusion on the LACV, is an Association which was formed by local residents “*to protect and preserve the woodlands in the area in particular of Kite’s Nest Wood and Wet [W]ood*”. Its Constitution provides that it shall be a not-for-profit unincorporated association with membership open to all local residents, organisations and firms who support its aims. The Constitution further provides that its funds may be used only to further its aims and objectives and that, in the event of dissolution of the association, any remaining assets are to be distributed to bodies with similar objectives to those of the Association.

13. The nomination form as completed by the Association states that the Woodland is classified as Ancient Woodland and it has been used by the local community for decades. It states that the benefits are multi-generational and that parents, grandparents, children and dog walkers, rambles and nature lovers have enjoyed the Woodland discovering wildlife, flora and fauna along the footpaths and smaller tracks that weave within them. The Association goes on to state that the Woodland is used all year round by residents going for dog walks and taking their children for nature walks and, with a public footpath running through the Woodland and adjacent fields, it is also used by rambles. The Association also states that the Woodland was particularly busy during the first Covid lockdown.

F The Issues

14. It was agreed at the hearing that the main issues raised by the appeal for the Tribunal to determine were:
 - (a) Whether the nomination made by the Association was a valid nomination;
 - (b) Whether there is an actual current use of the Woodland which is not an ancillary use which furthers the social wellbeing or social interests of the local community as required by section 88(1)(a) of the Act; and
 - (c) Whether it is realistic to think that there can continue to be a non-ancillary use of the land which will further (whether or not in the same way as the current use) the social wellbeing or social interests of the local community as required by section 88(1)(b).
15. The First Appellant has raised a number of issues relating to the motive of the Association in making the nomination, the motivation of local Ward Councillors in supporting the inclusion of the Woodland on the LACV and the motive, delays and other procedural failings in the Council's consideration of whether to include the Woodland on the LACV. He has also alleged that the Council's inclusion of the Woodland on the LACV is part of what is, in effect, a wider conspiracy to force him to sell the Woodland and to benefit from developing it at some stage in the future.
16. The Tribunal is exercising an original rather than a supervisory jurisdiction in determining this appeal. Given that I am considering for myself on a full re-consideration whether the inclusion of the Woodland is justified having regard to the statutory requirements, it is not necessary for me to make findings in relation to the First Appellant's claims in order to determine this appeal save to the extent that they bear on the credibility of the evidence that I have before me.

17. In relation to that, whilst I share the First Appellant’s concerns in relation to what may have motivated one supporter of the Association’s Facebook page to amend her Facebook page to refer to the name of himself and his wife, I have seen no evidence which would support the contention that the Association’s nomination of the Woodland for inclusion on the LACV was itself motivated by racial prejudice or any other improper motive or that any such issue played a part in the support of the local Ward members for the listing of the Woodland. The level of engagement by local Ward members was, in my experience, typical of ward member involvement in such matters and, in a process in which the decision on the nomination is taken by a senior officer of the Council by applying the statutory tests to the facts, not in any sense improper.

18. Further, there is no evidence before me which would support the claim that the Council’s handling of and decision on the LACV nomination was influenced by any improper motive. There were delays in responding to correspondence from the Appellants, some of which were very lengthy, and it is very regrettable that the Association’s nomination and supporting documentation were not sent to the Appellants in April 2021 when they were notified of the listing. This procedural failing was then compounded by fact that the Respondent’s attempt to remedy it led to a blank nomination form being sent to him in November 2021. The result was that it was not until after the making of the appeal that the Appellants had sight of the Association’s nomination. That was very unfortunate. However, the Respondent’s Chief Executive gave evidence as to the difficulties facing the Council in 2021 due to COVID and I am satisfied that the procedural failings were the product of those difficulties as opposed to any other motive as alleged by the First Appellant.

G Issue 1 - Whether the nomination made by the Association was a valid nomination

19. Section 89(1)(a) of the Act provides that land may be included by a local authority on its LACV only in response to a “*community nomination*” and this 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-

.....

