CHAPTER 3, PART 5 OF THE LOCALISM ACT 2011
ASSETS OF COMMUNITY VALUE (ENGLAND) REGULATIONS 2012

NOMINATION OF BUILDING OR LAND TO BE INCLUDED IN LIST OF ASSETS OF COMMUNITY VALUE

DELEGATED REPORT

Reference:	PR86-011
Case Officer:	Darren McBride
Site Address:	Land known as Hospital Field, Lees Road, Brabourne, Ashford, Kent (as shown on the attached plan)
Title Number(s):	Mostly unregistered but a small section is registered under Title Numbers K414908 (Freehold) and K583931 (Freehold)
Nominating Body:	Brabourne Parish Council
Nomination Validated:	11 February 2016
Deadline Date:	7 April 2016

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Introduction

Under the Localism Act 2011 ("the Act"), the Council must maintain a list of buildings or other land in its area that are of community value, known as its 'List of Assets of Community Value'.

There are some categories of assets that are excluded from listing, the principal one being a residential property.

Generally, buildings or land are of community value if, in the opinion of the Council:

- 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[1].

Buildings or land may also be of community value if in the opinion of the Council:

[1] Subsection 88(1) of the Act

- 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
- 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[2].

Buildings or land which are of community value may only be included in the 'List of Assets of Community Value' in response to a community nomination by certain specified bodies such as parish councils or voluntary or community organisations with a local connection.

A valid community nomination must contain certain information, including:

- a description of the nominated building or land including its proposed boundaries
- a statement of all the information which the nominator has with regard to the names of the current occupants of the land, and the names and current last-known addresses of all those holding a freehold or leasehold estate in the land
- the reasons for thinking that the Council should conclude that the building or land is of community value
- evidence that the nominator is eligible to make the community nomination

A valid community nomination must be determined within eight weeks. In this instance, the nomination was validated by the Council on 11 February 2016 and so must be determined by 7 April 2016.

If the Council accepts a valid nomination then it must be included on the 'List of Assets of Community Value'. If the Council does not accept that the asset nominated meets the statutory definition, or if it is one of the excluded categories, then the valid nomination must be placed on a 'List of Assets Nominated Unsuccessfully by Community Nomination'.

Procedure

Information about this community nomination has been sent to the following:

- Brabourne Parish Council (the nominating body)
- Dr C Johnson and Kent County Council (Freehold Owners)
- Mr W E Jeanes (Occupier)
- Cllr G Clarkson (Leader of the Council)
- Cllr B J D Heyes and Cllr G Bradford (the then Portfolio Holder and Lead Member for Highways, Wellbeing and Safety)[3]
- Cllr W Howard and Cllr J Martin (Ward Councillors)

No representations have been received from these persons/bodies.

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[2] Subsection 88(2) of the Act

[3] There has been a re-shuffle of these posts since the nomination was received

If the Corporate Director (Law and Governance) and Monitoring Officer (Principal Solicitor, Strategic Development to substitute) includes the asset on the Council's 'List of Assets of Community Value' then the owner has the right to request, within eight weeks from the date when written notice of listing is given, the Chief Executive to review the decision.

If the owner is not satisfied with the outcome of the internal listing review then they have the right to appeal to the General Regulatory Chamber of the First-Tier Tribunal against the review decision.

The property will remain listed during the review and appeal process.

Nominations of buildings/land to be added to the Council's List of Assets of Community Value are usually determined by the Corporate Director (Law and Governance) and Monitoring Officer. In this case, however, the Corporate Director (Law and Governance) and Monitoring Officer owns a property adjacent to the nominated land and so he has not been involved in any discussions or considerations of this nomination, nor in the making of any decision upon it. This report is instead made to the Principal Solicitor, Strategic Development who is – in accordance with the Council's decision-making arrangements – authorised to substitute.

Consequences of Listing

If an asset is listed nothing further happens unless and until the owner decides to dispose of it. If the owner does decide to dispose of the asset then, unless an exemption applies, the owner must first notify the Council in writing.

