

DECISION NOTICE

THE LOCALISM ACT 2011 Section 88

Decision on the nomination of land at Lymington and Pennington as an asset of community value.

I, Colin Read, Executive Head (Operations) of The District Council of New Forest, pursuant to delegated powers, have considered an application made by the Friends of Lower Pennington Field to nominate land bounded by the rear property boundaries of Longford, 4 Longford place, Northfield Nursery, a field boundary to the south, the rear property boundaries of 14 residential properties on the west side of Ridgeway Lane, and the southern boundary of public open space on the south side of Forest Gate Gardens as an asset of community value. Having considered the application I have decided that the application should not be accepted for the following reasons:

In the opinion of the local authority there is not an actual current use of the building or other land that is not an ancillary use that furthers the social wellbeing or social interests of the local community, and it does not believe 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.

It therefore does not meet the criteria set out in the Localism Act 2011 to be eligible for listing.

Signed

Colin Read

Executive Head

Dated: 17/8/2017

REPORT TO COLIN READ

Application to nominate land at Lymington and Pennington as an asset of community value

1.0 INTRODUCTION

- 1.1 This report relates to an application made to the Council by Friends of Lower Pennington Field (“the Friends”) to nominate land bounded by the rear property boundaries of Longford, 4 Longford place, Northfield Nursery, a field boundary to the south, the rear property boundaries of 14 residential properties on the west side of Ridgeway Lane, and the southern boundary of public open space on the south side of Forest Gate Gardens all of which is shown on the plan attached to the application, (“the Property”) as an asset of community value (“the Application”). The report reviews the Application, the criteria against which a decision has to be made, the result of consultations and makes recommendations.

2.0 BACKGROUND

- 2.1 The Application to nominate the Property as an asset of community value is made pursuant to the Community Right to Bid, arising out of the Localism Act 2011 (“the Act”). The Council must make a decision on the Application by 24 August 2017. If the Council accepts that the nomination meets the criteria set down in the Act, the Property must be added to the Council’s published list of assets of community value, registered as a local land charge and registered against the freehold title to the Property.
- 2.2 If the Property is listed as an asset of community value, the owners must notify the Council if they wish to dispose of the Property. The Council would notify community interest groups of the proposal. If such a group expresses an interest in the Property, a moratorium period of 6 months on the sale is imposed to allow the community interest group to prepare a bid and raise finance.

3.0 THE APPLICATION

- 3.1 The Application was made by Friends of Lower Pennington Field and was received by the Council on 22 June 2017. The Council is the proper decision making authority to determine the Application and delegations have been granted to an Executive Head to make a decision on the matter. The Application is valid under the criteria laid down by the Act and the Property is not within one of the exceptions laid down in the Act and a determination on the Application is required. The legal test for determining the Application is set out in paragraph 5.4 below.
- 3.2 The Friends are an unincorporated body comprising more than 21 local individuals who are on New Forest District Council’s Electoral Register. A copy of the body’s constitution has been supplied to the Council. The activities of the Friends take place wholly or partly within the area covered by New Forest District Council. The Friends are not profit making and any surplus is wholly applied to activities in support of the aims of the association. The Friends are entitled to make an application to list the Property as an asset of community value.

- 3.3 The Property and other land is registered under title number HP211005 and the title registers as at 2 Jun 2017 show the freehold owners to be Richard Ernest Smith, Damon Smith and Susie Puckett
- 3.4 The Application contends that the main use of the Property in its current use furthers the social well-being or cultural, recreational or sporting interests of the local community. The Application seeks to provide details as to how the Friends anticipate that the Property would continue to further the social well-being or cultural, recreational or sporting interests of the local community.
- 3.5 The applicant provided details about the use of the Property by the community at section B2 of the Application. In particular the Friends assert:-
- a) The main use of the Property is mixed recreational and agricultural
 - b) The Property is used on a very low key agricultural basis by the landowners who take an annual hay crop from it. In the past parts of the Property have also been used for horse grazing.
 - c) The Property is used on a daily basis by residents of the local community as a recreational and community resource for a range of activities including:
 1. The exercising of dogs
 2. For blackberry picking in the autumn
 3. For picnics during the summer months
 4. For the playing of family games
 5. For bird and wildlife watching
 6. For quiet reflection and enjoyment of the tranquillity of the asset
 7. By joggers, hikers/ramblers
- The Friends produced letters in support of the Application.
- d) The Friends assert the local community has established rights of access by virtue of in excess of 30 years' use.

