



NCN: [2023] UKFTT 514 (GRC)

Case Reference: CR/2022/0006

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

**Heard by: CVP Hearing**

**Heard on: 16 January 2023  
Decision given on: 21 March 2023**

**Before**

**TRIBUNAL JUDGE FINDLAY**

**Between**

**SWINTON PARK GOLF AND COUNTRY CLUB 2017 LIMITED**

**Appellant**

**-and-**

**SALFORD CITY COUNCIL**

**Respondent**

**Appearances:**

**For the Appellant**

Mr S Choongh, Counsel  
Ms H Cotterill, Solicitor  
Mr N Mills, witness  
Mr J F Coxon, witness  
Ms A Juszczuk, witness

**For the Respondent**

Mr B Brett, Counsel  
Mr F Malik, Solicitor  
Ms A Shaw Legal Officer  
Ms A Stewart, witness  
Mr M Smith, witness

## **Decision**

1. The appeal is dismissed. The provisions of s. 88(2)(a) and (b) of the Localism Act 2011 (“the Act”) are satisfied in that there is a time in the recent past when an actual use of the Land (defined below) that was not an ancillary use furthered the social wellbeing or interests of the local community and 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.
2. The Land was correctly listed as an Asset of Community Value (“ACV”).

## **Mode of Hearing**

3. 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 open electronic bundle of 720 pages, heard submissions from Mr Choongh and Mr Brett and evidence from Mr Mills, Mr Coxon, Ms Juszczak, Ms Stewart and Mr Smith.

## **Background**

4. The Act requires local authorities to keep a list of assets (meaning buildings or other land) which are of community value. Once an 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.
5. The Swinton Park Golf Club, East Lancashire Road, Swinton (“the Land”) is the appellant and comprises 97 acres and consists of an 18-hole golf course, a greenkeeping compound, a clubhouse with a function suite and a large tarmac carpark with about 170 spaces. The appellant is the freehold owner of the Land. The appellant appeals the decision of the respondent to list the Land as an ACV. The golf course and clubhouse were closed on 30 September 2020.
6. I find that there is a restrictive covenant which places a restriction on a part of the Land that it is not to be used for anything other a golf club and golf course. The area of the Land covered by this covenant is approximately 23% of the whole.
7. There are ongoing discussions with a view to the restrictive covenant being removed.

8. Wain Estates Limited (“Wain Estates”) acquired the appellant on 6 April 2021.
9. There were two nominations which were accepted, and the Land was entered in the list of land of community value on 25 November 2019.
10. The appellant requested the respondent review the decision. The appellant made detailed representations. A report dated 21 July 2022 was upheld and the respondent made a decision to confirm the listing on 3 August 2022.

### **Relevant Legislation**

11. 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-

  - cultural interests
  - recreational interests
  - sporting interests

### **Grounds of Appeal**

12. The appellant submitted the following points:
- a) The Land should be removed from the respondent's list of ACVs because the tests set out in s. 88(2)(b) have not been met. The Land does not meet the requirements to be listed as an ACV because it is not realistic to think that there is a time within five years when there could be a non-ancillary use of the Land that would further the social wellbeing or social interests of the local community.
  - b) The golf club ran at a loss for a number of years with membership declining from 2011 to 2020. 64% of the club's income came from operations of the clubhouse. These operations ceased with the Covid-19 lockdowns. The club was not solvent at the time of its closure and acquisition by Wain Estates.
  - c) The re-establishment of a golf course use is not realistic. 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.
  - d) The Land has never been open to the public. Since the acquisition of the appellant by Wain Estates security at the property has increased with additional fencing, CCTV, and on-site security. In that context it is not realistic to think that any other community use of the Land could be established in the next five years.
  - e) There is no statutory definition of 'realistic'. On the basis of the case law, it has been established that although a business plan is not required to establish a realistic prospect there must be some sensible proposal on the part of those who maintain the community use can continue in the future.
  - f) The submissions of the nominators do not demonstrate a sensible or practical idea of what can be achieved in seeking to purchase the Land.
  - g) The appellant has provided detailed information as to why use as a golf club cannot continue and the appellant has confirmed that it has no intention of reinstating the property as a working golf course.
  - h) As a commercial developer the appellant's parent company has no interest in running a golf club. The appellant's intention is to develop the Land.
  - i) The Land has a considerable financial value. The appellant paid £3,200,000 in April 2021 and the estimate that in the current market the Land would demand over £1,000,000 per net developable acre if sold with planning permission for residential development. Accordingly, only those with development intent could possibly raise such funds to purchase the Land rather than a local community group.
  - j) The nominators have provided no evidence of any steps that have been taken to raise the funds necessary to make a bid for the Land and refurbish the 18-hole golf course and the clubhouse. The fundraising attempts appears to show that the community interest is low. No information has been produced to show how the golf club could be brought back into viable operational use in its current form. No sensible or practical proposals have been put forward as to how any community use could be restored to the Land whether as a golf course or some other community use. It is clear that substantial funds would be needed and this would require massive community interest or at least people involved who have the relevant experience to raise significant funds.