Interim Moratorium
There is then a six week interim period from the point the owner notifies the Council. The Council must then inform the nominating community group who may then make a written request to be treated as a potential bidder. If they do not do so in this period then the owner is free to sell their asset at the end of the six week period.

Full Moratorium
If a community interest group does make a request during this interim period, then a full six month moratorium will operate. The community group does not need to provide any evidence of intention or financial resources to make such a bid.

During this full moratorium period the owner may continue to market the asset and negotiate sales, but they may not exchange contracts (or enter into a binding contract to do so later). There is one exception: the owner may sell to a community interest group during the moratorium period.

After the moratorium – either the interim or full period, as appropriate – the owner is free to sell to whomever they choose and at whatever price, and no further moratorium will apply for the remainder of a protected period lasting 18 months (running from the same start date of when the owner notified the Council of the intention to dispose of the asset).

Compensation

Private owners (not public bodies) may claim compensation for loss and expense incurred through the asset being listed. This may include a claim arising from a period of delay in entering into a binding agreement to sell which is wholly caused by the interim or full moratorium period; or for legal expenses incurred in a successful appeal to the First-Tier Tribunal. The assumption is that most claims will arise from a moratorium period being applied; however, the wording of the legislation does allow for claims for loss or expense arising simply as a result of the asset being listed.

The Council is responsible for administering the compensation scheme, including assessing and determining compensation awards.

As with the listing itself, an owner may request an internal review of the Council's compensation decision. If the owner remains unsatisfied then they may appeal to the General Regulatory Chamber of the First-Tier Tribunal against the review decision.

Assessment

The nominating body is "a voluntary or community body" with "a local connection", as defined in Regulations 4 and 5 the Assets of Community Value (England) Regulations 2012 ("the Regs").

The community nomination contains the information required by Regulation 6 of the Regs for it to be considered by the Council.

The community nomination form asked the nominating body to provide their reasons for thinking that the Council should conclude that the building/land is of community value. The questions and answers state as follows:

Q1. What is the current main use of the land/building(s)?

A1. "The land is an agricultural field which has been used by a significant number of inhabitants of the area for informal recreation for more than 20 years.

"The informal recreation use is an actual current use and is a non-ancillary use of the land"

Q2. How does the current main use of the land/building(s) further the social wellbeing or social interests of the local community...?

A2. "Please see the attached statement [*reproduced below*].

"If Ashford Borough Council considers further evidence would be helpful, the Parish Council holds and can provide to the Borough Council statements and completed questionnaires from well over 30 local residents describing their use of the land over many years. This plainly furthers the social well-being and interests of the local community. Insofar as it is relevant, the use by the local community is considered to be lawful

since it has been carried out openly, without force and tolerated by the owner for more than 20 years"

Q3. Why do you consider that this, or some other main use to which the land/building(s) will be put which will further the social wellbeing or social interests of the local community, will continue and over what period...?

A3. "Since the use is lawful, the owner is not is a position to prevent it in any event. Even if the owner did retain such a right, for the reasons set out in paragraphs 21-22 of the decision of the First Tier Tribunal (General Regulatory Chamber) in *Higgins Homes v LB Barnet (23 Oct 2014)*, it is realistic to conclude that the status quo can continue (as it has done for well in excess of 20 years) and therefore that the future condition is satisfied in the present case"

The 'attached statement' (referred to in A2 above) states as follows:

"The land which is the subject of this application has been in low level agricultural use (or left fallow at times) for many years, including the last 20 years. Its longer history includes use as a hospital during the Napoleonic Wars, a use which gave the field its local name. The field is understood to have been in the ownership of the Johnson family (resident in Devon) for some generations.

"Over the last 20 years and longer the land has been used for a wide range of informal recreation pursuits and pastimes by a significant number of inhabitants of the neighbourhood of Brabourne Lees within the locality of Brabourne and Smeeth parishes. This has been done openly, peaceably and without force and without consent or objection from the owner. The full range of pursuits includes dog exercising and walking, family leisure outings with children and pets, ball games, picnics, model aircraft and kite flying, bird-flying, nature observation, horse riding, and also extensive use at times of significant snowfall for a variety of games and activities. It is patently the case that use by residents of the neighbourhood indicates a general use for informal recreation rather than merely occasional use by trespassers.