(iii) by a person that is a voluntary or community body with a local connection”

20. Under regulation 4(1) of the Assets of Community Value (England) Regulations 2012 a body other than a parish council has a local connection if its activities are wholly partly concerned with the local authority’s area or with a neighbouring authority’s area of that of a neighbouring authority. Under Regulation 5(1)(c) a “voluntary or community body” is defined for the purposes of section 89(2)(b)(iii) as meaning:

“an unincorporated body –

- (i) whose members include at least 21 individuals, and*
- (ii) which does not distribute any surplus it makes to its members”*

21. Regulation 6(1) sets out the required contents for a community nomination:

“(a) a description of the nominated land including its proposed boundaries;

(b) a statement of all the information which the nominator has with regard to-

(i) the names of current occupants of the land, and

(ii) the names and current or last-known addresses of all those holding a freehold or

leasehold estate in the land;

(c) The nominator’s reasons for thinking that the responsible authority should conclude that the land is of community value; and

(d) Evidence that the nominator is eligible to make a community nomination”.

Appellant’s Submissions on Issue 1

22. The First Appellant contends that the nomination form as submitted did not contain evidence that the Association was eligible to make a community nomination and that the list of members was added subsequently by the Respondent by way of “*backdating*”, which itself had failed to provide evidence, or at least reliable evidence, that the Association was eligible to make a community nomination for the purposes of the Act and Regulations. The First Appellant argues that Mr Johnston gave inconsistent evidence as to the checking of the list of the Association’s members against the electoral

register; first saying that he had reconciled the list with the register himself and then saying that he had relied on others to check.

23. The First Appellant further argues that the Respondent's failure to decide whether to include the Woodland on the LACV until 9 September 2021 when it should have made its decision by 17 June 2021, invalidates the nomination. He states that he was informed by the Respondent's staff in June 2021 that the nomination was no longer valid and had been taken off the Respondent's system.

Respondent's evidence and submissions on ground 1.

24. The Respondent's Chief Executive, Mr Johnston, who was responsible for making the initial decision to include the Woodland on the LACV, gave evidence that the nominators listed in the Association's nomination were on the electoral roll at the date of the submission of the nomination and that he had confirmed that this was the case. He had spoken to the Electoral Services Manager who had returned a "confirmed" list. The Electoral Services Department would have no interest in doing anything other than confirming the correct factual position. As far as he was aware, the nomination form was received by e-mail and he could think of no reason why anyone might have attempted to "backdate" it.
25. In submissions on behalf of the Respondent, Mr Cant submitted that given the Association's 140 members, it was reasonable to infer that at least 21 were local members. The Association's Constitution was worded such that it met the statutory requirements for eligibility for nomination for listing as a voluntary or community body. Its aim was to protect the Woodland, it was not-for-profit association, its finances could only be used in furtherance of its aim and objectives and, on dissolution, any remaining assets had to be distributed to bodies with similar objectives.
26. As to the delay in the deciding on the Association's nomination, Mr Cant submitted that this did not have the effect of invalidating the nomination and the Respondent remained under a duty to decide whether or not the Woodland should be included on the LACV notwithstanding the expiry of the 8 week period. The delay was regrettable but had not caused any prejudice to the Appellants.

First Main Issue – Tribunal's Findings

27. Although the Appellant sought to cast doubt on the impartiality and credibility of Mr Johnston, I found him to be a fair and credible witness. He explained that whilst he knew one of the driving forces behind the Association (Mr Chris

Ashford) and had done for some 10-12 years, the relationship was purely professional and related to Mr Ashford's community activities. Mr Ashford was a well-known member of the local community, as Chair of the League of Friends for the Hospital and also being involved with St Mary's Woodland. Similarly, whilst Mr Johnston followed Mr Ashford on Facebook, that was in his capacity as Chief Executive of the Respondent and because it benefitted him in his role as Chief Executive, with Facebook being used to disseminate information. He did not recall ever having "liked" any of Mr Ashford's posts and had never exchanged private messages with him.

28. Mr Johnson explained that COVID had had a major impact on the Respondent's processes, with the absence of day to day interaction, and staff falling ill. He also explained that Mr Batchelor, whose role included dealing with nominations for inclusion on the Respondent's LACV, was also one of the Respondent's planning officers and was responsible during the relevant period for trying to clear a significant backlog in planning applications.
29. I accept Mr Johnson's evidence and no evidence was presented by the Appellant to dispute it. There is in particular no support in any of the evidence before me for the suggestion that Mr Johnston was a personal friend of Mr Ashford, that the Respondent itself might have had development aspirations for the Woodland or that it might, in some way, have "created" evidence to remedy any deficiencies in the Association's nomination as made. Whilst I accept that it is very unfortunate that the Respondent failed in accordance with its normal practice to supply a copy of the Association's nomination form to the Appellants until after they had lodged the appeal, I do not consider that the Respondent's procedural shortcomings provide any support for what the First Appellant sought to portray effectively a web of conspiracy.
30. As to the substance of the first issue, I am satisfied that the Association's nomination was a valid nomination. The Respondent's Electoral Services Department checked the 27 named members of the Association against the electoral register for January 2021 and confirmed to the Respondent's Chief Executive that all those named were on the Electoral Register for the District. Whilst I accept that it is always possible that a mistake may be made in undertaking a cross check of this kind, I do not consider it plausible that the Electoral Services Department might have erroneously concluded that as many as seven of the identified members of the Association were resident in the District as at January 2021 when they were not. I am satisfied that it is more likely than not that at the relevant date, the Association has at least 21 members who met the local connection requirement.
31. I am also satisfied that the failure of the Respondent to make its decision on the nomination within the eight week period prescribed by regulation 7 of the

