Development assets?

Lucy McDonnell analyses the impact of land and buildings being listed as ACVs on development schemes, as illustrated by three recent cases

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'These cases demonstrate that the assessment of whether land or buildings will meet the ACV listing test will turn on the facts of each case, and the challenges for both landowners and community groups in providing sufficient evidence.'

The Localism Act 2011 introduced a number of community rights, including provisions to help communities safeguard land and buildings serving a community purpose. The asset of community value, or ACV, regime allows local communities to identify land or buildings that serve a purpose to further the social wellbeing or social interests of the local community, and provide the community with an opportunity to bid for the land or building when the owner decides to sell – known as the community right to bid. When the provisions came into force, the then communities minister Don Foster described the measures as a 'new "stop-the-clock" power to save local treasures' (www.legalease.co.uk/stop-the-clock). However, since the regime was introduced, it has had a wider impact than simply giving local communities an opportunity to purchase community facilities when they are offered for sale.

Asset test

The test for whether or not a building or land should be included in the list of ACVs held by the local authority is set out in s88 of the Localism Act 2011. A nominated property qualifies where it meets the following tests:

- a current actual non-ancillary use furthers the social wellbeing or social interests of the local community; and
- either:
  - it is realistic to think that there can continue to be a non-ancillary use which will further (whether or not in the same way) the social wellbeing or social interests of the local community; or
  - in the recent past there has been an actual non-ancillary use which 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 that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community.

When the community right to bid was first introduced, and in subsequent press releases, it appeared that the regime was aiming at protecting traditional community buildings, in particular pubs, which have been the predominant type of asset listed as ACVs. A government report published in March 2017 reported that over 4,000 'buildings, green spaces and other much loved local assets' had been listed as ACVs, of which 2,000 were pubs (www.legalease.co.uk/6000-rights).

Pubs first?

Pubs have been the focus of a number of campaigns, and have

received considerable government support. The Campaign for Real Ale has published a guide entitled 'List Your Local' (www.legalease.co.uk/camra), while the government has established measures to help pubs, such as the 2016 'More Than a Pub' programme, with a value of £3.85m, aimed at helping communities buy and run pubs, and increase the services offered by community pubs to help their communities (www.legalease.co.uk/plunkett).

Pubs have also been safeguarded outside of the ACV regime, with permitted development rights for buildings most recently used as drinking establishments amended. Following the removal of permitted development rights, planning permission must now be obtained to demolish a pub, or a building last used as a pub.

There are also a number of less traditional community buildings and areas of land which have been listed as ACVs. Notably, a number of football stadia have been listed, while it seems unlikely that the community would be able to raise sufficient funds in the event of a sale (www.legalease.co.uk/grounds-for-change). Areas of land where a sale seems unlikely have also been listed, including the Lakeland fell Blencathra (www.legalease.co.uk/eden) and Longford Lake in Sevenoaks, Kent (www.legalease.co.uk/6000-rights).

There have been a number of decisions where the meaning of key elements of the section 88 test have been contested, with significant impact on developments, drawing inevitable comparisons with the registration of land as town or village greens.

ACV process

Time	Action
Day 1	A building or area of land can be nominated to the local authority by a parish council (in England) or a community council (in Wales), or a voluntary or community body with a local connection.
	The local authority has eight weeks to consider whether or not to list the building or land as an ACV.
Up to 8 weeks from notification	If the land or building is listed as an ACV and the owner is not happy about the decision, they have eight weeks from the date they were informed of the listing to ask the local authority to carry out an internal review of the decision.
Up to a further 8 weeks later	If a review is requested, the local authority has eight weeks to carry out their review and inform the owner of their decision, unless a longer period is agreed.
Up to a further 8 weeks later (unless a longer period agreed)	If a review has been made and the owner is unhappy with the result, they can appeal the decision to the First-tier Tribunal, within 28 days of the review decision being sent to them.
Five years after listing	ACVs must be removed from the list on the fifth anniversary of the asset first being listed, unless it has been removed earlier for any reason.

ACVs in the Court of Appeal

More recently, there have been a number of decisions where the meaning of key elements of the section 88 test have been contested, with significant impact on developments, drawing inevitable comparisons with the registration of land as town or village greens.

The first ACV case to reach the Court of Appeal concerns Bedmond Lane Field, a meadow in St Albans, located within the green belt and crossed by footpaths. The case confirms the risks associated with unauthorised use and the flexibility of the 'realistic to think' test for future community uses.

The field, owned by Banner Homes, has been the subject of a number of cases since it was first listed in March 2014. The local community applied to list the field following 40 years of community use, including 'walking, exercising dogs, informal play (by local children) and photography of local flora and fauna' (para 3, *Banner Homes Ltd v St Albans City and District Council* [2015]). The use of the field, beyond the areas of the public footpaths, was a 'trespassory' use, without permission or licence, of which Banner Homes was aware.

