COMMUNITY RIGHT TO BID

REVIEW DECISION NOTICE

(Section 92 Localism Act 2011)

To:

Applicant for the Review Banner Homes Group PLC

Nominating Group Verulam Residents' Association

Other owners Aspley Homes Limited, Batchworth Properties Ltd

A request was made for a review of the decision to include land in the List of Assets of Community value on 30th April 2014 under section 92 of the Localism Act 2011 for the determination of whether the listed land should continue to be included in the Council's list of Assets of Community Value.

The Land in question is the land situated at and known as

Bedmond Lane Field, St Albans [near to Bedmond Lane, Mayne Avenue, the A4147, Parkland Drive] **Land Registry Nos.** HD19595, HD311300, HD352290

The Council hereby gives Notice in accordance with section 92 of the Localism Act 2011 that following a review the land in question will continue to be included in the list of Assets of Community Value.

Our **reason(s)** for the decision:

1. Review Decision

1.1. On 26 September 2014 I conducted an oral review hearing into the listing of land known as Bedmond Lane Field, St Albans (near to Bedmond Lane, Mayne Avenue, the A4147, Parkland Drive) as an Asset of Community Value. The land was listed by St Albans City and District Council under a notice dated 10 March 2014. By a letter dated 30 April 2014, Pitmans Solicitors, acting for the owner of the land, Banner Homes Group PLC [BHG], requested a review of the Council's decision pursuant to Schedule 2, paragraph 1 (1) of the Assets of Community Value (England) Regulations 2012. They requested an oral hearing.

2. The Evidence

2.1. At the hearing I received oral and written representations from Mr Douglas Edwards QC on behalf of BHG, Debbi White, Property and Asset Manager, St Albans City and District Council and Martin Frearson on behalf of the Verulam Residents' Association (who nominated the land for listing).

2.2. I also heard oral evidence from Mr Paul McCann, Strategic Land Director, Cala Group Limited (which acquired the Banner Homes Group in April 2014). He produced a statutory declaration dated 3 September 2014 and also photographs of the land taken on 24 September 2014. I also received a copy of a petition signed by a number of local residents calling upon the Council to maintain the land on the list of Assets of Community Value and a written submission setting out the Verulam Residents Association case. I also had before me an Agenda for the hearing comprising 481 pages which contained extracts from the Localism Act 2011 and Assets of Community Value (England) Regulations 2012; details of the nomination for listing by the Residents Association; a statement from Debbi White; the Council's decision to list; BHG's request for a review and their evidence in support including case law and extracts from textbooks on statutory interpretation and evidence from Verulam Residents Association.

2.3. I also had before me a planning refusal notice from the Council's Head of Planning dated 13 August 2014 relating to a planning application (reference 5/14/1394) by BHG for a change of use of land from agricultural to the keeping of horses on land between Mayne Avenue and Bedmond Lane, St Albans.

2.4. I was accompanied at the hearing by Councillor Julian Daly, Council Leader and Portfolio Holder for Planning and Conservation. I am delegated by the Council in consultation with Councillor Daly to consider and determine requests for reviews of Council decisions to list land as an Asset of Community Value.

2.5. Notes of the hearing are attached as Appendix 1 to my decision. The notes summarise the submissions and evidence given at the hearing. The hearing was heard in public. A number of local residents attended the hearing.

2.6. Bedmond Lane Field has been entered into the List of Assets of Community Value maintained by the Council. The reasons given for the decision are:

"The land is open with no apparent barriers to public access. It is open space with a public footpath running through it. It appears to fulfil a community benefit and there is no reason to assume this will not continue". The land was entered onto the list on 10 March 2014. The decision and a location plan are contained at pages 170-172 of the Agenda for the Hearing.

2.7. Section 88 (1) of the Localism Act 2011 provides that a building on other land in a Local Authority's area meets the criteria for listing if in the opinion of the Authority:

(a) an actual current use of the building or other land that is not ancillary use furthers the social wellbeing or social interests of the local community, and

(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 local wellbeing or social interests of the local community.

2.8. Section 88 (2) goes on to provide that 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 was 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.

3. The Council's original decision maker's evidence

3.1. Debbi White, the Council's Property and Asset Manager, who made the decision to list the land stated that she had inspected the site which could be accessed from the adjoining highways. She said that there were no signs, notices or physical barriers and there were clear desire lines cutting across the land in addition to the public footpaths. Ms White described the land as uncultivated and not regularly managed. There appeared to be evidence of public use. The site inspection report by Lyn Henny from the Council's Property Services section dated 28 January 2014 states that it was wet during the inspection and there were no people evident but there were muddy footprints suggesting it was used for walking. No signage was noted other than public footpath signage. Debbi White noted that the land is within the Metropolitan Green Belt and that from the planning history for the site it seemed reasonable to suppose that the land will

not change use in the near future. Ms White had no reason to believe that the landowner had any intention of preventing the public using this land and there was evidence from a 1997 enforcement appeal that the Residents' Association had planted trees with the consent of the then owners. Ms White considered that the land has been important to the community for at least the last 21 years. She considered it was reasonable to assume that there is a realistic chance that the use will continue. Ms White confirmed that at the time of the site visit the land was not fenced and that she had made her decision without the benefit of representations from the landowner.

3.2. Ms White was questioned by BHG. The questions and her answers are recorded in the Hearing notes.

4. The Owner, Banner Homes Group PLC's, evidence

4.1. Mr Douglas Edwards QC referred to the Skeleton Argument for Banner Homes Group PLC (see pages 188 to 195 of the Agenda for the Hearing). BHG accepted that the land was open and undeveloped and that there had been some level of public access and recreational use. He said there were lawful footpaths and accepted that there were worn paths. Apart from the public footpaths the land has now been fenced to prevent any further public access. There was no suggestion that Banner Homes were not entitled to erect fences. The fences had been damaged and action was being taken to repair the fences. Mr Edwards said that the land was private. Members of the public had no right to enter the land and any use of the land beyond the public footpaths was a trespass.

4.2. The proper interpretation of section 88 (1) of the Localism Act 2011 was that if a benefit is granted it is to be presumed that Parliament intended the benefit to operate only when it arose out of a lawful use. Mr Edwards referred to Halsbury Laws of England Volume 96, paragraph 1152. "If a statutory benefit is given only if a specified condition is satisfied, it is presumed that the legislation intended the benefit to operate only where the required act is performed in a lawful manner".

4.3. Mr Edwards also referred to paragraphs 43 – 57 of the Judgment of Lord Mance in the case of Welwyn Hatfield BC v Communities and Local Government Secretary (2011) 2 AC 304. Mr Edwards stated that the principle of statutory interpretation applies whether the unlawfulness is criminal or civil – see paragraph 53 of the Lord Mance's Judgment. There had to be clear language before it could be presumed that Parliament had intended to confer rights on the basis of unlawfulness. Also, to do so will amount to an interference under Article 1 of the First Protocol of the European Convention of Human Rights. Mr Edwards referred to published guidance as to the application of section 88. Examples quoted at paragraph 17 of his Skeleton Argument were of uses of facilities by invitees.

4.4. To qualify under section 88 a use must be a lawful one. Mr Edwards maintained

that there can be no dispute that the use of the land was unlawful and as such it cannot be a qualifying use.

