

Decision Notice

Delegated Decision

Decision No:	DD57
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Subject:	REVIEW OF DECISION TO INCLUDE GLEBE FIELD, ST MARGARET'S-AT-CLIFFE ON THE COUNCIL'S LIST OF ASSETS OF COMMUNITY VALUE
Date of Decision:	3 May 2023
Notification Date:	9 May 2023
Implementation Date:	3 May 2023
Decision taken by:	Louise May, Strategic Director (Corporate and Regulatory)
Delegated Authority:	Delegation 81 of Section 6 (Scheme of Officer Delegations) of Part 3 (Responsibility for Functions) of the Constitution, as follows:
Decision Type:	Executive Non-Key Decision
Call-In to Apply?	No (<i>Call-in does not apply to Non-Key Officer decisions</i>)
Classification:	Unrestricted

Reason for the Decision:	A request for a review of the listing of the Glebe Field, St Margaret's-at-Cliffe within the Council's list of Assets of Community Value was received from the owner. The owner is entitled to request a review of the listing.
Decision:	That Glebe Field, St. Margaret's-at-Cliffe should remain on the District Council's list of Assets of Community Value (ACV).

1. Introduction

- 1.1 On 3 November 2022, following application by the St Margarets' at Cliffe Parish Council, the nomination for the listing of the Glebe Field was considered by Roger Walton, Strategic Director (Place & Environment). Mr Walton concluded that the Glebe Field was an Asset of Community Value within section 88(2) of the Localism Act 2011 (the Act); he therefore accepted the nomination and caused the Glebe Field to be included in the District Council's list of Assets of Community Value.
- 1.2 The Owners of the land in question subsequently requested a review and I am required to conduct this review under section 92 of the Localism Act 2011 and the Assets of Community Value (England) Regulations 2012. In so doing I am required to look at the nomination afresh but in the light of representations made by the Owners.
- 1.3 Section 88 of the Localism Act sets out the tests which must be met in determining what is an Asset of Community Value. The section deals with two situations. Section 88(1) of the Act is engaged when there is an actual current use of the land which furthers the social wellbeing or social interests of the local community. Section 88(2) of the Act is engaged where there is no actual current use but there is a use in the recent past which has furthered the social wellbeing or social interests of the local community.

1.4 There is no actual or current community use of Glebe Field. This fact is not in dispute and I have therefore confined my consideration to Section 88(2) of the Act. Neither is there any question as to the validity of the nomination under Section 89 of the Act and I therefore accept that Mr Walton was satisfied as to the validity of the nomination when he made his decision.

1.5 The test I am required to consider is as follows, as set out in Section 88(2) of the Act:

(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 (“the past condition”), 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”. (“the future condition”).

2. Matters Considered in Reaching the Decision

2.1 In determining the review, I have taken the following into consideration in reaching my decision:

1. Chapter 3 of Part 5 of the Localism Act 2011;
2. The Assets of Community Value (England) Regulations 2012;
3. Nomination Form and supporting information as submitted by St. Margaret's-at-Cliffe Parish Council and received on 16th September and 7th October 2022 respectively.
4. Decision Notice DD23 22 setting out the decision to include the Glebe Field, St. Margaret's at Cliffe on the Council's list of Assets of Community Value dated 3 November 2022
5. Submissions made by Counsel on behalf of the Bay Trust (the Owners) together with 13 appendices, which includes previous ACV decisions made in respect of the same piece of land

3. Review of Application and Submissions

Context and Brief History of Applications

3.1 The 5th Dover (St Margaret's) Scout Group successfully applied for the Glebe Field to be added to the Council's list of Assets of Community Value in 2015. This decision was upheld at both a subsequent request for review by the owners (15 January 2016) and at an appeal to the First-Tier Tribunal on 28 September 2016 (Appeal Reference CR/2016/0002).

3.2 Upon listing in 2015, the decision maker noted that the nomination provided clear evidence that the property had a long history of supporting community activities within

St. Margaret's at Cliffe and was thus furthering the social wellbeing or social interests of the local community. This listing expired in accordance with the provisions of Section 87(3) of the Act in 2020.

3.3 A further nomination was received in 2020. As it was accepted that actual use of the land had stopped, in considering the application to list the property received in 2020 from the 5th Dover (St Margaret's) Scout Group, the decision taken to **not** include the property on the Council's list of Assets of Community Value, turned on two key points:

1. Whether the community use of the land could be considered to be 'in the recent past' given that this area of land had by then been closed to active community use for several years.
2. Whether it is realistic to think that there was a time in the next five years when there could be non-ancillary use of the land that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community.

3.4 The decision maker considered it appropriate to have regard to the period of closure relative to the period of use. At that time, there was strong evidence that Glebe Field had been used by the community for many years dating back to its acquisition by Frank Cleary in 1970 and that this use will have furthered the social wellbeing or interests of the local community. He considered this use to be in the recent past. He did not, however, consider that it was realistic to think that there was a time in the next 5 years where the land would return to community use. The nomination therefore failed.