- k) The Land has ceased to serve any purpose furthering the social wellbeing or interests of the local community almost two years ago and public access is barred. The appellant has no intention of permitting any such use in the next five years.
- l) The Decision Record of the review is little more than a rubber stamp of the original decision and does not deal with the substantive points raised by the appellant or provide any reasoning as to why the decision was upheld. The respondent's officer should have considered the evidence put forward by the appellant as part of the review process. The review proceeded in a legally erroneous manner.
- m) Any planning application submitted by Wain Estates will need to be considered on its own merits on the basis of the specific scheme put forward and in light of the latest evidence. If the application is dismissed on appeal any shortcomings capable of being overcome by an alternative scheme will form the basis of a fresh application which will then go through the same process and to appeal if necessary. Even if the process results in failure Wain Estates will promote the site through the development plan process and given the sums expended it is highly unlikely to give up its ambitions until the Land has been promoted through at least two rounds of the development process.
- n) Wain Estates is a well-established land and property developer with a team of qualified experts advising on planning, technical and legal issues related to the purchase and development of sites. Wain Estates purchased the appellant company with a long-term view to developing the Land in order to realise its investment potential. While it is accepted that there is no guarantee that the Land will secure planning permission it is fanciful to suggest that Wain Estates would have purchased the Land had there not been reasonable prospects of securing planning permission for a type and quantity of development that would justify the considerable sum paid for it.
- o) The respondent seeks to rely on the restrictive covenant in the conveyance dated 31 March 1992 between Peel Investments (North) Limited and Swinton Park Golf Club Limited. The covenant prevents residential development and residential use of part of the Land for 79 years until 2071 and restricts occupation of that part of the Land to use as a golf club and golf course. Wain Estates has obtained legal advice on the prospects of removing the restrictive covenant and the Land was purchased with the benefit of that advice. The restrictive covenant is not an issue and discussions are underway to have it discharged.
- p) The appellant will pursue the processes and even if planning permission is granted in the next five years the processes themselves will not be exhausted in the next five years.
- q) Given the purchase price it is fanciful to suggest that the appellant will abandon the planning process in the next five years and re-open the Land for community use or dispose of the Land at a price that reflects a social or recreational use only. It would not be commercially prudent for Wain Estates to sell the Land within the five-year period for less than half the price it was bought for in 2021 when other options in line with its business plan will take considerably more than five years to fully explore and exhaust.
- r) It would make no sense for Wain Estates to re-open the Land because it would

not accord with its strategy of promoting the Land for residential development and there is no financial necessity to do so. Significant funds would be required to refurbish the golf course and clubhouse. It would be financially nonsensical for Wain Estates to spend money on the Land to make it fit for some temporary community use that in all likelihood would not even generate enough income to justify the expenditure.