4.5. The second ground of his argument was that for the land to be listed then under section 88 (1) (b) it had to be realistic for the use to continue. BHG had fenced the land and erected notices to prevent a claim based on access and to preclude trespassory use. He called Mr McCann to give evidence as to the erection of the fences and of recent damage caused to those fences [photographs were submitted in support – see Appendix 2].

4.6. Mr McCann gave evidence that in a telephone call on 1 September 2014. Paula Wilde, a Planning Enforcement Officer from St Albans District Council, informed him that the fencing was within permitted development tolerances. Julian Thornton, Rights of Way Officer at Hertfordshire County Council, had confirmed to Mr McCann that the fencing created no impediment to Statutory Rights of Way.

4.7. Mr Edwards contended that it was not realistic to think that the use can continue because of the active steps by the landowner to introduce a substantial fence and the owner's intentions to repair the fence and maintain it in future. In addition BHG viewed the land to have development potential. They would be making submissions to the Council when the Strategic Local Plan was published on 10 October and at the Detailed Local Plan stage. The owner sought to protect its land, from trespass and against any liabilities which might arise for injuries under the Occupiers Liability Legislation, by erecting the fence.

4.8. There was little basis on which it can be concluded that the ongoing recreational use of the land could realistically be thought to be capable or likely to continue. It was not possible, rational or reasonable for the test in section 88 (1) (b) to be found in favour of the application.

4.9. Questions put to BHG. The questions and their answers are recorded in the notes.

5. The Nominating Group, Verulam Residents' Association's, evidence

5.1. Representations were then made by Mr Martin Frearson on behalf of Verulam Residents' Association [VRA]. He read a submission which is attached at Appendix 3 to this decision and referred to various minutes of meetings of the Residents' Association from 1988 to 2001, personal testimonies as to use from local residents, a letter from the Planning and Policy Officer of the Hertfordshire and Middlesex Wildlife Trust dated 17 June 2014 and to various correspondence including that with the current and former owners of the land.

5.2. Mr Frearson introduced the Association. They believed that Bedmond Lane Field is suitable to be listed as an Asset of Community Value due to its social and recreational character and the use of the site since the late 1960s. He also

referred to the work undertaken by the Association to keep the footpaths open, work of planting and maintaining hedges and action to prevent traveller incursions. Mr Frearson stated that BHG was aware of this activity and that the Association were never asked to stop accessing the site. Mr Frearson stated that the Association had no knowledge of the recent damage caused to the fencing and the notices. Mr Frearson stated that until recently no notices have been displayed on the site by the previous owners, Olds, or by BHG. He said that Mr McCann on behalf of BHG had offered the VRA a more formal involvement in the management of part of the field in 1999. However, the Management Committee had declined the invitation because it was subject to a condition that the Association would not oppose a future housing development on part of the site. Mr Frearson stated that the field had functioned as an uncultivated informal public open space and a haven for wildlife forming a barrier between the Verulam housing estate and the arable fields beyond.

5.3. Mr Frearson contended that the site furthered the social wellbeing or social interests of the local community and he referred to the use made of the field as set out in the letters on pages 467 to 479 of the Agenda. The Association disputed the interpretation of the legislation put forward on behalf of BHG. Mr Frearson contended that there was no justification to read into section 88 of the Localism Act a limitation that use which amounts to a trespass cannot also add to the social wellbeing of the community. The Act is concerned with use rather than private rights over the land. In any event Mr Frearson contended that there were many uses made of the land which do not amount to a trespass. The cases sited by BHG referred to criminal trespass and did not apply here. Even if the reviewer was to interpret the Act as suggested by BHG there were many uses which were not trespassory, such as the use of the public rights of way, or of the desire lines, which are likely to have become public rights of way and which justify the qualification of the land as a community asset.

5.4. Mr Frearson also contended that the absence of the words “as of right” in the Localism Act supported an argument that permissive use is included. Mr Frearson contended that the desire lines are clearly shown in the photographs attached to the Council officer’s report and their use by local residents does not amount to a trespass. He further contended that the land was not only a community asset by virtue of being walked on. The land had importance as a visual amenity. The reference in the legislation to “actual current use” is fit to encompass the fact that the land is open and cultivated as a haven for wildlife. The visual amenity of the land contributes to the social wellbeing of the community. Mr Frearson noted that the site had recently been fenced and that BHG had argued that there was no realistic prospect that the use of the site will commence again in the next five years. However, Mr Frearson stated that the question whether it is realistic to think that the land could be of community value in the next five years must be asked on the assumption that it has come up for sale. He said that having regard to the green belt status of the site, and that it was not proposed to be released for development in the Draft Strategic Local Plan until at least 2021 and probably not before 2031, it is realistic to think that the land could in the next five years be used to further the social wellbeing of the local community. Mr Frearson drew attention to the interpretation placed on the Act in the recent First Tier Tribunal

decision of Patel v London Borough of Hackney contained at pages 300-304 of the Agenda. (Tribunal Reference CR/2013/0005). Mr Frearson said that the question must be asked on the assumption that the land was put up for sale. He estimated that based on current agricultural values of £3.5K per acre it would require only about £50 per resident household to purchase the field.

5.5. In answer to a question from me, Mr Frearson stated that the use of the land beyond the public footpaths was of right. People gained those rights by going onto the land not by forceful entry, not secretly and without paying anything. Mr Frearson said that the letters supplied by the Association provided evidence of this usage. He stated that the Residents' Association had not applied to Hertfordshire County Council to seek to have other paths on the land registered as definitive footpaths. He also stated that the Association had not applied to the County Council to register the site as a town or village green although this was under active consideration by the Association.

5.6. Questions were put to Mr Frearson. These questions and his answers are recorded in the Hearing notes.

6. Closing statements

6.1. Each party then made their closing statement to the hearing. The original decision taker, Ms White, asserted that the decision to list the site as an Asset of Community Value was based on the evidence at that time. There was no evidence when the site was listed that the landowner had taken steps to prevent its continued use.

6.2. Mr Frearson, on behalf of the Residents' Association, stated that land had been used for a long period and that local residents have been allowed by the owners to walk over it freely, having not entered by force and they had not paid for the privilege. He contended that the application was legitimate and meets the tests.

6.3. Mr Edwards for BHG reiterated the company's grounds for review. He said that the use of land beyond the public footpaths was trespassory. There was no evidence that residents had rights to use the land. Acceptance by the Residents' Association that the use of the land was "as of right" was itself an acceptance that the land was used by trespass. Had the words "as of right" been included in the Act, trespassory use would have been a qualifying use. Mr Edwards contended that use of the non-legally recognised paths was not lawful. Further, he said that land cannot qualify as an Asset of Community Value on the basis of its visual or environmental value.

6.4. In order to come within section 88 (1) (a) a use must be lawful. With regard to the second ground for review, Mr Edwards stated that the intention of a landowner only goes so far – see the Tribunal decision of Patel v London Borough of Hackney. Mr McCann had explained why BHG had put up the fences. The site had value and prospects for development either through the

development plan process or by planning application. There was a potential for adverse rights to be claimed and it was therefore proper for a landowner to frustrate any application. The fencing had also been erected having regard to a landowner's residual liability for injury to trespassers. This was a different situation from the position of closing a shop. The landowner was seeking to protect its interest. Mr Frearson was wrong to suggest that section 88 (2) (b) should be interpreted on the basis that the land had been offered for sale. The owner had lawfully put up the fence and explained its reasons for doing so. This should lead to the conclusion that there was no realistic prospect of the land being used again.