"The owner has never sought to challenge or restrict the informal recreational use and so no significant interruptions of use have occurred in the past 20 years and more. The nature of many of the recreation uses has also meant that in years when the land has been used for crop-growing, the two uses have continued to co-exist.

"The site is crossed by three Public Rights of Way (Footpaths AE274, 275 and 276) but virtually all the informal recreation use of the land has been of the field as a whole, way beyond anything which could reasonably be regarded as merely use attributable to use of the footpaths.

"Access to the field is available at many points around its perimeter, with footpaths crossing the site, regular gaps in hedgerows also affording access at various other points along Lees Road and Canterbury Road. Several properties in Mountbatten Way enjoy direct gated access to the

field. Direct access is also available from an alleyway off Canterbury Road. The ease of access has doubtless contributed to its attraction to such large numbers of inhabitants.

"In the view of Brabourne Parish Council, it is clear that the scale and nature of recreational use by a significant number of local inhabitants furthers the social well-being and interests of the local community"

The nominating body has also provided some "further evidence" (as referred to in A2 above) comprising nine[4] "statements and completed questionnaires" in support of a Village Green application[5]. I am informed that these represent a sample of some 61 "evidence questionnaires regarding use of the land which were returned to the Parish Council".

I understand that the questionnaires were completed by residents in support of a Village Green application but the nominating body considers that some of the information contained in the completed questionnaires also demonstrates use of the land which furthers the social wellbeing or social interests of the local community.

In summary, the nine questionnaires state that the land has been used without interruption or challenge for decades for activities such as:

- Walking/Jogging (including dog walking)
- Cycling
- Play area for children
- Kite flying
- Bird watching
- Picnics
- Hedgerow fruit picking
- Horse riding
- Ball games
- Homework assignments
- Star gazing
- Sledging and building snow men
- Metal detecting
- Flying model aircraft
- Fireworks
- General relaxation

The same evidence also refers to:

[4] The nominating body's covering letter refers to ten evidence questionnaires but just nine were received. The names and signatures of the residents who completed the questionnaires have been redacted by the nominating body but their addresses indicate that they live in the properties adjacent to the land.
All of the questionnaires submitted are recent (January-February 2016) and whilst it would have been more appropriate for their names (but not their signatures) to have been supplied to the Council, I have no reason to think that they are other than genuine.

[5] Which would be dealt with by Kent County Council, not Ashford Borough Council.

- "Collecting hay gleanings after crop removed" and "I have [been] respectful of any field crops if they were present" (*A person who first started using the land in 2003*)
- "After harvest time, people use the field for collecting blackberries, plums etc..." (*A person who first started using the land in 1986*)
- "When uncultivated it was a place to enjoy as a meadow with wild flowers and grasses"; "...when crops are growing or after ploughing or harvesting (in years when the field has been cropped)..."; "Of course when ploughing or harvesting takes place..."; "It is easy to assume that the fact a field is put down to arable use must mean that there are significant breaks in [use]. The field has not been cropped every year but I can recall crops of corn, peas etc. over the years. However the reality in the case of this field is that two uses have been able to co-exist and the relatively low-level agricultural activity in the field has not prevented informal recreational use..." etc. (*A person who first started using the land in 1980*)
- Informal recreational activities carried on "over entire field, during fallow periods between crops" (*A person who first started using the land in 1985*)
- "Climbing bales of hay" (*A person who first started using the land in 1982*)

Following validation of this nomination, I received a telephone call[6] from Gladman Developments Limited in which they asked about the nomination process. Later that day, Gladman sent me an e-mail which states as follows:

> "Thank you for speaking with me this morning.
>
> "Further to our discussion I understand you are the officer who will make a recommendation about the determination of the application for an Asset of Community Value on Land at Lees Road, Brabourne Lees (Your reference: PR86-011).
>
> "Having discussed this with you, I understand there is no formal scope for landowners to make representations at this stage of the application process and you will this week consider the matter based upon the nomination form. I also understand that, in the event a listing is made, we will be entitled to comment on behalf of the landowner via means of an internal review.
>
> "If any of the above is a misunderstanding, I'd be grateful if you would correct it.
>
> "There are however two factual matters which I am unclear whether you are aware of and which I have therefore set out below. Whilst there are of course consequential representations we may seek to make in due course if necessary, I have very deliberately only set out the facts below to hopefully enable you to take these into account.
>
> <u>"Village Green Trigger Event</u>
> I note that much of the material included within the nomination form (especially within the statement of support) presents arguments in a

[6] At 10:35am on Tuesday 29 March 2016.

manner more closely associated with an application for Village Green status. You should be aware that as no village green application has been made[7], the submission of the current planning application (16/00303/AS) constitutes a trigger event. I know you will be aware that the Assets of Community process and Village Green protections are materially different in their purpose, scope and operation and we would respectfully ask that any merits (or otherwise) of the site as a Village Green form no part of your consideration of the current nomination.

"The Primary Use of the Land
Given that the nomination form seeks to assert that the field has been in *"low level agricultural use"* and *"virtually all the informal recreational [use] of the land has been of the field as a whole"* I would be grateful if you could confirm that part of your decision making process will be to decide whether any community use which has (or may in the future) occurred is a primary use of the site (as opposed to ancillary use to the field's primary use as an actively farmed agricultural field).

"Whilst we note there will be an opportunity for us to make representation on this in due course, we respectfully do not consider you will be able to fairly form a view upon this from the information included on the nominations form.

"I therefore attach a document containing aerial photos of the site from a number of recent years[8]. For orientation purposes, the three public footpaths (especially AE274 & AE275 which cross the main part of the site in an "X" formation) can be clearly seen through the standing crops.

"Whilst we reserve the right to make representations if we are given the opportunity to, we trust that you will consider the attached photos when making your initial decision.

"Given that we are acting for the Landowner in the planning application for this site[9] (and with their consent) I would ask that Gladman are also copied into any further correspondence with the landowner on this matter"

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The Council cannot list buildings or land on its own initiative – they must be nominated. Therefore, the onus is on the nominating body to give their reasons

[7] The copies of the "statements and completed questionnaires" in support of a Village Green application, which I have received in support of this nomination, suggest that this claim may be incorrect. However, whether or not a Village Green application has been submitted is irrelevant for the purposes of determining whether the land should be included in the Council's 'List of Assets of Community Value', and so I do not give any weight to this matter.

[8] Attached to the e-mail is five Google Earth aerial photographs of the land dated at various times between April 2007-July 2014, all apparently showing crops growing on all or most of the nominated land.

[9] Ref. 16/00303/AS: "Outline Planning Application for up to 125 residential dwellings at land east of Lees Road, Brabourne Lees (including up to 35% affordable housing), introduction of structural planting and landscaping, informal public open space and children's play area, surface water flood mitigation and attenuation, vehicular access point from Lees Road and associated ancillary works. All matters to be reserved with the exception of main site access"

for thinking that the Council should conclude that the building/land is of community value.

There is little guidance on the criteria a local authority should consider when deciding whether an asset is of community value. When the Act was at the Bill stage, the Minister stated that:

> "...We have suggested that one of the criteria for assessing what is an asset of community value could be evidence of the strength of community feeling about supporting the asset's being maintained for community use"

In this case, the nominating body is a parish council and so it is reasonable to assume that the Parish Council is representing the views, or is expressing the general wishes, of a reasonable percentage of their local community. Also, notwithstanding that the sample of statements and completed questionnaires which have been submitted were originally produced by residents in support of a Village Green application, this evidence still suggests that there is likely to be strong community support for this nomination. Nevertheless, the decision is one for this Council to make.

To re-cap, buildings or land are of community value if, in the opinion of the Council:

- 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. [my emphasis]

The nomination form and supporting evidence describe a wide range of informal recreational activities which would all further the social wellbeing or social interests of the local community[10]. The activities described appear to be current and on-going at the date of the nomination.

