

Report

Asset of Community Value Listing Review

Land at Jubilee Colliery

INTRODUCTION

This advice note relates to a review into a decision taken on 14 March 2014 by West Lancashire Borough Council to list Jubilee Colliery ("Site") as an asset of community value. This decision follows the nomination of the Colliery by Bickerstaff Parish Council ("BPC").

BACKGROUND

At a meeting of the BPC on 11th November 2013, it was resolved to nominate that part of the Colliery Site known as Jubilee Wood.

A nomination form was duly completed and dated 18 January 2014 and submitted to West Lancashire Borough ("WLBC"). The application form is of great significance because it is the opportunity for the nominator to set out the information and evidence necessary to meet the test in the Localism Act 2011 for land or buildings to constitute an asset of community value ("ACV").

JURISDICTION

I have been asked as to advise as to what it is that a review constitutes i.e. is it a review of information and evidence upon which the decision was originally taken or does it allow for further confirmation and evidence to be submitted and taken into account such that a review is basically a new decision based on current facts and information.

In a recent decision of the First Tier Tribunal the Judge concluded that the local authority review decision and the Tribunal's appeal decision both involved a full reconsideration of the issues. In the case report it is stated that "it is well settled that this means looking at the facts as they stand at the time of the review decision". This is relevant since further submissions have been made by one of the owner's solicitors but also circumstances have changed on Site and further information has been obtained from the Parish Council regarding its nomination.

Whilst the Acts and Regulations are silent on exactly what a review constitutes it is clearly the view of the First Tier Tribunal that in a sense it is not a review of the previous decision but is in fact an opportunity to make a different decision based on the evidence and information available at the time the Review is carried out.

THE AREA NOMINATED

The area nominated is identified on a plan and forms approximately 2.6 hectares of woodland and the remains of the former Bickerstaff Colliery known as "Jubilee Colliery".

ALLEGED CURRENT USE

It was stated in the nomination form that the Jubilee Colliery is regularly used by local people for dog

walking, family visits, bird watching and cycling. There are well used footpaths across the site which evidence public use. There was no witness evidence to support these contentions.

BPC also made the point that the Site adjoins a County Council owned piece of land which is used by the public as open space and both sites are seen without difference because there was previously no boundary demarcation and so local people used the Jubilee Colliery Site in the same way that they used the County Council's open space land. Both areas form natural open space which is not laid out formally and so there is no difference in the maintenance or appearance of the two pieces of land.

A nature trail has been created through both pieces of land which is used by the public and school children.

It is also stated that the Jubilee Colliery furthers the social interest of the community in that:

- It offers value for recreation space
- Pride in local heritage and it allows people to explore the past
- There is a cycle track under construction (now complete)
- It offers free leisure activities in an areas without formal resources
- One of the few pieces of land open to the public for use
- The area acts as a noise barrier from the adjoining motorway

As a result of the nomination the Council served notice of receipt on the two owners of the land. Subsequently a letter was received from Quinn Barrow Solicitors acting for one of the Site owners.

It states that "Our client is interested in disposing of this site and believes that her attempts to do so would be fettered by a determination by yourselves that the land is of community value".

LISTING DECISION

The land was considered to be an ACV on the basis that the evidence of BPC together with evidence of officers following a site visit which established that the land was being used for recreation and play and had been so used for many years.

In particular the evidence from the site visit corroborated the contentions of BPC who concluded that there was:

- Clear access to the land nominated which was unrestricted
- Well used paths cross the land

It was also noted that the solicitors acting for one of the owners did not refute the claims regarding use of the land by the community.

In terms of the realistic prospect part of the test of an ACV (see later) the officer dealing with the application assumed that the proposed future use was for the same use as the current use.

REQUEST FOR A REVIEW

A request for a review was received from Quinn Barrow by letter dated 15 April 2014. The letter makes the following points of relevance to the listing:

- The land is totally inappropriate to be designated as an ACV
- It is not easily accessible and was mine workings
- The suggestion that the land acts as a barrier to pollution is refuted since it is too far away to provide such protection for local residents
- The land is not of benefit to the local community

WHAT MUST THE COUNCIL DECIDE

The test for an asset of community value is contained in Section 88 (1) which sets out the relevant test for land of community value -

- 88 (1) *For the purposes of this chapter but subject to regulations under sub-section (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 is not an ancillary use furthers the social wellbeing or social interests of the local community, and*
 - b) *it is realistic to think that there can continue to be non- ancillary use of the building or other land which will further (whether or not in the same way) the social wellbeing or social interests of the local community*
- 88 (2) *For the purposes of this chapter but subject to regulations under sub-section (3) a building or other land in a local authority's area that is not land of community value as a result of sub-section 1 will be land of community value if in the opinion of the local authority;*
- a) *there is a time in the recent past when an actual use of the building or other land that was not an ancillary use furthered the social wellbeing or social [sic] 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 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.*