4.0 THE OWNERS' COMMENTS

- 4.1 The Owners of the Property as shown on HM Land Registry's title register accompanying the Application being HP211005 as at 2 Jun 2017 were asked to comment on the Application.
- 4.2 The Owners were asked if there were any lawful occupiers of the Property.
- 4.3 The Council received representations from Ken Parke Planning Consultants who indicated that they were acting for the Owners. In particular the Owners assert:
- a) The lawful use of the Property is solely for the purpose of agriculture and for no other use. The Smith family have owned the Property for the past 35 years and farmed it for several decades prior to that with the agreement of the former landowner.
 - b) Mr Smith as part owner and operator of the Property receives the single farm payment from DEFRA to support his agricultural enterprise. The explicit requirement of which is that the Property is used for no other purpose.
 - c) The Owners do not dispute that there are 2 public footpaths which run around the perimeter of the land parcel. Footpath ref 82 runs east-west and Footpath ref 83 runs north-south, and intersects it. Beyond the defined limits of the footpaths there is no right granted to the public to enter or access the Property or use it for any purpose. The landowners have erected signage at the perimeter of the land which directs members of the public to keep to the public footpath. At any time when members of the public have been elsewhere on the Property such persons have

been expressly asked to leave with clarification provided that it is private and they have no rights of access or use over it.

4.4 Ken Parke Planning Consultants included submissions from:

4.4.1 Sturt & Company in which Mr Sturt asserts:

- a) the Property has been used for agricultural purposes for over 80 years.
- b) the Property is registered under the DEFRA scheme and receives EU subsidy payments. These payments would not be allowed should all the uses identified in the nomination form occur on the Property as the landowner has to exclusively use it for agricultural purposes.
- c) at no time have the landowners permitted or lawfully granted access to the public to use the Property for recreational purposes. The landowners have been vigilant in requesting persons found on the Property to leave and return to the footpath network. Signage has been erected by the landowners, directing the public to keep to the footpath.
- d) there are other community uses in the area, especially Woodside Recreation Park just to the east of the Property, the facilities on offer to members of the public there include football pitches, rugby pitch, cricket ground, tennis courts, picnic area, club house with ancillary bar and WC facilities, ornamental gardens, bowling green, skate park, public conveniences, children's play area and public car park.

4.4.2 Symonds & Sampson in which Mr Pollard asserts:

- a) the Property has always been in agricultural production.
- b) Mr Pollard has never seen the type of use that the Friends claim to have carried out on the Property and he has inspected the Property on a great number of occasions over the years.

4.4.3 Simon Smith who asserts:

- a) the Property has been farmed by the family in excess of 80 years. For the last 11 years the Property has been farmed for haylage/hay/silage and prior thereto the agricultural activity taking place was different but the Property is and has been in constant use for an agricultural activity.
- b) Mr Smith has claimed under the DEFRA single payment scheme using the Property and surrounding holding since 2003 and has continued claiming under the basic payment scheme which replaced it. To qualify the Property has to be used for an agricultural activity and be held at his disposal and Mr Smith confirms it is.
- c) the family do not permit any persons other than those directly connected to their agricultural enterprise to access or use the Property. The Property is private and operated solely for agricultural use.
- d) the public have a right of way along the defined route of the public footpath which passes through the Property, but not beyond this. The family have erected signage close to the footpaths for the past 2 years as a means of confirming to members of the public that they have no right to pass on the Property.
- e) at no time has Mr Smith observed people attempting to use the Property in the manner in which the Application claims. The family would not and have never permitted anyone to use the Property for any purpose, other than agricultural contractors carrying out agricultural operations.

5.0 LEGAL POWER AND DELEGATIONS

- 5.1 The Council must consider the nomination and decide whether to list the Property as an asset of community value.
- 5.2 The Council has put in place delegated powers for an Executive Head to make the decision.

- 5.3 The legal criteria to make the decision are laid down in the Act and supporting regulations. The Council must decide whether the Property is of community value.
- 5.4 The land is of community value if, in the opinion of the local authority 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 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 (section 88(1) of the Act). "Social interests" include cultural interests, recreational interests and sporting interests.
- 5.5 In the event of the Council deciding to list the Property as an asset of community value, the owner can appeal against that decision, firstly to the Council and ultimately to the court (the First Tier Tribunal). The owner is able to claim compensation for loss and expense in relation to the Property which would be likely not to be incurred if the Property had not been listed. This can include delays in entering into a binding agreement to sell the land which is caused by relevant disposals being prohibited by the regulations.