The activities which would occur on the public footpaths appear to take place daily. However, it would be inappropriate to extrapolate uses from the footpaths to the whole field, especially as there is a public right to walk, jog etc. on those public footpaths. Therefore, I consider that I should give little weight to the uses on the footpaths and should instead focus on the uses of the remainder of the land, especially since the nomination is not for the listing of the footpaths alone. (I return to this possibility below).

It would appear that the activities described are carried on across the remainder of the land outside of the crop-growing seasons. The evidence suggests these activities occur for several months each year in the years when the land is sown to crops, and throughout the year when the land is left fallow.

[10] "Social interests", as defined in subsection 88(6) of the Act, includes "recreational interests".

As mentioned in footnote 9 (above), an application has been submitted for outline planning permission for up to 125 residential dwellings to be erected on the land. If the planning application is successful and the proposed development fully built out, then clearly most of the informal recreational activities described would be unable to continue on the land. However, the land is not allocated in the Development Plan for residential development, no previous planning permission for residential development of the land exists, the current application for outline planning permission has not yet been determined, and there is no indication that the proposal will be acceptable. Therefore, at present it is realistic to think that the informal recreational activities can continue.

In my view, the actual current informal recreational use of the land does further the social wellbeing or social interests of the local community and it is realistic to think that the informal recreational use can continue.

However, to fully satisfy the two conditions in section 88(1) of the Act the relevant community use must be a non-ancillary use of the land.

There appears to be no definition or guidance as to what "ancillary" or "non-ancillary" would mean in the context of the community right to bid. Therefore, it is left to the Council to decide.

In this case, the nominating body describes the land as follows:

> "The land is an agricultural field which has been used... for informal recreation..."

The supporting evidence (summarised above) contains a number of references to the agricultural use of the land and, although the land may have been fallow in certain years, there is no suggestion that the agricultural use had been abandoned at the date of the nomination.

Instead, the nominating body states that:

> "The nature of many of the recreation uses has also meant that in years when the land has been used for crop-growing, the two uses have continued to co-exist"

It is not easy to understand this statement. It may refer to the fact that some users of the whole land have continued to do so despite the presence of crops, trampling them as necessary, although this is contrary to the submitted evidence. I think this is highly unlikely. A more likely explanation is that the recreational use of the land in cropping years has been restricted to: (a) 'spare time' i.e. outside the growing/harvesting season; and (b) 'spare land' i.e. the footpaths and hedgerows/field margins not used for cropping. If so, I think that this suggests strongly that the agricultural use is the primary use and that the informal recreational use is ancillary to the primary agricultural use in that it 'gives way' to it when necessary.

However, the nominating body is maintaining that the informal recreational use is not an ancillary use, so it must be suggesting that:

- the informal recreational use is now the primary use; or
- there are two primary uses which "co-exist" alongside each other i.e. the lawful agricultural use and the informal recreational use which is considered by the nominating body to be lawful because "it has been carried out openly, without force and tolerated by the owner for more than 20 years"; or
- the informal recreational use is a non-primary (or "secondary") use but it is non-ancillary to the primary agricultural use

First, regarding lawfulness, the nominating body states:

> "Since the use is lawful, the owner is not is a position to prevent it in any event. Even if the owner did retain such a right, for the reasons set out in paragraphs 21-22 of the decision of the First Tier Tribunal (General Regulatory Chamber) in *Higgins Homes v LB Barnet (23 Oct 2014)*, it is realistic to conclude that the status quo can continue (as it has done for well in excess of 20 years) and therefore that the future condition is satisfied in the present case"

Paragraphs 21-22 of the First-Tier Tribunal's decision notice in *Higgins Homes v London Borough of Barnet (2014)(UKFTT/CR/2014/0006 (GRC))* states as follows:

> "Turning to future use, Ms Ellis stressed the owner's right to prevent trespass. Of course that right exists and is to be taken into account. I accept that Mr Hancocks, a director of Higgins, when he visited the site recently told some young boys that they should not be playing football on it. At present, however, the status quo seems to be maintained. No doubt it is a delicate balance. The company must insist on its ownership rights – and the local community do not dispute those. The residents association, for example, has deliberately stopped holding formal events on the field. On the other hand, there is a sense in which the company might find a strict enforcement of their rights to be unpalatable. It might be bad local PR. It might even be that the residents' careful and tranquil use of the land is a cheap form of security. There is no planning permission to change the present use.
>
> "In these circumstances whilst Greensquare Field might reasonably be regarded as the subject of a fragile or uneasy truce, the absence of any contrary planning permission is significant enough for me to regard it as realistic that the status quo can continue (as it has done) and that the future condition is satisfied"

There is nothing before me to suggest that there have in the recent past in this case been any attempts – by notices, fencing, correspondence, remonstration or otherwise – by the owners or tenants of the land, to prevent the local community using it. As such, the use could be described as "tolerated" and it is reasonable to accept that the local community's use in the subject nomination – "openly, peaceably and without force and without consent or objection from the owner" – is similar to that described in *Higgins*. The informal recreational use, even if formally unauthorised, may still be taken into account by the Council when considering this nomination. In reaching this conclusion I have also relied

on the First-Tier Tribunal's decision in *Banner Homes Limited v St Albans City and District Council (2014)(UKFTT/CR/2014/0018 (GRC))*[11].

However, whether or not the informal recreational use is lawful does not answer the key question: *Is that informal recreational use the (or a) primary use of the land or, at the very least, a use which is not ancillary to the primary agricultural use?*

The passive nature of arable farming (where a field can be – or can appear to be – crop-free for long periods) may give an impression that the more visible day-to-day informal recreational activities on the land constitute its primary use. In fact, even when crops are present, some of the informal recreational activities can still take place on parts of the land and may appear to be the predominant use.

In this case, there is no suggestion that the agricultural use of the land has ceased. The nominating body has referred to the land being "left fallow at times" but, as I understand it, crop rotation and fallow periods are common practice in arable farming as they improve the fertility of the soil. Fallow periods are often necessary for the continued effective use of the land and so are intrinsic to the agricultural use. In short, the land does not cease to be an agricultural field when crops are not growing in it. Moreover, one of the supporting statements refers to a hay crop being taken from the land.

Concepts such as a "dual uses", "composite uses" and "ancillary uses" exist in planning law. However, there is no indication that Parliament intended Councils to transplant those planning law considerations into the Asset of Community Value regime.

In the First-Tier Tribunal's decision in *The General Conference of the New Church v Bristol City Council (2015)(CR/2014/0013)*[12], the Judge stated that:

> "...it may be helpful (to put it no higher) to look at how the concept of primary and ancillary uses is dealt with in planning law" [my emphasis]

In my view, even if it would be helpful to look at how such concepts are dealt with in planning law, it would be inappropriate for the Council to reach a formal view on matters such as whether there is now a lawful planning-type "dual use" or "composite uses" of the land when dealing with a community nomination of this type.

Instead, unless they are specifically defined in the Act or the Regs, I feel that it would be more appropriate to reach a conclusion on a community nomination using the ordinary meaning of words and expressions.

In this case, from the information I have received, I do not consider that the informal recreational use has supplanted the agricultural use as the primary use of the land, nor does the nomination claim it has done so. Neither does the informal recreational use now hold a joint-primary status because it 'gives way'

[11] Specifically paragraphs 22-36

[12] Specifically paragraphs 18-23

to the agricultural use whenever this is being actively pursued. In other cases which have reached the General Regulatory Chamber of the First-Tier Tribunal, uses by other persons/groups of buildings/land outside of their hours of use for their main uses have generally been held to be "ancillary" in the context of the assets of community value regime[13]. This is so even though, in planning law, an ancillary use would usually be carried on by, or under the control of, the owner/occupier who carries out the primary use(s) and confirms that in the assets of community value regime the concept of "ancillary uses" can encompass uses by third parties. Only in *Idsall School v Shropshire Council (2015) (UKFTT/CR/2014/0016 (GRC))* was a joint use of playing fields by two institutions, which had in the past been formalised under a sharing agreement, held to create a non-ancillary use, which I take to mean a joint primary use.