7. My Decision

7.1. I have carefully considered the evidence and submissions presented to me by Ms White as the original decision taker, by Mr Frearson on behalf of Verulam Residents' Association and by Mr Edwards QC on behalf of the landowner, Banner Homes Group.

7.2. I set out below a summary of the evidence given at the Hearing as to use of the land.

7.2.1. Page 166 – Verulam Residents' Association say it is used extensively by all local residents for recreational outdoor activities such as children playing, kite flying, walking and exercising dogs.

7.2.2. Page 169 – Lyn Henny, Asset Management Surveyor, St Albans Council, describes the site as having plenty of public access points including a public footpath. She says it was wet during her inspection so there were no people evident on the site, but there were muddy footprints suggesting it is used for walking.

7.2.3. Page 176 – Debbi White, Property and Asset Manager, refers to clear desire lines cutting across the site.

7.2.4. Page 467 – Caroline Ciric of 7 Deva Close, St Albans says in a letter dated 15 August 2014 that as a child and a teenager in the 1970's and 1980's she used the land as a place to play with her brother, sister and many of her friends.

7.2.5. Pages 468-470 – Dr Robert Wareing of 3 Claudian Place, St Albans writes that for over 40 years he and his family have enjoyed the enchanting environment of diverse and rich flora and fauna. He says they harvest blackberries and mushrooms. He describes diverse flora and fauna and says the land is a rare example of a true natural wildflower and wildlife meadow. He refers to many varieties of birds including jays, goldcrest, cuckoos, green woodpecker and red kites.

7.2.6 Dr Wareing states that the land is well used by dog walkers and ramblers and that he has seen others cycling through the meadow. He says that the extent of its usage is easy to gauge from the pattern of well worn footpaths which criss-cross the meadow in addition to the well used designated public footpath. (See his letter dated 26 August 2014).

7.2.7 Pages 471-472 – Martin Hicks, Ecology Adviser, Hertfordshire Ecology, in an email dated 16 July 2014 describes previous and recent ecology surveys of the land. He says that much of the site continues to support a good flora, at least in places, sufficient to meet Wildlife Site status and supports a good local wildlife generally enhanced by boundary hedgerows.

7.2.8 Pages 473-479 – Odette Carter, Planning and Policy Officer, Herts and Middlesex Wildlife Trust writes in a letter dated 17 June 2014 that the land is known to the Wildlife Trust to be one of the best areas of species-rich grassland in the St Albans area. Ms Carter states that, being within walking distance of the Trust's office, many staff regularly visit the site to enjoy its wildlife.

7.3. I have considered and give weight to the letters at pages 467 onwards. They support the conclusion of there having been relevant types of use within the meaning of section 88. Indeed, the letter on behalf of the Herts and Middlesex Wildlife Trust shows that it's not just individuals but groups which have used the land reflecting the public interests.

7.4. Until recently the site was open and accessible for use by the public. However, in September 2014 action was taken by Banner Homes to erect fences and notices on the site. The land, however, can still be accessed via two public footpaths. Firstly, one public footpath (No 95) crosses the site between Mayne Avenue and Bedmond Lane. A second public footpath (No 32) within the site runs adjacent to Parklands Drive and Mayne Avenue. I attach at Appendix 4 a map showing the location of these public footpaths. There are extensive views into the site from these public footpaths. [1] The land is in the Metropolitan Green Belt. A recent application by Banner Homes for a change of use from agricultural to the keeping of horses was refused by the Head of Planning and Building Control of St Albans District Council on 13 August 2014. There is also an area Tree Preservation Order on the site. Evidence was given at the hearing by Ms White that there are clear desire lines crossing the land.

7.5. Section 88 of the Localism Act 2011 provides two grounds for listing a property as an Asset of Community Value. Section 88 (1) is about actual current use and

[1] Extract from the Definitive Footpath Map maintained by Hertfordshire County Council

section 88 (2) is about recent past use. Under section 88 (1) 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 a building or other land that is not an ancillary use furthered the social wellbeing or social interests of the local community, and

(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.

7.6. Under section 88 (2) land in a Local Authority's area that is not land of community value as a result of sub-section 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 a building or other land that was not an ancillary use furthered the social wellbeing or interests 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.

7.7. I am conducting a review of the decision of Ms White to list Bedmond Lane Field as an Asset of Community Value pursuant to section 88 (1) (a) of the Act. Mr Edwards on behalf of Banner Homes contends under ground one that in order to meet the test in section 88 (1) one should interpret the section on the basis that actual current use must be a lawful use and that any use that entails trespass cannot be relied upon. I accept that, as a general rule "use" for the purposes of section 88 means lawful use. Parliament would not in my view generally endorse unlawful conduct and in any event unlawful activity would seldom be capable of being something which can be said to further the social wellbeing or interests of the community. In this case, however, there is a clear lawful use which does further the social wellbeing and interests of the local community. That use is demonstrated by walking along the two public rights of way through the land which the evidence demonstrates is notable for its flora and wildlife. Although the public's right to walk through the land may be limited to be public footpaths, their use in the sense of enjoyment of their surroundings whilst walking extends to the whole area. In my view such use furthers the social wellbeing and interests of the community. Therefore, my primary reasoning is that even if Banner Homes is correct in its submission on the necessity of lawful use, this would not invalidate the listing in this case. The *lawful* use of Bedmond Lane Field (i.e. the use confined to the public footpaths) suffices for section 88 purposes, in my view.

7.8. In this regard, I also note the submission from Banner Homes that visual or environmental value does not constitute 'social wellbeing or interest' for section 88 purposes. I agree that there may be many cases where the conditions under section 88 would not be satisfied purely on visual grounds, or purely on environmental grounds. But I must have regard to all the circumstances of the case. I see nothing in the wording of section 88 to suggest that visual and

environmental considerations must necessarily be excluded from the assessment; social wellbeing and interests are very broad terms. In my view, the visual (somewhere beautiful where people enjoy walking) and environmental (a home to flourishing flora and fauna) factors contribute to the overall picture in this case. They are each part of the explanation for why members of the local community enjoy (in the relevant sense of deriving wellbeing and interest from) their use of the public footpaths through Bedmond Lane Field.

7.9. Furthermore, to return to the submission about the importance of lawful use, I observe that although Banner Homes claim that there has been trespass by local residents on Bedmond Lane Field they do not appear to have particularised this allegation apart from making the general submission that all use (other than on the two public rights of way) amount to unlawful acts of trespass. The use of the site as described in the evidence before me in the Hearing Agenda (see pages 467-479) alleged to have been trespassory appears to have been minor. The evidence before me suggests that Banner Homes was aware of such use and until September this year never did anything to stop it. In my view even if such use was strictly unlawful it does not disqualify the land from being listed as an Asset of Community Value. Such use does not in my opinion undermine the primary use via the public footpaths which is non-trespassory.

7.10. Overall, whilst I accept that generally use for section 88 purposes must be a "lawful use" it seems to me that this general rule is not entirely inflexible. Suppose for example that due to an oversight an owner failed to obtain the appropriate premises licences before opening an entertainments facility whose use subsequently delivers social wellbeing without anyone every complaining about the licensing deficiency. Would it automatically be said that because some of the features of a community's enjoyment of that facility are tainted by a form of unlawfulness section 88 can never be fulfilled? It seems to me at least arguable that the answer is no.