Regulations did not invalidate the nomination. The purpose of that Regulation is to give the nominating body the right to seek a mandatory order to compel a local authority to decide whether to include land on its LACV in circumstances where it fails to do so within the eight week period. It does not operate to deprive the local authority of jurisdiction to decide on a nomination once the eight week period has passed. It would be a strange result if the statutory scheme was interpreted as allowing a local authority to frustrate a nomination by simply not making a decision in time and it would be pointless to require a nominating body to re-submit a nomination in such circumstances simply in order to re-start the process. I interpret the requirement as being directory in that it tells the local authority what it must do, that the duty to determine is enforceable by the nominating body, but that a failure to do so does not invalidate the relevant nomination.

32. I note that the Appellants were told in or about June 2021 by its staff that there was no record of an extant nomination before the Respondent, however, an informal statement of this kind cannot affect the validity of an otherwise valid nomination. Such a representation is not capable of binding a local authority to refrain from the exercise of a statutory duty to the detriment of the nominating body.
33. For completeness, I should also add that I am satisfied that the Respondent's failure to provide the Appellants with the Association's nomination does not invalidate the nomination. The Regulations require only that a land owner is informed of the fact that a local authority is considering listing (Regulation 8). The Respondent's letter of 27 April 2021 strictly complied with that requirement. Whilst it is good practice, and indeed I was told, the Respondent's normal practice, to provide land owners with a copy of the nomination form, there is no requirement that it should and a failure to do so cannot, in my view, invalidate a nomination. That said, it is very regrettable that the Appellants did not receive the nomination until after they had made this appeal and the result is the obvious mistrust of the Respondent by the Appellants.

H Issue 2 - Whether there is an actual current use of the Woodland which in not an ancillary use which furthers the social wellbeing or social interests of the local community as required by section 88(1)(a) of the Act

The Submissions on behalf of the Appellants

34. The Appellants dispute that the land has a qualifying use and that it has had such a use for decades. If there were, a nomination would have been made

before now. There is no photographic evidence, no social media posts or emails to support the claimed use which would provide tangible evidence of the Woodland being used for social or recreational purposes of the kind one would expect to see provided if land were genuinely being used for such purposes. That may be contrasted with the evidence of the usage of the woodland at St Mary's. There is simply no evidence to support the listing.

35. In his answers in cross examination the First Appellant stated that he acquired the Woodland in 2018 and had visited twice a year since then.
36. In answer to questions from the Tribunal, the First Appellant stated that there was some fencing to the land but this did not prevent public access. However, not many people used the Woodland; only one or two people and there are signs of fires and barbecues which are not allowed.

The Respondent's evidence and submissions

37. Mr Johnson stated in evidence that he had not himself visited the site and that he had relied on the Memorandum provided to him by Mr Batchelor and which stands as the initial internal decision of the Respondent to include the land on the LACV. The Memorandum states under the heading "Site":

"The woodlands are dense but there are a number of well-trodden footpaths that weave throughout.

38. Under the heading "Appraisal" the memorandum includes the following:

"...assessing the nomination it was clear from visiting the site that the woodlands are well used.

....

Not only are there public rights of way through and around the land, there are a number of well-trodden informal paths showing access to [the] woodland are made regularly".