- s) The appellant accepts that there is a possibility that planning permission may not be granted within the five-year period but it does not follow that Wain Estates will sell the Land within the five-year period for a price that will facilitate someone else to deliver a community use on the Land.
  - t) The Land should be removed from the respondent's list of Assets of Community Value.
  - u) If the appeal is successful, the appellant seeks an order for costs against the respondent in relation to its legal expenses connected with opposing the respondent's decision. The right to costs flows from a successful appeal and is independent of the respondent's conduct or changing circumstances since the listing of the Land.
13. Mr Choongh sought to rely on the evidence of Mr Mills and Mr Coxon to establish that the Land was purchased with the aim of promoting it through all avenues of the planning process by an experienced and sophisticated company that knows the land promotion industry and in the knowledge that the process can take many years and certainly more than five years. He submitted that it is unrealistic to conclude, knowing the world of land promotion that the Land will revert to a use that will entail a massive financial loss unless and before it is fully satisfied that all reasonable avenues and prospects of securing planning permission have been exhausted. This will take longer than five years.
  14. Mr Choongh has sought to establish that the expenditure required to restore the Land to its previous use as a golf course and clubhouse is so high that it would not be viable.
  15. Mr Choongh has sought to establish that it cannot be said that public open space or other recreational facilities will ever be provided on the Land. The need for such facilities would be addressed through a financial obligation and provided off-site.
  16. Mr Choongh has sought to establish that even if a part or parts of the Land may be provided for purposes which would satisfy section 88(2)(b) to satisfy the test the test must apply to the whole of the Land. In a redevelopment scenario the majority of the Land would not be available to be used for purposes that would further the social wellbeing or social interests of the community.
  17. Mr Choongh has sought to establish that even if public open space or recreational facilities were to be provided on the Land pursuant to planning conditions or s.106 obligations this would not happen within the next five years. Even if planning permission were to be granted within 2-3 years it would be several years after that before development commenced and several years after that before any public open space or recreational facilities could be in use.

18. Mr Choongh argued that any open space or recreational facilities provided would be non-ancillary to the purpose of the Land because the primary use would be residential.
19. He submitted that the purpose of the ACV regime is to protect existing buildings and other land and not to protect potential future open space and/or recreational facilities provided through planning conditions and/or s.106 obligations.

### **Grounds of Opposition**

20. The respondent submitted the following points:
  - a) The appellant's case is misconceived.
  - b) The expressed intention of the appellant, while one among a number of relevant factors, cannot be determinative of the question of whether or not there is a realistic prospect of future qualifying use.
  - c) There are considerable planning constraints on the Land and the principle of residential development of the Land is not currently supported by the Council.
  - d) The planning position is an important factor when considering the non-fanciful possibilities for the use of the Land within the five-year period.
  - e) It cannot be said that there is such a strong probability that the appellant will realise its intentions to develop the Land that this excludes and makes fanciful any other possibility for a qualifying purpose.
  - f) There is a realistic prospect that the appellant would not be granted permission for residential development on the Land within the next five years and even if permission were granted any development would inevitably be required to provide a considerable quantum of open space, recreational facilities and replacement community facilities amounting to qualifying use.
  - g) There are constraints and obstacles with the planning application process for the appellant because planning decisions are required to be taken in accordance with the applicable development plan (unless material considerations indicate otherwise), the emerging development plan and the National Planning Policy Framework which give strong protection to recreational land including golf courses.
  - h) Even if an application planning permission successfully demonstrated that the Land was surplus to golfing purposes the appellant would need to demonstrate that the Land as a whole would be surplus to use for all other sports and recreational uses and would be incapable of meeting the Council's recreational standards set out in National Planning Policy Framework.
  - i) The appellant's plan to bring forward the Land for residential development does not exclude the likelihood that large parts of the Land in accordance with planning policy would be required to be set aside for open space or recreational

space for the use of new inhabitants of the residential development to create green infrastructure to link the Land with adjacent open spaces, to provide areas for sustainable drainage, ecological improvement and biodiversity net gain.

- j) The appellant's stated intentions are speculative. Wain Estates Ltd would have purchased the appellant company after due diligence which would have shown the difficulties that would be encountered in seeking to develop the Land.
- k) The intentions of the appellant are significantly constrained by the restrictive covenant. The appellant is constrained from undertaking any development on a large proportion of the Land until 2071 without discharging the covenant and the restriction is significantly adversely affecting the viability of development across the rest of the Land. The restriction calls into question the appellant's ability to develop an appropriate quantum of development thereby further reducing the prospect of the grant of planning permission.
- l) It is not necessary to establish that the nominators are capable of purchasing the Land at all or for any particular purpose.
- m) It is not unrealistic to think that the appellant would wish to do something with the Land which could include a disposal of the Land.
- n) There is a higher than normal demand for golf in this area and the Pandemic has resulted in a considerable increase in interest in and engagement with sport. The Land is viable as an 18-hole golf course notwithstanding the appellant's previous financial difficulties.