7.11. In other words, I consider it may be argued that some uses could qualify for the purposes of section 88 notwithstanding a taint of technical unlawfulness, especially where that use has caused ~~more~~ no harm and has been condoned for many years. Therefore, my overall view is that there has been sufficient purely lawful use to satisfy the conditions under section 88 in this case, and that such technically unlawful conduct – if there has been any – which has formed part of the overall pattern of use of Bedmond Lane Fields does not disqualify it from being an Asset of Community Value.

7.12. I have taken into account the extracts from leading authors and case law provided by Mr Edwards on behalf of Banner Homes. I have particularly considered the conclusions in the Supreme Court Case of Welwyn Hatfield BC v The Secretary of State Communities and Local Government. However, the facts of that case are wholly different from the facts in the present review. The review does not involve individuals or groups seeking to profit from their own deceit. In my view, therefore, the Welwyn Hatfield case does not add to the analysis as to whether the criteria of section 88 had been met. Whilst I do not dispute the general propositions put forward on behalf of Banner Homes, I do not consider

that they apply on the facts of this review. In my view the listing decision is not flawed by virtue of its reliance on any alleged unlawful conduct.

7.13. Evidence was given at the Hearing that in March 1998 (see pages 456 and 457 of the Hearing bundle) Mr McCann wrote to Mr James Hargreave of the Residents' Association offering to grant a licence to the Verulam Residents' Association to use the land for recreational purposes on payment of a peppercorn. Mr McCann in the hearing stated that the licence was offered with a view to deterring other parties from entering the land (there had been a recent incursion onto the land by travellers). Minutes of the Residents' Association contained in the bundle show that the Association decided not to pursue this offer. However, it is clear from the evidence, particularly the letters from local residents and from the Herts and Middlesex Wildlife Trust, that local residents and others have been using the site. The evidence presented by Debbi White refers to desire lines which she saw when visiting the site. The desire lines were also visible from the photographs. I consider there is sufficient evidence to draw an inference that Banner Homes Group must have been aware of at least some level of use outside of the two public rights of way.

7.14. In conclusion, my view is that there is actual current use of the land that is not an ancillary use which furthers the social wellbeing or social interests of the local community and the test in section 88(1) (a) is satisfied.

7.15. I also need to address whether my review should be of matters as they stood at the time of the original decision or now – the difference being that Banner Homes has now erected fencing on the property. The drafting of section 88 appears to suggest that when carrying out my review I perform an assessment as to whether the criteria had been met by reference to the facts as they stood at the time of the original decision. Section 92 (4) provides that where a request is made for a review the reviewer must consider whether the land concerned should not have been included in the Authority's lists of Assets of Community Value. I would also observe however that the purpose of the scheme appears to be for the review to be a full re-consideration as if the first decision had not happened. Whichever view is adopted ultimately in my view it does not make a difference to my conclusion. Either matters should be analysed as they stood at the time of the original decision in March 2014 (when there was no fencing and the public's lawful enjoyment of the public footpaths and their surrounds was unimpeded) or as they stand now (when, despite the fencing, the public are still using the footpaths in a way which furthers their social wellbeing, albeit in a slightly diminished way on account of their view being partly obstructed by the fencing). In other words, with or without the fencing, the land has been and is being used in a way which furthers the social wellbeing or social interests of the local community. The relevant reference point at which the matter is assessed does not on the facts of this case affect the outcome.

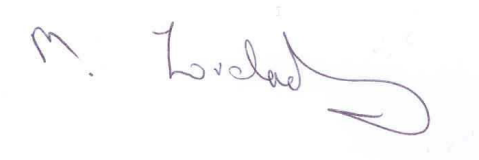
7.16. I also consider that I am not bound by the legal analysis in the original decision. The fact that the original decision was taken on section 88 (1) grounds does not stop my review decision from being taken on section 88 (2) grounds. In my view, an actual current use of land that is not an ancillary use and furthers the social

wellbeing or social interests of the local community is met on the facts of this case. The relevant and lawful use is as described in paragraph 7.7 above. I consider that this use remains current. However, even if I am wrong in my conclusion that the use is current, then it is use that has occurred in the recent past.

7.17. I have taken into account the content of Mr McCann's Statutory Declaration at pages 416-426 of the Hearing bundle. I have also considered his oral evidence and the submissions made by Mr Edwards, Ms White and Mr Frearson as to whether it is realistic to think that there can continue to be non-ancillary use of the land which will further the social wellbeing or social interests of the local community. I accept that it is Banner Homes current intention to maintain the fences and carry out repairs with the aspiration to develop the site in future. However, I consider that the planning history of the site is also relevant (as described in Ms White's statement at pages 176-179, and in the SHLAA assessment at page 420). A recent planning application for a change of use from agricultural or grazing horses was refused in August 2014. Earlier applications for housing on the land have been refused. I also note that the land has not been allocated for housing in the Council's Draft Consultation Strategic Local Plan published on 10 October 2014. The land is in the Metropolitan Green Belt. I acknowledge that the owner's stated intention to maintain the fencing should be given some weight and that it does weaken to some extent the case put forward by Ms White and Mr Frearson that it is realistic to think that there can continue to be or could be non-ancillary qualifying use. In my view, however, even with the fencing the public use of footpaths 32 and 95 still deliver a sufficient degree of social wellbeing or social interest. The flora and wildlife can still be appreciated from the public footpaths by users of the public footpaths. I therefore consider that the test in section 88 (1) (b) is satisfied because it is realistic to think that use which will further the social wellbeing or interests of the local community will continue even with the presence of the fences.

7.18. In the alternative if it is appropriate to consider the matter on the basis that the use is in the recent past, I have to assess the prospects of the fencing coming down so that the recent use without the fencing is restored. Under section 88 (2) (b) I have to consider the matter over a time period for the next five years. Banner Homes does not have planning permission to develop the land for housing. The land is in the Metropolitan Green Belt. It is not identified for housing in the draft Consultation Strategic Development Plan. A recent application for change of use from agricultural to grazing of horses was refused. Given this planning history, I consider it reasonable to conclude that if future applications for a change of use and/or for development prove to be unsuccessful, Banner Homes may decide to remove the fencing and either allow full public use or enter into a licence with the Residents' Association subject to payment of a fee. Whilst such outcomes may not be probable at the present time in my view they are at least realistic outcomes for some time within the next five years. In the alternative, therefore, I consider that the test in section 88 (2) (b) is satisfied.

7.19. For the reasons outlined above it is my decision that Bedmond Lane Field should continue to be included in the Authority's list of Assets of Community Value. BHG may appeal this listing review decision to the First-Tier Tribunal.



M Lovelady
Head of Legal, Democratic and Regulatory Services
20.10.14

Appeal of Decision

The Owner can appeal the Review Decision to the First Tier Tribunal [General Regulatory Tribunal].