39. Mr Cant submitted that the ACV regime is not prescriptive as to the evidence which must be supplied to support a nomination. There was no requirement for a separate witness statement or specific types of evidence. It was left to the nominator or lay person to put forward the justification which should be received in good faith. The local authority was not intended under the regime to be an investigator; it acts on the basis of the evidence it has and on what is supplied in the nomination.
40. The Woodland is to a large extent Ancient Woodland which is an important asset for the community and, through the Agreement, steps have been taken

to ensure that it is available for the local community. The Association's nomination is not expansive but it provides evidence of activities occurring which has the ring of truth about it in COVID times. The usage is supported by the representations made by the local ward councillors in support of the listing. There is no requirement for evidence of "communal activity" of the kind the Appellants argue for. The users of the Woodland are there for walking, exercise and exploring nature; for individual activity and not necessarily as a local community. That does not diminish the case for listing as shown by Banner Homes Ltd v St Albans District Council CR/2014/0018, , Oliver's Battery Ltd v Winchester City Council CR/2019/0001 and Trustees of the Duke of Northumberland Charity v Hounslow LBC CR/2016/0007.

Second Main Issue – Tribunal's Findings

41. I do not wholly accept the characterisation of the ACV regime as contended for by Mr Cant. Under regulation 6(c), the nominator is required to provide its:
"...reasons for thinking that the responsible authority should conclude that the land is of community value".
42. In my view, that does place an onus on the local authority to explore those reasons and to decide whether it has been provided with sufficient evidence of the community value to meet the requirements, in this case, of section 88(1). Whilst the Association's nomination provided some evidence of the community value of the Woodland, it was as the Respondent accepts "*not expansive*". Further, whilst the public have an entitlement to access to the Woodland under the Agreement, That is not evidence that as a matter of fact they do access it, to what extent they access it or for what purpose they access it.
43. The support for listing provided by the local ward members, when the detail of what was said is considered, adds little material to what is contained in the nomination. An e-mail from Councillor Errington of 9 May 2021 speaks of the Woodland having "*a lot of potential, in addition to current usage*" and refers to its location enabling "*a large number of the population to "walk to the woods" rather than getting in their cars*" and points to the number of people who had joined the Association as indicating how much the Woodland is currently used. None of this provides first hand evidence of actual use.
44. However, Mr Batchelor did visit the site, as the Memorandum shows. Whilst the date of that site visit is not recorded and there is no accompanying photographic evidence, the extent of the well-worn paths which he observed "*throughout*" the Woodland and his conclusion that these confirmed the description within the Association's nomination, are in my view sufficient for

me to conclude that it is more likely than not that the Woodland as a whole is used by the local community for recreation principally for enjoying woodland walks on the *informal paths* (the public right of way has a main use as a public thoroughfare and I exclude its use as supporting the nomination). That in my view is not an ancillary use of the Woodland there being no evidence of any other use to which the Woodland as a whole is put or that the public recreational use is a subordinate use. The evidence of Mr Batchelor's site visit can be said to confirm the content of the nomination.

45. Whilst the late production of the Memorandum led the First Appellant to contend that it had been fabricated by Mr Johnston to support the Respondent's finding, I reject that. There is no evidential basis for that assertion and, whilst the Memorandum could and should have been provided earlier, I accept Mr Johnston's evidence it was produced in or about August 2021 and before the initial decision to include the Woodland on the LACV.
46. In my view, the use of the Woodland for recreational walks is a use which can be said to further the social well-being of the local community. Whilst the use might not involve organised communal activities of the kind which the evidence suggests are undertaken at the woodland at St Mary's, it is not a requirement of a use which furthers social wellbeing that it should involve organised communal activities. The social wellbeing of a local community can be furthered by individual and family recreational activities undertaken by members of a local community which provide the opportunity for random interaction. That is consistent with the Tribunal's decision in the Banner Homes case.
47. As to the timing of the making of the nomination and the First Appellant's claim that this supports the inference that the Woodland has no qualifying actual use, I do not agree. From all that I have seen, it is far more likely that it was the making public of the Appellants' development aspirations for the land which led to the nomination being made when it was. Up until that point, I can well see how the local community would have felt that Agreement and the TPO adequately protected the recreational use which I have concluded was being made of the Woodland.
48. I am therefore satisfied that the Woodland has an actual use which furthers the social wellbeing of the local community for the purposes of section 88(1) (a) of the Act.

I Issue 3 - Whether it is realistic to think that there can continue to be a non-ancillary use of the land which will further (whether or not in the same way as the current use) the social wellbeing or social interests of the local community as required by section 88(1)(b).