Summary of 2022 Decision (ACV3)

3.5 In his decision notice, Mr Walton set out a considerable amount of detail about the nomination by the Parish Council. In coming to his decision to add the land to the list of Assets of Community Value, in respect of question of recent past, he stated: *"In this instance, there is strong evidence as stated within the application that Glebe Field had been: "continuously used by the community without interruption for a period of at least 100 years. The land was originally owned by the church and there is evidence of fetes happening here in 1910. The St Margaret's Bay Trust acquired the land in 1972 and it was promoted at the time that the purpose of this was to protect it in the community interests and for recreational purposes." I note that although the history of nominations reviews and the appeal is punctuated by reference to many years use, this is the first occasion on which evidence has been put forward that the community use began anything like as early as this."*

3.6 On this basis, he concluded that there was 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.

3.7 In respect of the "future" test, Mr Walton concluded that it was realistic to contemplate a range of possible outcomes, some of which could allow community use to be re-established, despite that fact that the Owners continue to prevent community access to the land. The planning application remained outstanding at that point. He also found it to be determinative that Parish Council on behalf of the whole community, set out quite clearly their aims for the land and their willingness to purchase the site from the Owners. This, in his view, strengthened very significantly the potential for community use of the land to be re-established.

Summary of Submissions Made on Behalf of the Bay Trust (the Trust)

- 3.8** The Trust considers that the decision made in 2022 is unsound and I am invited by those representing the Trust to conclude that the conclusions underlying the decision taken by Mr Walton are not well-founded.
- 3.9** The Trust submits that the Council's decision in respect of the past condition in ACV3 was founded on a concept of 'relative recency' and that such a concept is neither endorsed nor referenced in the cases cited by the Council in the ACV 3 decision. In the view of the Trust, whilst the history and duration of a past community use may have some bearing on the local authority's consideration of the test in section 88(2)(a) of the Act, 'relative recency' should not dominate such an assessment and is not determinative of the matter.
- 3.10** In support of its submissions on the 'relative recency' of the past community use, the Trust refers to the decision in *GK Scott v South Norfolk DC* (CR/2014/0007) and noted the long history of the community use of the asset in that case, and its subsequent period of non-use, and drew attention to the judge's reluctance to disagree with South Norfolk DC's decision that a period of six years non-use was sufficient to mean that the asset in that case had not been in community use in the recent past.
- 3.11** The Trust disputes the Parish Council's assertion (and the Council's acceptance of the assertion) that there had been uninterrupted community use of the land for more than one hundred years. It submits that to consider fetes as an instance of longstanding and uninterrupted community use is "substantially erroneous" and highlights that fetes have only been held on the land on seven occasions in the last twenty-five years and that there has been a period of eight years with no community use at all.
- 3.12** The Trust submits that the circumstances in which a community use has continued and ceased are relevant to the consideration of the past condition. It explains the history of its plans to develop the land for housing and its previous engagement with the Parish Council (which included a period of "very close cooperation" between the parties in 2008-2012) and states that it had received the Parish Council's "consistent support" for the provision of housing on the land between 2004-2012.
- 3.13** The Trust restates its commitment to securing the development of the land and preventing future community use. It maintains that this would remain the case even if the land remained listed as an ACV and cites multiple examples of what it considers to be matters which emphasise the settled nature of its decision to cease community use of the land.
- 3.14** The Trust disagrees with the Council's view that the Parish Council's stated willingness to acquire the land amounts to a significant change in position from the facts on this point in the ACV 2 decision. It questions the realism of the conclusion that the future community use could occur within the next five years and observes that it has seen no evidence of the Parish Council having the financial means to acquire the land in due course.

4. Consideration of Review

- 4.1** I will now consider each of the tests I am required to consider in turn. Firstly, whether 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. For these purposes, I will adopt the same language used by Counsel for the Trust and call this "the past condition".
- 4.2** As stated earlier, it is not in dispute that there is no current actual use community use of the land. I do, however, consider it necessary to establish when the actual community use ceased. This is to enable me to consider the relative nature of the

period of recency. I accept the finding made by Judge Hughes in *The Bay Trust v. Dover District Council [CR/2016/0002]* (the Dover Case), who at paragraph 9 of his judgment stated “*The evidence is that no communication of a change of the management of the land was made to the Scout Group until 2015. Until that time the predominant and non-ancillary use of the land was for recreational purposes and the Scout Group was a major use for that purpose.*” I therefore consider that the last actual community use of the land took place in 2015. If, for arguments sake, the date in 2015 was taken to be 1 January 2015, there has been no such use for a period of around eight years or so.