MINUTES OF THE REVIEW HEARING OF THE LISTING OF BEDMOND LANE FIELDS AS AN ASSET OF COMMUNITY VALUE

held in the Council Chamber on Friday, 26 September 2014 at 10.00 am

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Present:

Mike Lovelady, Head of Legal, Democratic and Regulatory Services (Chairman)
Councillor Daly (Consultee)

In Attendance:

Councillors Wartenberg and Hill

Officers in Attendance:

Judith Adamson, Regulatory Solicitor
Hannah Adler, Democratic Services Officer

Parties:

Debbi White, Property and Asset Manager, St Albans City & District Council
Paul McCann, Banner Homes
Douglas Edwards QC, for Banner Homes
Christina Daniels, Pitmans, for Banner Homes
Martin Frearson, for the Verulam Residents' Association
Julia Pyburn, for the Verulam Residents' Association

1. WELCOME AND INTRODUCTIONS

The Chairman introduced the meeting and the Committee Members, the Council Officers in attendance, and the Parties. He clarified that the background to this review hearing was the decision taken by St Albans City & District Council on 14 March 2014 to list the land known as Bedmond Lane Fields as an Asset of Community Value under s. 88 of the Localism Act 2011. The hearing was at the request of the landowner, Banner Homes. The Committee would hear representations from Banner Homes against the listing, from the Council who granted the original listing and from the Verulam Residents' Association, who were the original applicants.

In making his decision, the Chairman would be consulting with Councillor Daly, however it was noted that the decision was to be that of the Chairman.

Members of the public were asked to sign the register of attendance.

2. THE ASSETS OF COMMUNITY VALUE REVIEW PROCESS

The Regulatory Solicitor confirmed the date of the review request, and confirmed that this was in accordance with the timeframe provided for in the Act and Regulations. She noted the procedure to be followed as set out in the Act, and the procedure for this review. It was noted that the Chairman's decision would be issued at a later date. The Regulatory Solicitor noted

the steps taken by the parties to date in light of the Localism Act 2011. The Regulatory Solicitor noted the additional materials provided to members of the Committee and Parties, which had not been issued for reasons of data protection, or which were being re-produced for greater visual clarity.

3. **EVIDENCE OF THE COUNCIL'S ORIGINAL DECISION MAKER**

St Albans City & District Council's Property and Asset Manager explained how the Council had come to its decision, noting that she had looked for signs of public use, and the absence of physical barriers separating the land from the highway. She noted that she had no reason to believe that the landowner sought to prevent public use of the land, that future planning permission would be unlikely to be granted due to green belt restrictions and that the site provided a visual amenity to the surrounding area.

4. **QUESTIONS TO THE COUNCIL'S ORIGINAL DECISION MAKER**

Banner Homes clarified several points from the Council's decision maker, firstly that two site visits were carried out, one before the decision made on 10 March 2014, and one after, and that at the time of site inspection the land was not fenced. Secondly, that the decision was taken without representations from the landowner and that the request from the landowner to make representations was declined. Thirdly, that the Council's decision maker had not sought legal advice in taking this decision.

There were no further questions for the Council's decision maker.

5. **EVIDENCE OF OWNER BANNER HOMES GROUP PLC APPLYING FOR REVIEW OF LISTING**

Banner Homes acknowledged the strong local feeling that use of land should continue as before and that the land should remain undeveloped, however noted that this was outside the remit of the review hearing. Banner Homes noted that this hearing's sole purpose was to establish whether, in fact and in law, the tests of s. 88 are met.

Banner Homes firstly dealt with matters of fact: that the land in question is open and undeveloped and that there has been historically some level of public access and recreational use. Following the Council's decision, the land has been fenced so as to prevent any further access onto the land. It was confirmed that this fencing is now complete. Officers of Hertfordshire County Council and St Albans City & District Council have confirmed that the erection of the fence is lawful. It was noted that there is now some damage to this fencing and defacement to the notices.

Banner Homes secondly noted the legal status of the land, and that of its users. It was noted that the land in question is private land, owned by Banner Homes, part of Cala Group, and that, as a matter of law, its use by members of the public is unlawful, and is trespass.

Thirdly, Banner Homes presented Ground 1 of their argument. Banner Homes noted the guidance provided by s. 88(1)(a) of the Localism Act as to the criteria needed to qualify as an asset of community value. Banner Homes noted that the statute must be construed in good faith, and that it is to be presumed that Parliament intended the benefit to operate only when it arises from an act that was performed lawfully. On that basis, a use of land amounting to a civil wrong cannot be used as a basis for a listing of an asset of community value. A number of authorities were provided to support this, the most recent being the Supreme Court's decision in Welwyn Hatfield Borough Council's appeal against the Secretary of State for Communities

and Local Government. Bennion on Statutory Interpretation was additionally cited. Banner Homes submitted that, for unlawful and trespassory use to be a ground for listing an asset of community value, Parliament would have needed to indicate this in the clearest language. It was noted that this was particularly the case since the effect of land being placed on the asset of community value register imposed a substantial impediment on the landowner's rights, and could amount to interference under Article 1 of the First Protocol of the European Convention on Human Rights.

The recent tribunal case of Higgins Homes Plc v London Borough of Barnet CR/214/0006, where a similar point to that of Ground 1 was argued, was noted but the decision has not yet been issued.

It was noted that guidance had been provided as to the types of buildings expected to be applications under s. 88, and that all are buildings or facilities whose use is lawful. It was noted that these examples are not exclusive.

Banner Homes presented an alternative ground, arising from s. 88(1)(b), raising the question of whether, on the evidence before the hearing, it is realistic to think that there can continue to be non-ancillary use of the land. Paul Joseph McCann's statutory declaration of 3 September 2014 was confirmed. It was noted that as the landowner, Banner Homes is entitled to preclude trespassory use of the land, and that the erection of the fence is lawful. Mr McCann confirmed, from memory, a telephone call on 1 September 2014 from an enforcement officer from St Albans District Council and visit from a rights of way officer from Hertfordshire County Council, who confirmed that the barrier created no impediment to statutory rights of way. Two sets of photographs showing the fencing were presented to the Committee, the first showing the fencing when completed, the second, taken 24 September 2014, showing damage to the fencing and notices.

Banner Homes submitted that active steps have been taken by the landowner to prevent access to the land, that the landowner intended to repair the damage to the fence, and to ensure that the integrity of the fencing remain. It was explained that this is to protect the development potential of the land, particularly in light of the District's new Strategic Local Plan which identifies a need for new housing.

Banner Homes submitted that there is therefore little basis on which it can be concluded realistic that ongoing recreational use of the land is likely to continue, and that it is therefore not possible, rational or reasonable for the test of s. 88(1)(b) to be found in favour of the application.

6. QUESTIONS TO APPLICANT

The Council's original decision maker noted that a letter of 24 March 1998 from Mr McCann seemed to indicate that Banner Homes thought it could be good for residents to take a licence of the land to use for recreational purposes to prevent use of the land from other people, and therefore questioned whether it was reasonable to assume that residents understood this as evidence that residents' use of the land was not trespassory. Banner Homes replied that under no circumstances could this letter be understood to have conferred any rights, and that this was evident from minutes of a Verulam Residents' Association meeting. It was also noted that this licence was not in the context of recreational use, but to deter use of the land by travellers.

Banner Homes noted that the Council needed to take a neutral position. The Chairman replied that the Council's original decision maker was seeking to clarify the facts.

The Council's original decision maker noted that it was accepted that residents were using the land prior to the fence's erection, and questioned whether Banner Homes had taken steps to prevent this. Banner Homes replied that no steps had been taken, and upon further questioning explained that this was because most access to the land was by public footpaths and that they had only been aware of a small number of incursions. Banner Homes confirmed that they had not approached the residents' association, but there had been more recent correspondence with the residents and noted email correspondence regarding hedge planting. Additionally, it was noted that until 2011 residents were seeking permission for use of the land.