Submissions on behalf of the Appellants

49. The First Appellant submitted that the land immediately adjacent to the Woodland has been covered by a TPO and had no access and yet the Respondent had approved 100-300 units because of the high demand for housing and its inability to demonstrate that it had a five year supply of housing land. The Woodland was immediately adjacent to the settlement and it would make no sense to develop a new hamlet as opposed to extending the settlement edge. Development of the Woodland would be comparable to the development of the adjacent site which the Respondent had approved. In a few years' time, the Respondent will need to find additional sites for housing such as the Woodland which would provide social and affordable housing.
50. Irrespective of who owned the Woodland in the future, whether that is 5 to 10 years, it would be developed for housing and the Appellants' propose 100 units of housing, including 40% affordable housing. Of the 17.5 acres of Woodland, only 12 acres was in fact Ancient Woodland, leaving scope for residential development of the remainder. Whilst there was no planning application as yet, the Appellants had commissioned a planning report.

Submissions on behalf of the Respondent

51. On behalf of the Respondent, it was submitted that the use was a protected use and there was no reason why it would cease. There were two hurdles to housing development which would need to be removed the need for planning permission and the restrictions of the agreement.
52. There was no evidence that the removal of these constraints would occur as a matter of certainty and without the certainty, the "compliant use" as referred to by Lane J in R (oao T V Harrison CIC) v Leeds City Council [2022] EWHC 130 (Admin) cannot be found to be ruled out by a non-compliant use. The long line of First-tier Tribunal decisions starting with Patel v London Borough of Hackney CR/2013/0005 which found that there only has to be a possibility that the qualifying use will continue, for the requirement of section 88(1)(b) to be satisfied, was approved by Lane J in his judgment in T V Harrison.

53. Here that possibility exists and is protected by the Agreement. It is therefore realistic to think that it will continue. Whilst the Appellants might not wish that to be the case, that does not prevent the continuation of the use being a realistic possibility.
54. Section 88(1)(b) does not prescribe any period over which the qualifying use “*can continue*”. The period cannot be de minimis and it suffices that it is for a significant period. Here, even were a planning application successful, the current use will continue for some considerable period of time. There is currently no planning application and no certainty that one would succeed. A lot of work would be involved in making a planning application and any grant of planning permission would be some years in the future during which period the current use of the Woodland would continue.
55. As to the adjacent site, there is no suggestion that this was Ancient Woodland and here there was the Agreement restricting the use of the land. There was no indication that the Appellants had given consideration to how they would remove the restrictions and obligations contained in the Agreement.
56. In the circumstances, the possibility that the existing use of the Woodland would continue and that it would do so for a significant period which satisfies section 88(1)(b) is unanswerable.

Third Main Issue - Tribunal Findings

57. The statutory test of “*realistic to think*” as used in section 88(1)(b) has consistently been interpreted by the First Tier Tribunals as a low threshold, to be distinguished from higher thresholds, notably the “*balance of probabilities*”. “*Realistic*” does not mean “*most likely*”; it permits of a number of possibilities; see Evenden Estates v Brighton and Hove City Council CR/2015/0015). This approach now has the approval of Lane J in the T V Harrison case. In Carsberg v East Northamptonshire Council UKFTT CR 2020/004, Judge Findlay held that the term “*realistic*” meant having to show “*a sensible and practical idea of what can be achieved*”.
58. Whilst the Appellants clearly have development aspirations for the Woodland and has already commissioned a planning report and marketed the Woodland with development in mind, any planning application would face the considerable hurdle of the presence of Ancient Woodland within the Woodland. Further, no development could proceed without the Woodland being freed of the obligations and restrictions contained in the Agreement. In my experience, it is likely that, even if the Woodland were accepted by the Respondent to have any development potential, it would take a significant

period of time, measured in years and not months, for any such potential to be realised.

59. The First Appellant appears to recognise that any development proposals would be realisable only beyond the short term, with his reference to a 5-10 year period.
60. In my view on the facts, it is at least one of the realistic possibilities that the Appellants' development proposals will come to nothing and that the existing use of the Woodland by members of the local community will continue, protected as it is by the Agreement. It is also realistic to think that, even if those proposals were to find some favour with the Respondent, it would take well in excess of a year for them to progress to such an extent that the existing use could be brought to an end. That is a more than de minimis period of time and therefore, even on what I would regard as a best case assessment from the Appellant's perspective, the requirement contained in section 88(1)(b) is satisfied in this case.

J Conclusion

61. For the above reasons, I find that the requirements of section 88(1) are satisfied in respect of the Woodland and I therefore conclude that the appeal should be dismissed.

26 August 2022

JUDGE SIMON BIRD QC