- 4.3 In terms of the concept of relative recency, I prefer the findings of Judge Lane in *Crostone v. Amber Valley Borough Council [CR/2014/0010]*, who states at paragraph 14 “*The “recent past” is not defined in the Localism Act 2011 or any relevant subordinate legislation. What constitutes the “recent past” will depend upon all the circumstances of a particular case. To that extent, the expression is a relative concept. In this regard, it is relevant that the Black Swan operated as a public house for almost 200 years, until its closure in 2012.*” This approach was further applied by Judge Simon Bird QC in *Astim v. Bury Council [CR/2015/0022]* where at paragraph 19 he held that a last use in 2011 is “*in the recent past when seen in the context of a use which commenced in the middle of the nineteenth century*”.
- 4.4 The evidence presented by the Parish Council in respect of the latest nomination suggests a use dating back much earlier than had been originally suggested by the Scout Group in previous nominations. In their nomination, the Parish Council state that the land “*has been regularly and continuously used by the community without interruption for a period of at least 100 years. The land was originally owned by the Church and there is evidence of fetes happening here in 1910*”. Although not provided, they state that many photos can be provided of large community events taking place on the land. In his factual rebuttal statement, Mr Alistair Gould does not provide a rebuttal to the claim that there is evidence that the field was used by the community prior to the formation of the Scout Group (paragraph 4, Appendix 9).
- 4.5 The Parish Council claim that “*the Glebe Field has unquestionably been used as a community resource for a century to further the social interests and well being of villages (sic). These facts were not disputed in the The Bay Trust v. Dover District Council [CR/2016/0002]*”. I do not accept this proposition – the facts put forward in the First Tier Tribunal related only to the period of community usage since the Scout Group had been established and Judge Hughes made no assessment of usage going back beyond 1968 (see paragraph 9 of the decision for the consideration of the recent use of the land). All that said, I do find that, given the land was previously owned by the Church, it is more likely than not that their was a non-ancillary use of the land to further to social wellbeing or interests of the community, probably as early as 1910. Taking the period of closure of 8 years in the context of a history of 100 years of use, I would assess this to be in the recent past.
- 4.6 I do, however, accept the proposition made by Counsel at paragraph 23 of the Trust’s submissions and agree that the concept of relative recency should not dominate an assessment of the past condition and that other factors should be considered “in the round”. In my view, the other factors to consider are as follows:
- 3.1.1 Length of period of community use of the asset in the past;
 - 3.1.2 Type of asset involved;
 - 3.1.3 Nature of community use of the asset;
 - 3.1.4 Degree of connection between the asset and the community;
- 4.7 Taking these in turn; the length of period of community use of the asset in the past. My assessment here is that it is more likely than not that there was a community use dating

back as early as 1910. The type of asset is not, to my mind, of particular note, i.e. a field is not unique in character and not as significant to the community as, for example, a school might be.

- 4.8** In respect of the nature of the community use of the asset, it is accepted that the predominant use prior to 2015 (since the formation of the Scout Group in 1968) was for recreational purposes. Judge Hughes found in the Dover Case that the Scout Group were a major user for that purpose (paragraph 9). Although there is some suggestion that the Scout group use may have been unlawful, I do not consider that technical unlawfulness would preclude the activity taking place falling within the definition of community use (see the discussion on this point in paragraphs 46-66 of *Banner Homes Limited v St Albans City and District Council* [2018] EWCA Civ 1187).
- 4.9** In terms of the degree of connection between the asset and the community, I consider that there is a strong connection between the Scouts, the community and their use of the asset. There is clear evidence that an organisation such as the Scouting Association is the type of body that is at the very heart of what it means to further the social wellbeing or interests of the local community.
- 4.10** In the round, therefore, I consider that the past condition set out in s.88(2)(a) is met, that is, that 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.
- 4.11** I will now consider the future condition. I have to consider whether 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 that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community.
- 4.12** To my mind, this is a simpler consideration, and one for which there is a good deal of judicial consideration to assist. The test does not require the likely future use of the land to be determined but rather that a future community use is one of a number of realistic options for the land. In *Worthy Developments Limited v Forest of Dean DC* [CR/2014/0005] at paras 18 and 19, Judge Warren accepted that the future of the land (which was the subject of a planning application in that case and was opposed by a community group which sought to raise funds to acquire the site) was uncertain and that Worthy Developments may, or may not, obtain the planning permission they applied for and may, or may not, sell their land to the local community group. Nonetheless, he considered that, despite Worthy Developments stated intention to develop the plot for housing, the potential resurrection of a community use was a realistic prospect in those circumstances. In *Evenden Estates v Brighton and Hove City Council* [CR/2014/0015] Judge Lane stated “that what is “realistic” may admit a number of possibilities, none of which needs to be the most likely outcome”. The same can be said in this case. Whilst it remains clear that the owner intends to continue to restrict community use of the land, the planning application remains to be determined and, therefore, it is realistic to consider that there are a number of possible outcomes, one of which being that community use of the land could resume.
- 4.13** Notwithstanding the Trust’s clear intentions to restrict community use, I accept that this alone is not determinative of the future use of the land. However, this, together with the Trust’s charitable objects (as set out on the Charity Commission Website) and the clear intentions of the Parish Council (and their potential for fundraising as set out in their nomination) lead me further to find that 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 that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community.

4.14 I therefore consider that the requirements of the Localism Act 2011 as set out at Section 88(2)(a) and (b) are met.

4 Conclusion

In conclusion, taking all these points into account I am satisfied:

- That the test set out in section 88(2)(a) & (b) of the Localism Act 2011 as to whether (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, has been met.

I have therefore decided that the property should remain included within the District Council's list of Assets of Community Value.

6. Any Conflicts of Interest Declared?

No.

7. Supporting Information

None.