## **Evidence**

### **Ms Juszczuk**

- 21. Ms Juszczuk, Director at Roger Hannah Ltd, has over thirteen years of specialist experience in the valuation of commercial and residential properties in the North-West of England. She stated that she had no experience of golf courses in Manchester and her opinions and estimates were on the basis of limited examination. She stated that she was not an expert in relation to golf course management and maintenance.
- 22. She stated that it was not within her expertise to question the opinion of Mr Smith. She confirmed that lifestyle purchasers are typically individuals who have a passion for the game and not driven by the level of commercial return available from the business and other motive factors can be important.
- 23. Ms Juszczuk provided very detailed and a useful description of the Land and provided estimates in her witness statement.
- 24. Ms Juszczuk admitted that she was not an expert in the costs associated with putting a disused golf course back into operational use. Her estimate was that the total cost for the renovation work of the clubhouse and land would be £1,200,000.

### **Mr Mills**



25. Mr Mills, Strategic Planning Manager at Wain Estates Limited, gave evidence to establish that the possibility of the future use of the Land for a qualifying purpose within the five-year period was fanciful.
26. Mr Mills explained that the business strategy of Wain Estates is to acquire land that has long term potential for development or investment and to work with local authorities and stakeholder to initiate considered development solutions prior to submitting planning applications. He explained that the time between the purchase of land and securing planning permission could be considerable.
27. Prior to purchasing the appellant company on 6 April 2021 Wain Estates undertook the normal tried and tested due diligence procedure detailed in paragraphs 9 to 12 of Mr Mills' witness statement dated 14 November 2022 and which appears with exhibits at pages 87 to 111 of the bundle.
28. Mr Mills stated that Wain Estates was currently considering the potential options and a decision had not yet been reached on the proposals for redevelopment and there was no set timeframe for making this decision.
29. Mr Mills stated that as a privately owned company Wain Estates had flexibility to take a slow approach to the development options and that Wain Estates would work closely with the respondent when this was appropriate.
30. Mr Mills stated that Wain Estates had no interest in running a golf club or selling the Land for a golf club use. The intention is to develop the Land for alternative uses with residential development being the most likely use.
31. Mr Mills gave examples of other sites in the Wain Estates' portfolio to illustrate the timescales involved. One example was of the purchase 8 years ago of 67 acres of agricultural land within the Green Belt where no planning application for redevelopment of the site had been submitted. A second example was of a site of 14.5 acres of agricultural land where no planning application for redevelopment of the site had been submitted in the five-year period since the signing of Planning Promotion Agreement ("PPA"). A PPA arises where land is sold and the landowner is paid following the grant of planning permission for redevelopment. A third example was of 27.9 acres of agricultural land within the Green Belt. A PPA was entered with the landowners in April 2014 and no planning application has yet been submitted.
32. Mr Mills explained that the examples were put forward to illustrate that Wain Estates were aware that it was sometimes necessary to hold sites for a considerable period of time to successfully negotiate the planning process and that the Land was purchase with that knowledge and the willingness to pursue a medium to long-term strategy.
33. Mr Mills explained in detail in his evidence and in his witness statement (paragraphs 32 to 41) that the planning permission route is lengthy and prolonged and that even if planning permission is refused there are still a number of other options to be pursued all of which would take significant time and significantly

longer than five years. Mr Mills set out in his witness statement the estimated time scales for an initial planning application, a revised planning application and for promoting the Land through the local plan process.

34. Mr Mills submitted photographs to illustrate that substantial costs would be required to restore the golf course to a playable condition and there is likely to be a backlog of work to drainage, trees, bunkers and water features. He stated that the clubhouse is in a poor state of repair. He stated that it would not make commercial sense for Wain Estates to invest any money in the Land given the strategy of securing planning permission.

#### Mr Coxon

35. Mr Coxon, Director of Emery Planning, gave the opinion that there was a realistic prospect of achieving planning permission for an alternative use on the Land subject to a suitable proposal and evidence which demonstrates compliance with the relevant policies. Mr Coxon has wide experience of dealing with planning applications and the promotion of sites through development plans in the North-West of England.
36. Mr Coxon gave the opinion that it will take a number of years to obtain planning permission and more years before development could commence and certainly more than five years before any open space would be delivered as part of an approved scheme or even if they would be required at all on the Land. Such facilities may be provided off site.