It is clear from the legislation that there are two parts to the test of land of community value, the first part of the test involves looking at the actual current use of the building or other land or a use in the recent past of the building or other land and deciding whether or not it is

1. *ancillary to another use and*
2. *whether it furthers the social wellbeing or social interests of the local community.*

The second part of the test requires a decision maker to consider whether or not it is realistic to think that there can continue to be a use in the next five years which furthers the social wellbeing or social interest of the local community.

For these purposes social interest is defined as cultural interests, recreational interests and sporting interests (Section 88 (6)) whereas social wellbeing is not defined however that is not relevant here because the use alleged for this land is a recreational purposes which falls clearly within the social interest part of Section 88.

Looking at the evidential burden that is required of the authority in reaching its decision, the Act and Regulations are silent on the level of evidence required to establish whether land or buildings meet the test of land of community value. In this respect it is worth reflecting on the purpose of this provision because that assists in understanding what kind of evidence it is reasonable to expect in the circumstances.

The purpose of the provision is to retain "much loved" local facilities from being lost to other uses through redevelopment. The idea is that land is nominated and if the owner intends to sell the freehold or leasehold interest in the site local people can then indicate an intention to bid and trigger the sixth month moratorium period. The purpose of the six months is to give local people an opportunity to get a business case together for a site and to get the funding in place to allow them to bid for the site.

It is therefore the case that at the nomination stage the parish council/community group is not expected to have a business case or funding in place. However sufficient evidence is necessary for the Council to make a reasonable decision and reach a conclusion on the evidence that land/building does meet both parts of the test in Section 88.

The First Tier Tribunal looked at the test for evidence in a recent decision and in relation to the second part of the Section 88 test (realistic prospect of a future social interest use) concluded that the question posed by parliament is whether "it is realistic to think" that there could be such an outcome. The test therefore anticipates a number of outcomes and is not therefore "on the balance of probability". However it must be remembered that this process does equate to an interference with property rights and therefore the decision maker should reach a reasonable decision based on the evidence. The actual evidential burden is not defined but the test in Section 88 makes it clear that it is "in the opinion of the authority". This is in effect means in the reasonable opinion of the authority.

Whilst looking at the definition of land of community value it is worth considering whether or not the current use/past use is required to be a lawful use in view of the fact that the Owners have stated that the public were not allowed to use the Site. The answer to that is no although it cannot be an ancillary use. There are other examples of recent legislation where a use is limited to that which is lawful and those words have not been used in this legislation. It is therefore reasonable to conclude that the present or past use for a social interest use does not have to be lawful.

The Review Decision

HAS THE LAND BEEN USED FOR SOCIAL INTEREST PURPOSES, CURRENTLY OR IN THE RECENT PAST

It is alleged by the Parish Council that the land has been used for a variety of recreational purposes

including walking and enjoying nature etc as set out above. The claim of the Parish was substantiated by Council officers who visited the site and found that:

1. There was evidence of well used paths
2. Access to the land was unimpeded
3. The land was used together with the County Council land which adjoins this land and to which the public have access and there was no demarcation between the areas such that the public would realise the areas were in separate ownership or more importantly that they had differing access rights and so the public have used both areas as if they both form part of the public open space.

At no point have the owners refuted the claims of public use. They have made the point that the land is not suitable for recreational use, however that is not relevant to the decision which is – has the land been used for social interest purposes. Further, signs have now been erected on the land advising that it is private land but that does not affect this decision since it can be a current use or use in the recent past for a social interest purpose. The erection of the signs therefore just means that rather than looking at Section 88 (1) we are looking at Section 88 (2).

The evidence from officers site visit shows that the Site is well used by the public since there are well trodden paths through the area which do not in themselves lead anywhere and so are not being used as a highway but are being used for purely recreational purposes.

There is therefore clear evidence of public use of the Site which is not refuted but to be weighed against that conclusion are the comments of the owner's solicitor that the land is:

1. Totally inappropriate to be designated as an ACV
2. Is not easily accessible and was mine workings
3. Cannot act as a barrier to pollution
4. Is not of benefit to the local community

Commenting on those points.