Banner Homes requested a review of the listing decision, and St Albans District Council upheld its decision to list the field as an ACV. Banner Homes appealed that decision to the First-tier Tribunal.

The First-tier Tribunal dismissed the appeal in 2015, and the Upper Tribunal confirmed its decision in 2016. Banner Homes appealed to the Court of Appeal, which dismissed its appeal in May this year.

In the meantime, following the listing of the field, Banner Homes erected fences along the length of each of the footpaths, with signs stating: 'private land no unauthorised access'.

Banner Homes also applied for planning permission to use the

land for the keeping of horses. Permission for this use was refused by St Albans District Council, which Banner Homes appealed. Following the dismissal of the first appeal, a further application was made, refused by the local planning authority, appealed and the appeal dismissed. Banner Homes was undertaking a statutory review of that appeal decision at the time of the Court of Appeal hearing.

The First-tier Tribunal (*Banner Homes Ltd v St Albans City and District Council* [2015]) dismissed the argument that there was still an actual current community use of the field, on the basis the visual amenity of looking over the whole of the field from the footpaths constituted a current use. However, the First-tier Tribunal did find that it was realistic that there could be a main community use in the next five years. Banner Homes had provided a statutory declaration that it did not intend to dispose of the land, and intended to keep the fencing in place, continue to exclude the public from the field and seek to get the site allocated in the local plan. However, the First-tier Tribunal found that given the history of peaceable use of the field and the recent refusal of planning permission (in light of green belt status), it was 'not fanciful' that Banner Homes would decide to restore the previous arrangement, or grant a licence for community use.

On appeal, the Upper Tribunal found that the use of 'fanciful' rather than 'realistic' was not an error of law, and that the decision regarding future use was not contrary to the evidence. Future use cannot be vetoed by the landowner, and is a matter of judgement for the local authority or judge. Permission to appeal on this ground was refused by the Upper Tribunal and on the papers by the Court of Appeal (*BHL v St Albans City and District Council* [2016]).

The Court of Appeal considered the single ground of appeal proposed by Banner Homes: whether an unlawful use, the trespassory use in this instance, could constitute a use for which the land could be listed as an ACV under s88 of the Localism Act. Banner Homes had argued throughout the proceedings that 'actual use' must mean lawful use. As the residents' use of the wider area of the field was trespassory and therefore unlawful, it could not meet the test for listing as an ACV. This argument had been rejected by the local authority in its review of the decision to list the field, by the First-tier Tribunal and by the Upper Tribunal, but the Court of Appeal considered that it merited its consideration (*Banner Homes Ltd v St Albans City and District Council* [2018]).

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Banner Homes proposed that the doctrine of *in bonam partem* (in good faith) applied, and therefore without Parliament

Sale of an ACV

Time	Action
Day 1	The local authority must be informed if the owner of an ACV decides to sell the ACV, or grant or assign a lease of 25 years or more, subject to some exemptions. The local authority will inform the group who nominated the ACV, and will publicise the proposed sale.
	There is an initial six-week period from the date the owner notifies the local authority of their intention to sell or grant a long lease (the interim moratorium). During this period, the owner can only enter an agreement to sell to a community interest group. The community group can also express an intention to make a bid during this period.
Six weeks from notification	**If no community interest group has made a bid**: the owner may sell or lease the ACV to any party after the end of the six-week period, and a longer moratorium period does not apply.
	If a community group has made a bid: there is a further four and a half month moratorium period, during which the community group can prepare a business plan and arrange finance. During this period, the owner may only sell the ACV to a community interest group.
4.5 months later	The moratorium period ends six months after the date the owner informed the local authority of their intention to sell or grant a long lease (which is four and a half months after the end of the interim moratorium period). After the end of this period, the owner may sell to any party within the next year, either the community group or another purchaser, and the sale or lease does not need to be to the highest bid.
One year later	If no sale is made within that year, a further moratorium process must be followed before the owner can sell or grant a lease of the ACV.

clearly demonstrating the opposite intention, unlawful conduct could not lead to the grant of a right or benefit. Banner Homes referred to the *Welwyn Hatfield* case (*Secretary of State for Communities and Local Government v Welwyn Hatfield Borough Council* [2011]), where a builder had constructed a home disguised as a barn, and then sought a certificate of lawful existing use after the end of the enforcement period. The Court of Appeal rejected this argument, finding that the context is key where public policy is used to interpret statutes. The Court of Appeal followed the Upper Tribunal and the First-tier Tribunal in finding that the requirement under s88 that the use benefits the community would inherently preclude many unlawful activities, which would not be capable of meeting the test. On the facts of this case, the unlawful trespassory use could constitute a qualifying use for the field to be listed as an ACV.