#### Ms Stewart

37. Ms Stewart, a Principal Planning Officer with the Planning Department, stated that there are significant constraints and planning issues which arise in relation to an application for the development of the Land for residential purposes. She identified the issues that would impact of the development of the Land and the number of units that could be accommodate on the Land.

#### Mr Smith

38. Mr Smith, a chartered surveyor specializing in UK golf property, stated that the golf market is in a strong and healthy position and in a better position than pre-Pandemic. He gave the opinion that had the golf course not closed and had the clubhouse remained in reasonable operational condition the golf club business would be financially viable.

#### Conclusions

39. I find that the nominations were valid. This is not in issue between the parties.
40. The task before me is to make a fresh decision standing in the shoes of the 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.

41. 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.
42. From its establishment in 1926 until February 2017 the Land was operated as a 'not for profit' private members' golf club. In the mid-1990s the clubhouse was rebuilt and Swinton Park Golf Club Limited was formed in order to raise debt finance for this purpose. In the years up until 2017 the company got into financial difficulty. In January 2017 an Extraordinary General Meeting of the company agreed to sell to a consortium of 21 existing members. The consortium's company was called Swinton Park Golf and Country Club 2017 Ltd, namely the appellant. The appellant took over operational control in May 2017.
43. I find that the conditions of s.88(2)(a) of the Act are satisfied in that there was a time in the recent past when an actual use of the Land which was not an ancillary use furthered the social wellbeing or interests of the local community. In reaching this decision I have taken into account that the use does not need to be a use which is open to the public at large or free of charge and that the golf course was in operation until 30 September 2020 which is in the recent past taking into account the length of time over which the Land has been used by the community. I find that there was community use of the Land notwithstanding that a payment was required for some of the use of the facilities. I have borne in mind that s. 88 of the Act defines 'social interests' as including cultural, recreational and sporting interests.
44. The only issue before me is whether the condition in s. 88(2)(b) of the Act is satisfied.
45. I have borne in mind that the test of s.88(2)(b) is that it must be realistic to think that the Land could be used for any purpose that furthers the social wellbeing or social interests of the community and it is not a requirement that the previous use of the Land has to resume for the condition to be met.
46. I have borne in mind that to be 'realistic' it is not necessary to find that the resumption of a use is likely or probable. It is required that the use of the Land for some qualifying purpose within 5 years is a possibility that is not fanciful.
47. I have borne in mind that that 'realistic' includes a number of possibilities and in order to be 'realistic' one possibility does not need to be more likely than the others.
48. I have borne in mind that in considering whether a possible future qualifying use is

'realistic' regard should be had to the stated intentions of the owner, but that intention is not determinative of the test in s. 88(2) of the Act. If the intentions of the owner were determinative a listing would only be possible with the consent of the owner which cannot have been the intention of the legislation.

49. I have borne in mind that it is not necessary for me to be satisfied that it is realistic that a person or body, including the nominators, would be capable of purchasing the Land if it were subject to a qualifying disposal.
50. In reaching my decision I have considered the reasons given by the respondent and have taken into account the evidence which was not before the respondent when the decision was made.
51. 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."*
52. 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.
53. I reject the appellant's assertion that the respondent's argument is based on nothing more than a mere assertion that within 5 year period Wain Estates will for some inexplicable reason either give up on its hope of securing planning permission and dispose of the Land at a massive financial loss or it will temporarily or permanently allow some community use to recommence on the Land despite the fact that there is no commercial incentive for it to do so.
54. I have taken into account that Wain Estates is a well-established developer which take a strategic approach to managing its investments and there is often considerable time between purchasing a site and applying for planning permission. I have taken into account that being a privately owned company Wain Estates takes a long-term commercial approach to development and if planning permission is not forthcoming on the first attempt it will continue to promote the site through the system for as long as it takes.
55. I have taken into account that the appellant has submitted that Wain Estates is not going to write-off its investment unless and until all hope of a redevelopment consent has been fully extinguished it will not give up on its ambitions within the five-year period.