The Verulam Residents' Association corrected Banner Homes on the subject of payment, and clarified that the sum of £99 had not been paid for the hedge maintenance in 2011.

The Verulam Residents' Association noted that they understood s. 88(1) to refer to actual, current use, and that Banner Homes were changing the interpretation of the Act. Banner Homes replied that as a matter of statutory construction Parliament must be taken to refer to lawful use.

The Verulam Residents' Association noted that Banner Homes must have been aware of the community's use of the land, and questioned why they would obstruct this use now with a fence. Banner Homes replied that the land has development potential which they are attempting to safeguard for the future.

The Verulam Residents' Association noted that the field in question is green belt land, and it is not likely that development will be possible. Banner Homes replied that the draft Strategic Local Plan suggests that there may be a need for housing in strategic locations.

The Verulam Residents' Association noted that, while the draft Strategic Local Plan proposed green belt locations, none of these were near Bedmond Lane Fields. Banner Homes replied that there were dwellings needed for which locations had not yet been identified.

The Verulam Residents' Association noted the considerable restraints to developments in the area, such as archaeological considerations.

The Verulam Residents' Association noted that Banner Homes had not considered the community's ability to purchase the land, and that this would amount to a sum of approximately £50 per household. Banner Homes replied that this was not relevant since the hearing is considering whether the land should be registered in the first place.

The Verulam Residents' Association noted that it was clear from the evidence provided that there had been no attempt to request that local people desist from entering the land. Banner Homes replied that they had been in dialogue with residents' associations over the years, and that it has been made clear that this is private land. The Verulam Residents' Association noted that no notices like those recently displayed had ever been displayed, and Banner Homes confirmed this.

The Chairman noted that this is a new piece of legislation, and that there have not yet been rulings by courts and tribunals to indicate interpretation. The Chairman questioned whether Parliament could have precluded using the word lawful so as to allow the decision making bodies to use their judgment. Banner Homes replied that clear language would be necessary to include unlawful use into statute.

Councillor Daly noted that reference was made to conveying benefit, but questioned what this benefit was. Banner Homes replied that s. 88 arises when land is listed on the register, and

that the benefit in question was the prevention of the disposal of land during the moratorium period.

Councillor Daly also noted that the legislation does exclude categories of land. Banner Homes replied that the exclusion of certain categories of land does not lead to the conclusion that Parliament intended to allow certain uses of land to be included.

The Chairman noted that the residents' use of footpaths has been lawful, and that the site had not been fenced until recently. He questioned whether Banner Homes could be understood as having granted implied consent to the use of the land. Banner Homes replied that without the right to use land, those using it are trespassers and that this has been endorsed by the Supreme Court. The owner's acquiescence is not relevant, since the question is whether users were entitled to use the land.

At this point, the hearing was adjourned for ten minutes.

The Hearing resumed at 11.55 am.

Verulam Residents' Association asked Banner Homes whether they intended to sell the land. Banner Homes replied that there was no intention to sell the land, and that if they intended to develop the land, plots would be sold.

7. EVIDENCE OF NOMINATING GROUP - VERULAM RESIDENTS' ASSOCIATION

Verulam Residents' Association first noted that, with regard to the planting of a hedge in 2011, the sole purpose of the request for permission was due to a need to be covered by the County Council, and that this was a health and safety matter only.

The Verulam Residents' Association introduced themselves and their organisation. They noted that they believed Bedmond Lane Fields to be suitable as an Asset of Community Value due to its social and recreational character, the continued use of the site since the late 1960s, the work of the local community to enhance the open, rural character of the site by keeping footpaths open, planting and maintaining hedges, preventing traveller incursions and stopping groups of youths riding bikes. The Verulam Residents' Association noted that, along with local councillors, officers, ramblers' associations and the police, they have ensured that the field is a public, open space. Verulam Residents' Association meeting minutes were cited as evidence for this. It was noted that Banner Homes was aware of this activity, and that, since 1981, the Verulam Residents' Association have never been asked to stop accessing the site. They also noted that they had been invited to become more involved in management of the site, but had declined due to residents not having relevant experience. The Verulam Residents' Association noted that they have no knowledge of the damage to the fencing and notices, but noted that a deer had got trapped in the fencing and had to be rescued by a resident. The Verulam Residents' Association asked that the reviewer disregard the fencing and consider the field as it was when the application was made.

The Verulam Residents' Association noted Banner Homes' two grounds for review, and responded to each in turn.

On the ground that s. 88 should exclude trespassory use, the Verulam Residents' Association responded, firstly, that there is no justification to read any limitation into s. 88 that use which amount to trespass cannot also add to the social wellbeing of the community, and that the Act is concerned with what is happening on the ground rather than private rights over the land. Secondly, that the purpose of the review is not to sort use of land into trespassory and non-

trespassory, and that since the trespass in question is not criminal it should not be considered. The cases cited by Banner Homes refer to criminal trespass and thus do not apply here. Thirdly, that even if the reviewer were to interpret the Act as suggested by Banner Homes, there remain many uses of land that are not trespassory, for instance use of rights of way, or of desire lines which are likely to have become public rights of way, and which justify the qualification of the land as a community asset. And fourthly, that Banner Homes are wrong in their assertion that the land is not likely to contribute to the social wellbeing of the community in the next five years, and that its value as visual amenity and as a haven for wildlife also needs to be considered.

On the ground that the site did not meet the criteria of continuing use of land, the Verulam Residents' Association noted that Banner Homes ignored s. 88(2)(b) which provides for the situation where community use has dropped but may commence again in the next five years. On the basis that Banner Homes are unlikely to be granted planning permission and carry out developments in the next five years, it is reasonable to assume that use of the land will continue. It was noted that this was the interpretation placed on the Act in Patel v London Borough of Hackney.

The Verulam Residents' Association noted that if a landowner could block the community's use of the land and thus deprive an asset of registration, this would render the Act voluntary, which is not the correct interpretation.

Following on from their earlier question, the Verulam Residents' Association noted that at current market values, local residents could purchase the land at £50 per household.

8. **QUESTIONS TO NOMINATING GROUP**

The Chairman asked the Verulam Residents' Association whether use of the land by the community has been trespassory or lawful. The Verulam Residents' Association responded that it has been lawful to some extent, for example the use of footpaths. The Verulam Residents' Association noted that they had discussed making a commons application, but decided against this because of not qualifying under a sports and pastimes criteria.

Banner Homes asked the Verulam Residents' Association a question regarding the Christmas newsletter of December 1994. Banner Homes noted that an article in this newsletter suggested that the Verulam Residents' Association were seeking permission to use the land. The Verulam Residents' Association replied that permission was sought to maintain the land as a nature reserve.

Councillor Daly clarified that the Verulam Residents' Association had been seeking permission to use the land for a specific purpose and distinguished this from seeking permission to access the land.

The Chairman noted that the Verulam Residents' Association have asserted that use of the land, beyond the public footpaths, was as of right, and questioned what evidence there was to support that. The Verulam Residents' Association replied that people gain rights by going onto the land not by forcible entry, not secretly, and without paying anything, and that local residents have met this test. The Verulam Residents' Association confirmed that evidence for this was the letters provided and personal experience.