6.0 CONSULTATIONS

- 6.1 A number of consultations have been made as summarised below.
- 6.2 The Owners as referred to at 3.3 above were informed of the Application and submitted objections to it as described in section 4 above.
- 6.3 Lymington and Pennington Town Council was informed of the Application and made the following comments:-

“The public already has right of way over the land via various footpaths, which link to the nearby Woodside Park, an area of recreational uses. Irrespective of the outcome of the District Plan in relation to this land the public footpaths will remain and therefore many of the concerns raised in the letters attached to the application will be satisfactorily met.

The amenity land to the north east of the area of land, not included in the land nominated in the application as an ACV, is to be retained as such and will continue to be maintained by the Town Council, and therefore picnics and family games may take place in that nearby location.

There is currently no right of access to the area as a whole and it seems that people are perhaps straying onto private land which has led to an increase in signage asking for the public to stay onto the footpaths.

Given that there is already public right of way across the land providing a good connection to Woodside Park for further recreational use we would question the need for the area as a whole to be nominated as an Asset of Community Value.”
- 6.4 The Executive Head for Governance and Regulation has no comments on the proposal.
- 6.5 The Executive Head for Economy, Housing and Planning has no comments on the proposal.

- 6.6 Cllr Jill Cleary was informed of the Application as portfolio holder for Housing and Communities and she commented that she would leave it to the local Councillors to make any comments.
- 6.7 Cllr Binns was informed of the Application as portfolio holder for Health and Leisure and he supports the views of the local ward members.
- 6.8 Local ward members Cllr White and Cllr Jackman were informed of the Application and neither support the Application. In particular Cllr White advises the Property has been used for agricultural purposes for over 30 years. "The fields have been used annually for producing hay and grazing horses and cattle...and on occasions planted with grain. There is a public footpath which passes through the area...used regularly in the summer months, and little used during the winter as it is generally wet and boggy". Cllr Jackman advises "it appears the main use of the field has been for agriculture, growing hay... there is a footpath and the land owner has put up signs requesting the public to keep to the footpaths...". Both local ward members alluded to the existence of the nearby public facility, Woodside Park, which can be used for activities such as those referred to in the Application.

7.0 ASSESSMENT

- 7.1 The Owners argued any use of the land by the local community is trespassory or otherwise unlawful. The Upper Tribunal considered the question of trespassory use in *Banner Homes Ltd v St Albans City and District Council* [2016]UKUT 0232 (AAC) and held that trespassory use would not of itself prevent the property from satisfying the legal test for listing.
- 7.2 Submissions on behalf of the Owners refer to alternative sites for recreational use. However the existence of alternatives would not prevent the property from satisfying the legal test for listing.
- 7.3 There is disagreement between the Owners and the Friends regarding the use of the Property. The Owners submitted that it is used for agricultural uses only and this is supported by extensive submissions provided on behalf of the Owners and by the local ward members. The Application referred to a number of uses of the Property however the supporting letters referred almost exclusively to dog walking, some of which could have been restricted to the public footpaths.
- 7.4 The assessment as to whether the Council should accept the Application to list the Property as an asset of community value is made under Section 88(1) of the Act. The first element of this test, s88(1)(a), is whether in the opinion of the local authority 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.
- 7.5 Taking into account all the comments made and the information provided relating to this Application, it does not seem that there is an actual use of the Property which furthers the social wellbeing or social interests of the local community which would satisfy the test set out in S88(1)(a).
- 7.6 The second element of the test as to whether the Council should accept the Application to list the Property as an asset of community value is set out in S88 (1)(b) of the Act. This requires the Council to decide whether 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

7.7 Taking into account the comments made, the first element of the test set out in s 88(1)(a) has not been satisfied, it is not therefore necessary to consider the second element of the test set out in s 88(1)(b).

8.0 RECOMMENDATION

8.1 It is recommended that you as an Executive Head of the Council decide this Application pursuant to delegated powers as follows:

- (1) In the opinion of the local authority the actual current use of the building or other land that is not an ancillary use does not further the social wellbeing or social interests of the local community, and it does not believe 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. It does not therefore meet the criteria set out in the Localism Act 2011 to be eligible for listing.

For Further Information Contact:

Julia Turner
Solicitor
Tel: 023 80285588
E-mail: julia.turner@nfdc.gov.uk

Background Papers:

Application by Friends of Lower
Pennington Field

Letter from Ken Parke Planning
Consultants dated 13 July 2017