- Firstly the tests for land of community value does not include consideration of the appropriateness of the land. Therefore the point about the use being totally inappropriate is not relevant to the determination of the Review.
- It is clear from the site visit carried out by officers that the site is easily accessible and so the point made has been refuted by the evidence of officers.
- Whilst it is accepted that the site was used for mine working the Parish Council is of the view that that is part of the attraction of the site in that local people visit the site because of its historical significance.
- Whether or not the site acts as a barrier to pollution is again irrelevant to the decision as to whether or not the land is currently or has in the recent past been used for social interest purposes.
- Finally the point was made that the land is not of benefit to the local community, however again that is not relevant to this decision since it is a question of whether or not there is evidence of use which fulfils the social interest test and there is no element of judgment as to

whether or not that benefits the local community in this decision.

For those reasons it is therefore considered reasonable for the Council to conclude on the evidence submitted and that gathered by Council officers that the Site has been used in the recent past for social interests of the local community such that the test in the first part of s88 is made out..

The second part of the test which also needs to be substantiated, which is "is it realistic to think that there can continue to be non-ancillary use of the building or other land which will further (whether or not in the same way) the social wellbeing or social interests of the local community".

In this case the nomination form fails to identify how the Parish Council sees the land being used in the future and so the original decision making officer assumed that what was proposed was a continuation of the use of the land for recreational purposes in the same way as it had been used in the past i.e recreational use for nature trail, dog walking etc. The Parish Council's position has now been clarified to officers and it has confirmed that the community use proposed in the future is the same as that which has taken place in the recent past i.e. recreational use. This information was contained in an e-mail from the Parish Council which has been disclosed to the Owners Solicitors who have been give an opportunity to agree to an extension of time for the decision to be made if they require more time to comment on the additional representations..

A question therefore for the decision maker is, is there a realistic prospect that one outcome for the future use of the land is for recreational purposes.

The owner's have stated that they do not intend to allow the continued use of the Site for public recreational use and so it is necessary to consider how that affects the realistic prospect test. An owners intention for land is a consideration in the determination of an ACV but is not determinative of the situation and so the fact that the owners may have proposals for the development of the site or intend to deny public access carries little weight since there is no planning permission for a development and no contract in place with a developer to build such a scheme out and preventing public access to the land is not relevant because the Site could be purchased thereby making public access available..

The fact that the owner has erected signs and intends to prevent access to the land does not prevent it from being "realistic" that the site could be used for leisure purposes in the next 5 years. There is no reason that the Parish Council could not acquire the site for leisure purposes within the next 5 years. We have no evidence to establish that that is not a realistic prospect and there is no evidence of a scheme for the site that would render such a use unrealistic.

In fact it is quite the opposite in that the fact that the land is listed as an ACV can be a material consideration for a planning application and that can therefore be taken into account in the determination of an application for a development of the site, thereby affecting site value and therefore the ability of the Parish Council to acquire the site for leisure purposes.

The significance of an owners intentions for the future use of a building was considered by the First Tier Tribunal in a recent case. In that case the owner stated that he did not intend to use the building as a pub and therefore there was no realistic prospect of a social interest use in the future. The Judge in that case concluded that if an owners intentions for the future use of the land were determinative i.e. an owner had set their face against community use, then that would make the ACV scheme voluntary (see Case CR/213/0005) since it would be entirely dependent upon an owners intentions for future uses. Therefore, in this case it is noted that the Owners have erected signs to deter public access to

the area their intention to prevent access in the future is not determinative of whether this Site should be considered to be an ACV.

RECOMMENDATION

1. On the first part of Section 88 it is considered that there is sufficient evidence to establish the fact that Jubilee Colliery has been used for recreational purposes in the recent past and that use constitutes a social interest use of the local community and therefore the first part of the test is made out

It should be noted that there is no evidence to the contrary on this point or even a denial that the recreational uses set out by the Parish Council have in fact taken place on the Site.

2. In view of the Parish Council's recent confirmation that the future social interest use proposed for the Site is for recreational purposes it is now reasonable to conclude that there is a realistic prospect of a recreational use being re-established on the Site. That would require the acquisition of the Site by the Parish Council since the owners are now seeking to stop public access but there is a realistic prospect that the Parish Council could do that.

It is acknowledged that the owners have now put up signs indicating that the Site is private and that access is denied, that does not of itself prevent one possible future use of the Site being for recreational purposes which is therefore a realistic prospect.

In addition there is no planning permission for the Site for an alternative use and no agreement with a developer securing another use so it is realistic to conclude that one possible future use of the site for recreational purposes were the Parish Council to acquire the site which it may well do given the opportunity in the future.

In conclusion it is my recommendation that the land at Jubilee Colliery should be confirmed as an Asset of Community Value.



Frances Robinson

Dated 9th June 2014