The Chairman noted that the Verulam Residents' Association refer to informal lines of usage and that residents have rights to use these footpaths, and asked whether attempts to formalise

these paths had been made by applying to the County Council. The Verulam Residents' Association replied that they had not attempted to make an application yet.

The Chairman asked whether the Verulam Residents' Association had applied to make an application to apply to register the site as a town or village green. The Verulam Residents' Association replied that they had not. The Chairman asked whether any current application was being considered, and the Verulam Residents' Association replied that this was under active consideration.

9. CLOSING STATEMENTS

The Chairman invited each Party to make closing statements.

The Council concluded that the decision to list the site as an asset of community value was based on the evidence available at the time and the guidance provided. At the time of the decision there was no evidence that the landowner had taken steps to prevent the land's continued use.

The Chairman noted for the record that there had been a recent application by Banner Homes for a change of use of land, from agricultural to the keeping of horses, which was refused by the planning authority on 13 August 2014. Banner Homes noted that they made this application since they felt it was appropriate and in the remit of the local plan.

The Verulam Residents' Association concluded that the land in question has been used for a long period of time, that local residents have been allowed by the owners to walk over the land freely, have not been entering by force and have not been paying for the privilege, and thus that they have gained rights to continue to do so. The application is legitimate and meets the tests.

Banner Homes reiterated its two grounds for review. Firstly, that use of the land beyond the public footpaths is trespassory, and there is no evidence that residents have rights to use the land. Acceptance that use of the land was as of right is itself an acceptance that the land was used by trespass. The statute must be construed to mean lawful use, and therefore the land in question cannot qualify as an asset of community value. Banner Homes noted that were the words 'as of right' included in the Act, trespassory use would be a qualifying use. Banner Homes also noted that use of non-legally recognised paths is not lawful, and that the land cannot qualify as an asset of community value for its visual or environmental value.

The second ground for review is that continued non-ancillary use of the land is not necessarily likely to continue. Banner Homes considers that the site has value and prospects for development, and that they are justified in the erection of the fence.

As a final point of law, Banner Homes submitted that there is no basis to suggest that the test of s. 88(2) needs to be approached on the basis that the opportunity to bid arises if the land is placed on the register.

There were no further questions.

The Chair notified the parties that he would provide them with a written decision. The Regulatory Solicitor clarified that the decision was to be issued by 10 October 2014.

The Hearing ended at 1.17 pm

(SIGNED)

CHAIRMAN

APPENDIX 2

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Community Right to Bid

Tribunal Reference:	CR/2014/0018
Appellant:	Banner Homes Limited
First respondent:	St Albans City and District Council
Second Respondent:	Verulam Residents' Association
Judge:	Peter Lane

DECISION NOTICE

1. 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 the 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.

2. This appeal concerns land known as Bedmond Lane Field, St Albans. The appellant, Banner Homes Limited ("Banner Homes") is the owner of the Field. The listing authority is St Albans City and District Council ("the council"). Banner Homes is part of the Banner Homes Group, owned since April 2014 by Cala Group Limited. Banner Homes would like to build on the Field but, since it falls within the metropolitan green belt, it is apparent that (absent a change in planning policy concerning the green belt) such development is unlikely within the near future. Two public footpaths (nos 32 and 95 on the council's definitive map) run across the Field. Footpath 32 runs essentially along its eastern edge, whilst footpath 95 joins it at right angles, roughly at the Field's halfway point. The Field comprises 4.83 hectares.

3. Until 2014, the Field had for some 40 years been used by local residents for recreational use, such as walking, exercising dogs, informal play (by local children) and photography of local flora and fauna. Ms Debbi White, Property and Asset Manager of the council, in 2014 observed evidence of such uses in the form of "desire lines" across the Field, away from the public footpaths.

4. On 10 March 2014, the Field was listed by the council as an asset of community value under the Localism Act 2011. On 30 April 2014, Banner Homes' solicitors requested a review of the decision. That review took place on 26 September 2014. The council's decision was to maintain the listing. Banner Homes appealed that decision to the First-tier Tribunal.

5. A hearing of the appeal took place at Field House on 4 March 2015, when Banner Homes were represented by Mr Douglas Edwards QC and the council was represented by Mr Robin Hopkins. I am very grateful to them for their submissions. The council's stance was supported at the hearing by Mr Timothy Beecroft of the Residents' Association.

6. I received written evidence from Mr Paul McCann, on behalf of Banner Homes, Mr Mike Lovelady and Ms Debbi White of the council and Dr Robert Wareing of the Residents' Association.

7. Section 88(1) and (2) of the 2011 Act provides as follows:-

> "**88 Land of community value**
>
> (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
>
> (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.
>
> (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, 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".

8. Dr Wareing has lived in the vicinity of the Field (or Meadow, as he calls it) for over 40 years:-

> "It has been an inspiration and a joy for us. We have spent at least an hour each day almost every day – in total amounting to more than 10,000 hours – enjoying the enchanting environment and diverse and rich flora and fauna. We use it for walking our dog, for playing with our grandchildren and our children before that. More recently, for the perfect tranquillity it affords, whilst I have been convalescing after a life-threatening illness".

9. Dr Wareing has produced a book of photographs depicting the Field, particularly in spring, when wildflowers and grasses are much in evidence, as well as in summer, when "floral blooms [are] typified by the rosebay willowherb, ox eye daisies, poppies and bee orchids". According to Dr Wareing, "where informal footpaths pass through areas with high density shrubs and bushes, the vegetation is carefully trimmed by residents to keep the footpaths open".

10. There is also evidence that, in the late 1990s, the owners of the Field, concerned about the activities on the land of travellers, unsuccessfully tried to interest local residents in taking a licence of the Field. Local residents apparently sought permission of the owners to go on to the Field for the purposes of hedge-planting.

11. Following the listing of the Field under the 2011 Act, Banner Homes erected a wire fence along the entire length of the footpaths, interspersed with signs stating "private land no unauthorised access". Mr McCann says this was done partly as a result of concerns regarding liability to trespassers. Also in 2014, Banner Homes applied to the council for planning permission to change the use of the Field so as to facilitate "the keeping of horses". In August 2014, the council's officers recommended refusal, owing to the absence "of a tree survey, ecology survey, detailed site layout, means of access, or any other supporting information", which meant that the local planning authority was "unable to fully or properly assess the acceptability of the impact of the proposed development on the openness and visual amenity of the green belt, the impact on ecology, the impact on existing landscape and trees and the impact on highway safety". It was also noted that Banner Homes "did not engage in pre-application discussions with the local planning authority and the form of development proposed fails to

comply with the requirements of the Development Plan and does not improve the economic, social and environmental conditions of the District". I was informed that planning permission was subsequently refused by the council and that the matter is currently the subject of an appeal.

12. The council's case is essentially as follows. Notwithstanding that the fencing off of the rights of way means local residents can no longer physically access any part of the Field other than the public footpaths, the council contends that the benefit which residents derive from looking at other parts of the Field constitutes "an actual current use" of the Field, for the purposes of section 88(1)(a). Alternatively, the council contends that, prior to the fencing off of the footpaths, the use made of the Field by local residents constituted an actual use, within the recent past, which furthered the social wellbeing or interests of the local community, with the result that section 88(2)(a) is satisfied. Notwithstanding Mr McCann's statement that Banner Homes do not intend to take down the fencing or dispose of the Field, the council submits that (a) it is, in all the circumstances, nevertheless realistic to think that there can continue to be non-ancillary use of the Field (on the basis of its first submission, in that local residents will continue to derive relevant benefit from looking at the Field from the footpaths); or (b) that, in terms of section 88(2), it is nevertheless realistic to think that there "is a time in the next five years when there could be" relevant non-ancillary use of the entire Field.