The nominating body has claimed that "the informal recreational use is... a non-ancillary use of the land". However, the nominating body has not explained to my satisfaction why it considers the informal recreational activities to be intrinsic to the main agricultural use of the land. From the information I have received, I do not consider that the activities described are in any way integral to the primary agricultural use.

The informal recreational use may be a form of secondary use, but it is clearly ancillary to the primary agricultural use of the land and in accordance with the case law above I do not think that there is any warrant for a concept of 'secondary' uses that are neither primary nor ancillary. I therefore find it to be ancillary.

Also, generally, if the Council did accept this nomination then it could, in effect, suggest that many agricultural fields which are also used at times by the local community for walking, picnicking, berry picking, bird watching etc. could be considered for inclusion in the Council's 'List of Assets of Community Value'. Yet, there is no indication in any of the government guidance concerning the Act and the Regs that Parliament intended the community right to bid scheme to extend to active (as opposed to abandoned) agricultural land in this way.

Finally, I have found it instructive to consider also *Gullivers Bowls Club Limited v Rother District Council (2014)(UKFTT/CR/2013/009 (GRC))*. The judgment in this case confirms that planning law concepts, developed by the Courts for a different purpose, should not readily be imported into decisions under the Act[14] and that each case will turn on its own facts[15]. Importantly, this case also considered whether, where "an actual current use" extends to only an identifiable part of a nominated land, there is power to list only that part of the land i.e. list less than the whole land nominated. This is of potential relevance in this case because I have considered the possibility that merely the sites of one or more of the three public footpaths across the land should be listed, rather than the entire land. It seems to me that there may be a primary use of these public footpaths for recreational purposes that furthers the social wellbeing or

[13] See *Dorset County Council v Purbeck District Council (2014) (UKFTT/CR/2013/0004 (GRC))* and *New Church*
[14] Para 7
[15] Para 8

social interests of the local community and which – given the extant public rights of way – will be likely to continue.

I do not need now to consider whether there may also be a primary use of these footpaths for non-recreational walking (e.g. to work or school) or for agriculture. Nor indeed whether any use of these footpaths for agriculture is or could be lawfully taking place. I consider that it would be artificial to separate out up to three small strips of land for listing under the Act[16] – especially in the absence of carefully-drawn plans of those footpaths and written evidence focused on the extent and purposes of their use.

I am also not convinced that there is necessarily an implied power to list very small part(s) of a large nominated site[17], nor – if there is – how this would operate in terms of the preparation of plans showing such part(s). I prefer the view that it is normally for the nominating body to submit appropriate plans, supported by evidence that the land shown thereon is eligible for listing, which I think is "the fair and sensible course" (as stated in *Gullivers*, para 9) in a case such as this. Therefore, I feel that it would not be fair or sensible to consider this further under this nomination, and I would dismiss the possibility of partial listing in this case. I note that it was also dismissed in *Banner Homes*[18], although for reasons apparently connected with views, flora and fauna with which I do not necessarily agree – but each case must be decided on its own facts.

*

Conclusions

In my view, the actual current informal recreational use of the land does further the social wellbeing or social interests of the local community and it is realistic to think that the informal recreational use can continue.

However, from the information I have received, the informal recreational use is ancillary to the main agricultural use of the land. Therefore, the land does not meet the statutory definition and so should not be included in the Council's 'List of Assets of Community Value'.

Recommendation

That the Principal Solicitor, Strategic Development decline the nomination for this land to be included in the Council's 'List of Assets of Community Value'.

That the Principal Solicitor, Strategic Development consent to this land being placed instead on the Council's 'List of Assets Nominated Unsuccessfully by Community Nomination'.

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[16] cf para 8 *Gullivers*
[17] cf para 9 *Gullivers*
[18] Para 20

AUTHORITY

In accordance with the functions delegated to me, and for the reasons set out above, I hereby decline the nomination for this land to be included in the Council's 'List of Assets of Community Value'. This land should instead be placed on the Council's 'List of Assets Nominated Unsuccessfully by Community Nomination'.

.....Jeremy Baker.....

Principal Solicitor, Strategic Development

Date: .....27 May 2016.....

Parish Online

Hospital Field

Brabourne CP N