56. However, just because Wain Estates has decided that it will apply its strategic approach to managing this investment in the same way as it manages all its investments does not mean automatically this precludes all other possibilities. I am not persuaded that the scenario detailed by Wain Estates is so likely to occur as to render any other scenario unrealistic and the Wain Estates' non-compliant scenario is, therefore, determinative.
57. I find that there are a number of realistic future uses of the Land. The appellant may further pursue an application for planning permission and be successful and proceed to develop the Land with or without some provision for community use of part of the Land. This process may take many years. Any application would be considered on its own merits on the basis of the specific scheme and the latest evidence then available.
58. I find that the appellant's application for planning permission may be unsuccessful at every stage and the appellant may decide to sell the Land notwithstanding its avowal not to do so.
59. I find that it is a possibility that the restrictive covenant may be lifted by negotiation.
60. I find that it is a possibility that the negotiations will not be fruitful and the restrictive covenant will remain.
61. I find that the economic situation may change for Wain Estates in line with the national economic situation and the appellant, despite the protestations to the contrary, may decide to consider other options for the Land which may include a sale which would permit community use.
62. I find it is realistic that a lifestyle purchaser may decide to put forward an offer to the appellant and such a lifestyle purchaser would pay a considerable sum for this golf course which has such an unusual and unique history and reputation. In reaching this decision I have borne in mind that the golf course was designed by James Braid who was a legendary golf course architect whose work has been influential and important in course design. The golf course is nearly 100 years old with an interesting and illustrious past and as such may be of particular interest to a lifestyle purchaser.
63. I find it realistic that a lifestyle purchaser may come forward who would wish to work with the local community to create a green space for all sorts of different community and recreational activities. In reaching this decision I have borne in mind the evidence of Ms Juszczuk and Mr Smith who both stated that lifestyle purchasers are individuals with means who have a passion for the game and are not driven by the level of commercial return available and are driven by other motives connected to the game of golf.
64. I have borne in mind in this regard that commercial viability is not the test and community use need not be and often is not commercially profitable.
65. In these uncertain economic times, I find that all the above are all realistic future uses of the Land. I find it significant that the demand for open spaces and

recreational facilities has become more valued since the Pandemic.

66. 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 appellant and that it is important not to confuse commercial viability with what community enthusiasm and innovation and a specialist investor with a large amount of capital might achieve together. The legislation does not require a detailed financial analysis or business case at this stage. It is enough to establish that such a use would be realistic.
67. 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.
68. 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 case planning permission has not been obtained.
69. I have considered whether even if a decision were made to sell the Land the market value would be so high as to make the purchase an unrealistic option. The appellant has submitted that this would be the case because to do otherwise would not make commercial sense. Different figures were put forward about the possible valuation of the Land with or without planning permission. I find that the features and circumstances of the Land are so unique that it would be impossible to put a valuation on the Land at the present time but that does not mean it is unrealistic to think that if the Land were to be put on the market a purchaser would not come forward. It is possible that the present value of the Land, without planning permission and subject to the restrictive covenant, is not dissimilar to the value when purchased by Wain Estates taking into account that the clubhouse and course have substantially deteriorated due to neglect by the appellant who has clearly failed to make adequate security arrangements as evidenced by the vandalism
70. The appellant has indicated that there is no intention to sell the Land and no plans have been put forward for raising any finance. However, this does not mean that this is not a realistic option. There is strong level of local support and enthusiasm in the community and the confirmation of the ACV would give the nominators the opportunity to do seek a lifestyle purchaser and other sources of finance. I find that the ability of local communities to raise funds and the enthusiasm to do so cannot be underestimated.
71. In reaching my decision I have taken into account that the Swinton Park Golf Club has been one of the most famous landmarks and features of Swinton since it opened in 1926. It is a highly rated golf club and the longest golf course in Greater

Manchester. It has in the past acted as a community hub where social events were held such as musical events and comedy evenings. There was a restaurant and bar, and live football was shown. I have taken into account that the three public meetings regarding the future of the Land were attended by about 300 people. Those who attended were described as vocal and steadfast in their support for the golf club. There were a significant number of signatures on the petition to Save Swinton Park Golf Club. It would be wrong to underestimate the enthusiasm and innovation which will emerge in local community to preserve an asset when faced with the loss of that valued amenity.

