FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Community Right to Bid

Tribunal Reference:	CR/2013/0009
Appellant:	Gullivers Bowls Club Ltd
Respondent:	Rother District Council
Second Respondent:	Cantaloupe Community Association
Judge:	NJ Warren

DECISION NOTICE

1. This is an appeal against a review decision made by Rother District Council ("Rother") on 16th September 2013 to include the site of Gullivers Bowls Club at Bexhill-on-Sea on its list of community assets.

2. There was a hearing of the appeal on 11th April 2014. Mr Cameron QC represented Gullivers Bowls Club Ltd ("Gullivers"), the owners of the land; Mr Flanagan represented Rother; and Dr Stookes represented Cantaloupe Community Association who had nominated the land for inclusion on the list.

3. The Localism Act 2011 requires local authorities to keep a list of assets (meaning buildings or other land) which are of community value. Once an asset is placed on the list it will usually remain there for five years. The effect of listing is that, generally speaking an owner intending to sell the asset must give notice to the local authority. A community interest group then has six weeks in which to ask to be treated as a potential bidder. If it does so, the sale cannot take place for six months. The theory is that this period known as "the moratorium" will allow the community group to come up with an alternative proposal – although, at the end of the moratorium, it is entirely up to the owner whether a sale goes through, to whom and for how much. There are arrangements for the local authority to pay compensation to an owner who loses money in consequence of the asset being listed.

4. It is convenient to set out here the present and future conditions for listing which are relevant in this case. They are to be found in Section 88(1) of the Act which reads as follows:-

> (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
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> (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.

5. Gullivers has existed as a private members' club on the site for about 50 years. The latest figure for membership I have is 126. Members play on an indoor green as well as an outdoor one. Until about ten years ago there were two outdoor greens available for play but a decision was taken to cease to maintain one of them. It remains as a mown grass area but it is not a bowling green. Two small outbuildings that were alongside the old green have been closed. The old green accounts for about 37 percent of the whole site. Gullivers' buildings are old and dilapidated. They include asbestos within their structure. Nevertheless, the social side to the club appeared lively to a planning inspector who visited it about fifteen months ago. Financially there is about £26,000 in the bank and small profits and losses are recorded each year.

6. In respect of the present condition for listing, Mr Cameron submits that Rother were wrong to list the whole site. This is because 37 percent of the site has no current or recent use made of it. This, he submits, goes way beyond any "de minimis" absence of use that might be overlooked.

7. Mr Flanagan drew my attention to the concept of a "planning unit" which has been designed and developed by the courts to assist in the assessment of whether a

change of planning use is "material". As a useful working rule, the unit of occupation is taken to be the appropriate planning unit unless some smaller unit can be recognised as being physically and functionally separate. Helpful as this approach might seem, I would be reluctant to import this device, developed by the Courts for a different purpose, into decisions under the Localism Act.

8. It seems to me that I should approach the matter recognising that each case will turn on its own facts. Lines will have to be drawn somewhere and so far as possible, those lines should correspond with actualities. In my judgment, Rother were correct to take the nominated site as a whole and to conclude that, as a whole, its current use furthered the social wellbeing or social interests of the local community. It is a feature of some sports clubs to have, at any one time, some facilities that are redundant. In this case it seems to me, having looked at the aerial photographs, that it would be artificial to separate out the old green for the purpose of listing under the Act.

9. My conclusion on this makes it unnecessary for me to explore an issue discussed at the hearing as to whether a local authority, or the Tribunal on appeal, can decide to list part of a nominated site. Any such judgment is likely to be very fact-specific. I would comment only that, for myself, I can find nothing in the Act to suggest that Parliament intends to forbid local authorities to take what might appear in some cases to be the fair and sensible course.

10. Another issue which I need not explore is Dr Stookes' proposal that both greens were a visual amenity for the local community and thus furthered its social wellbeing. He pointed out that some residential care homes overlooked both greens. I would be doubtful about this. It may be wrong to say that something which is merely looked at can never satisfy the test for listing. It is conceivable, for example, that a mural or a statue might do so. In the circumstances of this case, however, I am doubtful whether as a matter of fact I would describe the care home residents overlooking the bowling greens as being a "use" of them; and if it were, it would surely be ancillary.

11. Turning to the future condition in Section 88(1)(b) Mr Cameron submits that the existing bowls club has no realistic prospect of continuing. He points to the poor state of the buildings and the finances and relies on a report prepared by GVA. This finds that Gullivers is not commercially viable. Mr Cameron submitted that since listing lasts for five years, my starting point in considering whether the future condition was satisfied, should be whether the bowls club could continue in existence for that length of time.

12. I do not accept that the statute requires me to foresee such long-term viability. Indeed, it seems in the very nature of the legislation that it should encompass institutions with an uncertain future. Nor, in my judgment, is commercial viability the test. Community use need not be and often is not commercially profitable.

13. On this issue, I accept the submissions made by Mr Flanagan. Gullivers may be limping along financially but it still keeps going and membership is relatively stable. Of course it is possible that something could go drastically wrong with the buildings and Gullivers would not have the capital to repair them; but that has not happened yet and, in an institution that has lasted for 50 years, it would be wrong to rule out community spirit and philanthropy as resources which might then be drawn on. In any event, should the site cease to be land of community value, Rother would have power to remove it from the list.

14. There is another additional factor. Some years ago there was an application for planning permission in respect of the site for housing. This was refused. More recently an application was put in which proposed retaining one outdoor green and building a new clubhouse and indoor green along with a residential development. This was turned down only on grounds of design. A new application, with a different design, is likely and would have good prospects.

15. Mr Cameron argues that I cannot take this into account as a possible way in which a use which will further the social wellbeing or social interests of the local community could continue. This, he says, is because the use would not apply to the whole of the site.

16. Whilst it is a matter of fact and degree in each case, I do not accept this submission. In considering the future condition, especially perhaps in recent use cases, I do not accept that Parliament intended that no consideration at all could be given to imaginative partnership schemes, perhaps using section 106 money, which conserve substantial parts of a site for community use.

17. I should perhaps add that Mr Flanagan submitted that, in hearing appeals under the Act, I have a more limited jurisdiction than that afforded by a rehearing. He submits that the statutory context emphasises the primacy of the local authority in the making of the decision and, because the right of appeal is non-specific as to whether it is a review or a rehearing, a construction which affords weight to the council's decision is to be preferred.

18. In my judgment appeals in this jurisdiction are no different from the hundreds of thousands of appeals before the First-tier Tribunal every year and I have therefore conducted a complete rehearing.

19. For these reasons the appeal is dismissed.

NJ Warren
Chamber President
Dated 24 April 2014