On the facts of Banner Homes, *the unlawful trespassory use could constitute a qualifying use for the field to be listed as an ACV.*

Development to displace community use

The impact of the ACV regime in constraining development has also been considered in *New Barrow Ltd v Ribble Valley Borough Council* [2017], which related to some allotments listed as an ACV. The allotments were owned by New Barrow Ltd, who had in 1977 granted a licence to the Barrow Allotment Holders Association. New Barrow Ltd had in 2014 obtained outline planning permission for residential development of its site surrounding the allotments. The allotments were listed as an ACV in 2016, and the decision to list them was upheld by the local authority on review. New Barrow Ltd terminated the licence with the Barrow Allotment Holders Association, and on the day of the hearing of the appeal against listing signed a five-year licence for the allotment site with Redrow Homes Ltd.

In its evidence, New Barrow Ltd's land agent argued that the allotment licence had been terminated as the private road and track usually used to access the allotments would be needed

for construction traffic, and the allotment site itself used as a site compound for six to seven years, as it would be more cost effective than moving the compound as the remainder of the site was developed.

The First-tier Tribunal concluded that at the time of the nomination and of the listing, the actual current use of the land furthered the social wellbeing and social interests of the community, and at that time there was a prospect of a community use continuing. However, by the time of the First-tier Tribunal hearing, the judge found the position had materially changed. The judge considered that as ACVs are removed from the list after five years, it was difficult to see how the future-use test could be met where the existing use would cease for at least five years, while it was used as a construction compound, even if it was likely the allotment use would resume after the end of that period. In the circumstances, the judge found it unlikely the allotment use would resume, and the appeal was dismissed. The case therefore confirms that the position at the time of the hearing rather than the nomination or listing is relevant.

ACVs and enabling development

The impact of an ACV on a wider development was also considered in the *Greyhound Inn Developments Ltd* case (*Greyhound Inn Developments Ltd v Bromsgrove District Council* [2017]).

In that case, a property development company had its application for planning permission refused, and its appeal dismissed, due to traffic impacts. The developer acquired the Greyhound Inn, with the aim of demolishing it to improve the junction which was the source of the application and appeal refusal. The developer notified the local authority that it intended to demolish the pub using permitted development rights, at which point the pub was listed as an ACV, so the permitted development right was no longer available. A further planning application was submitted, including the demolition of the pub. The wider site was included as an allocated development site in the emerging local plan, and was considered to be deliverable by the inspector. However, the respondent emphasised that there was no extant planning consent for the demolition of the Greyhound Inn at the time of the hearing.

The judge noted that 'the stated intentions of an owner of a listed asset are not necessarily to be treated as determinative', but found that given the Greyhound Inn's importance for the proposed development, it was extremely unlikely that it would be re-opened as a pub or other community facility. The judge concluded that it was not realistic to think the pub could further the social wellbeing or social interests of the community in the future, given the planning position, although noting that:

> ... the result of this appeal is not to be construed as suggesting that the intentions of the owner of a listed asset will, henceforth, be treated as determinative.

These cases demonstrate that the assessment of whether land or buildings will meet the ACV listing test will turn on the facts of each case, and the challenges for both landowners and community groups in providing sufficient evidence. There are therefore some emerging oddities in the regime. The fact that ACV status can be material to planning decisions engages the risk identified by Davis LJ in the Bedmond Lane Field case (*Banner Homes*) of unintended consequences (as landowners may seek to prevent public access to their property in case it leads to an application for ACV listing being made, constraining development opportunities in the future, but preventing community use in the meantime).

Similarly, while it would be difficult for the regime to function without some scepticism about the statements of ACV owners and their future intentions for their properties, the outcome suggests the impact of underlying planning considerations. For example, in *Banner Homes* the green belt status of the site was held to make the likelihood of achieving permission for redevelopment sufficiently unlikely that the prospect of the owner giving up on development and reinstating the community use was not fanciful. In contrast, the New Barrow allotments escaped listing by virtue of their importance in realising the wider development potential. Understanding the way that the planning position and the ACV risk feed off each other has therefore both a complex, and a critical, aspect of promoting development on affected land. ■

New Barrow *confirms that the position at the time of the hearing rather than the nomination or listing is relevant.*

BHL v St Albans City and District Council & anor
[2016] UKUT 232 (AAC)

Banner Homes Ltd v St Albans City and District Council & anor
[2015] UKFTT CR_2014_0018 (GRC);
[2018] EWCA Civ 1187

Greyhound Inn Developments Ltd v Bromsgrove District Council & anor
[2017] UKFTT CR-2017-0004 (GRC)

New Barrow Ltd v Ribble Valley Borough Council
[2017] UKFTT 2016_0014 (GRC)

Secretary of State for Communities and Local Government & anor v Welwyn Hatfield Borough Council
[2011] UKSC 15