72. I have noted that the support for a community use is partly based on the fact that the Land provides an oasis for inner city wildlife with different types of wildlife including deer, foxes, rabbits and birds. It has been described as a "green lung" for the area. This is clearly a much loved and valued green space perhaps more so because it has been allowed to go wild. However, I have borne in mind that the protection of trees and wildlife fall outside the ambit of the ACV provisions.
73. I find that there is a demand for golfing facilities in the area and it is not unrealistic to think that there would be interest because golf courses of this particular design and age rarely come up for sale which may create additional demand.
74. I find that the community interest suggests the reprovision of golf facilities would be welcomed and utilized. I find that due to its geographical situation the golf course has a large catchment area.
75. I do not have before me photographic evidence of the whole of the Land. It would be unrealistic to expect this. However, there is sufficient evidence to find that the clubhouse has suffered damage internally and externally and this was confirmed by oral evidence. I find that the golf course and land is overgrown on the basis of the photographic and oral evidence.
76. Mr Choongh submitted that the very high costs involved in bringing the clubhouse and land back into use as a golf course or for any other recreational or social activity would be extremely high and therefore at best any proposals to do so could be classed as a hope rather than a realistic prospect.
77. I make no findings about the underlying structure of the clubhouse, however, find that it is likely that considerable capital investment would be required to bring the clubhouse back into use and to bring the irrigation system and Land back into a useable condition. However, I do not accept that such costs would be so high as to preclude the possibility of there ever being an offer of purchase which would induce the appellant to sell and a prospective lifestyle purchaser with the financial means to undertake the necessary work.
78. Mr Choongh submits that the Land was listed in 2019 and as time starts to run from the date of the listing, I should consider the situation to 2024 and even if planning permission were granted at the date of the hearing it would take years for the Land to be developed. For the reasons as stated this is not the test to be applied and the appellant's intentions are not determinative.

79. Mr Mills stated that with a current book value of £3,571,464 it is unrealistic for a local community group to raise this amount of money. For the reasons as stated because it would be misconceived to underestimate the enthusiasm, hard work, dedication, perseverance, persistence, and ingenuity of a local community with a passion and purpose.
80. It is irrelevant that at the time of the purchase in April 2021 no one had approached the appellant with a view to acquiring the Land to re-instated it for golf course use. It is often the situation that it is not until a community is in danger of losing something valued that it will be galvanized into action to save it.
81. I find that it is likely that the level of funding to enable community use of the Land would be the purchase prices and the costs of viable proposals for the on-going management and maintenance of the site. I find that there has been some vandalism and the greens would need a maintenance programme to return it to a standard suitable for playing. This would take time but is a realistic possibility and not fanciful. It would involve a significant investment of time and interest by the local community with the assistance of specialist advisers.
82. Mr Smith gave his opinion that had the golf course not been closed and had the course and clubhouse remained in a reasonable operational condition the golf club business would be financially viable today. It is not useful to speculate on this matter and is not necessary to do so.
83. I have considered whether the future test would be satisfied if only part of the Land would further the social wellbeing or social interests of the community. For example, if the restrictive covenant could not be lifted and the 23% of the Land covered by the restrictive covenant were turned over to community use or if the development scheme included some green space and recreational facilities. I find that to satisfy the test the use must be non-ancillary. The term 'ancillary' was specifically chosen by Parliament and as it is not defined should be given its ordinary meaning. I find that if the Land were developed for residential properties with some green space and recreational facilities being provided, that use would merely be supportive or would be serving the purpose of providing residential housing and as such would be ancillary to the main use and accordingly would not satisfy the test.
84. In my view part listing is permissible but would not be appropriate in this case as it would not be practical or useful to identify any part of the Land which could be separately listed.
85. I am satisfied that the future test is satisfied in relation to the whole of the Land in any event.
86. The appellant put forward some criticisms about the decision-making process. I make no findings in relation to these criticisms because, as previously stated, my role is to proceed by way of a *de novo* hearing.
87. Regarding costs, an order can be made pursuant to rule 10(b) of The Tribunal Procedure (First-tier Tribunal)(General Regulatory Chamber) Rules 2009 if the



tribunal considers that a party has acted unreasonably in bringing, defending or conducting the proceedings. It is open to either party to make an application for costs following consideration of the decision.

**Tribunal Judge J Findlay**

**DATE: 16 January 2023**