13. Mr Edwards QC categorises the first issue as follows:-

Issue 1 – does use of the two public footpaths amount in law and/or fact to a proper basis to conclude in respect of the whole of the 4.83ha of the land that there is "an actual current use of ...the land that is not an ancillary use..." and which "it is realistic to think ...can continue" for the purpose of s.88(1) of the LA 2011?

14. Although caution must be employed in employing statutes involving somewhat different regulatory regimes, I nevertheless agree with Mr Edwards that it is useful to note how enactments regarding town and village greens have been interpreted by the courts. In Cheltenham Builders Ltd. v South Gloucestershire District Council [2003] EWHC 2803 (Admin), Sullivan J had cause to consider section 22(1A) of the Commons Registration Act 1965:-

> "(1A) Land falls within this subsection if it is land on which for not less than 20 years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality have indulged in lawful sports and pastimes as of right, and either –
>
> (a) continue to do so, or

(b) have ceased to do so for not more than such period as may be prescribed, or determined in accordance with prescribed provisions".

15. At [29] of his judgment, Sullivan J observed that:-

> "The onus was upon the applicants for registration to prove on the balance of probability that the site had become a village green. Thus the applicants had to demonstrate that the whole, and not merely a part or parts of the site had probably been used for lawful sports and pastimes for not less than 20 years. A common sense approach is required when considering whether the whole of a site was so used. A registration authority would not expect to see evidence of use of every square foot of a site, but it would have to be persuaded that for all practical purposes it could sensibly be said that the whole of the site had been so used for 20 years".

16. I agree that the same "common sense" approach falls to be applied in the case of section 88 of the 2011 Act. Assuming for the moment that the requirement imposed by section 88 is for there to be a physical use of the land to be listed, it cannot sensibly be contended that the narrow strips forming the public footpaths are such as to entitle the council to list the entire 4.83ha Field.

17. The council, however, argues that a person's observation from the footpath of the flora and fauna of the Field constitutes a use of the entire Field, albeit that the observer is no longer physically able to wander about the Field. Mr Edwards submits that the use of the word "actual" in section 88 "strongly suggests an intention that 'physical' use was intended". Mr Edwards accepts that visual observation of things growing or otherwise present on land may be an aspect of section 88 use but that mere reliance on people looking at such things from across a fence is not what Parliament had in mind, in enacting the 2011 Act.

18. I agree. Mr Hopkins was unable to point to any example, either in case law or guidance, that might support the contrary view. Indeed, the examples given in the gov.uk website on the 2011 Act all comprise or involve "physical" uses: for example a village shop, pub, community centre, allotment or recreation ground.

19. The council's interpretation would, I consider, have some surprising consequences. Local residents who derive enjoyment from viewing attractive scenery from a road might, on the council's view, be able to have the land in question placed on the list, even though they have never ventured upon it. Mr Hopkins suggested that any mischief which such an interpretation might entail would in practice be alleviated by the fact that the "scenic" aspect of the land would, in most cases, be merely ancillary to its agricultural use. However, one can envisage situations where that

would not be the case. In any event, it is in my view highly unlikely that Parliament intended the owners of such land to be compelled to rely on the non-ancillary requirements of section 88, in order to defeat listing.

20. It was not suggested that the actual public footpaths have any significant flora or fauna of interest to the local community, since they are merely trodden grass paths. Any suggestion that the footpaths themselves might separately be listed is refuted by that fact, together with the finding I have just made regarding the inability of the council to pray in aid the merely visual aspects of the remainder of the Field. Such a suggestion in any event founders on the basis that the clear primary use of the footpath is, like any other right of way, for passing and repassing and that any enjoyment of views from the footpath is, on the facts, merely an ancillary use, incidental to the main use of passing and repassing.

21. The next issue is what Mr Douglas describes as:

Issue 2 – did trespassory use beyond those footpaths in law amount to an actual current use of the land on the facts for the purposes of s.88(2) of the LA 2011?

22. As Mr Edwards states, it is common ground that, as a matter of fact, local residents have, over at least several decades, "strayed off the public highway and onto wider parts of the land, including for recreational walking and dog-walking" before Banner Homes erected the fences in 2014. Mr Edwards contends that this use "was trespassory and therefore tortious". Such unlawful use is, according to Mr Edwards, not "an actual use of the …land" within the scope of section 88(2)(a) of the 2011 Act because Parliament cannot have contemplated conferring a benefit on those who can bring themselves within the relevant requirements only by relying upon their unlawful actions.

23. In Barkas v North Yorkshire County Council & Anor [2014] UKSC 31, the Supreme Court was concerned with whether a field that had been maintained by a local authority as a recreation ground for the benefit of those living in adjacent houses, pursuant to statutory powers, could be registered as a town or village green under section 15 of the Commons Act 2006, which provides:-

> "(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2)…. applies.
>
> (2) This subsection applies where –
>
> (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in

lawful sports and pastimes on the land for a period of at least 20 years; and

(b) they continue to do so at the time of the application".

24. The Supreme Court held that members of the local community who had made use of the field had not done so as trespassers. At [27] Lord Neuberger made it plain that a person is either a trespasser or present on the land lawfully; there is no "middle ground":-

> "[27] It was suggested by Mr Edwards QC in his argument for Ms Barkas that, even if members of the public were not trespassers, they were nonetheless not licensees or otherwise lawfully present when they were on the field. I have considerable difficulty with that submission. As against the owner (or more accurately, the person entitled to possession) of land, third parties on the land either have the right to be there and to do what they are doing, or they do not. If they have a right in some shape or form (whether in private or public law), then they are permitted to be there, and if they have no right to be there, then they are trespassers. I cannot see how someone could have the right to be on the land and yet be a trespasser (save, I suppose, where a person comes on the land for a lawful purpose and then carries out some unlawful use). In other words a 'tolerated trespasser' is still a trespasser".

25. Banner Homes have, for years, been well aware of the use made by the local community of the Field. As I have already noted, in the relatively recent past the owners contemplated formalising that use. The local residents have also sought permission for hedge-planting. None of that, according to Mr Edwards, makes the use of the Field (other than the footpaths) non-trespassory.

26. Mr Edwards invoked the principle of statutory interpretation known as construction *in bonam partem* (in good faith). According to *Bennion on the Statutory Interpretation* (Sixth Edition):-

> "It is the basic principle of legal policy that law should serve the public interest. The court when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. It should therefore strive to avoid adopting a construction which is in any way adverse to the public interest".

27. *Halsbury's Laws of England* (Fifth Edition) has, at paragraph 1152, a passage along very similar lines, followed by this:-

> "Where a literal construction would seriously damage the public interest, and no deserving person would be prejudiced by a strained construction to avoid this, the court will apply such a construction.

> ...If a statutory benefit is given only if a specified condition is satisfied, it is presumed that the legislature intended the benefit to operate only where the required act is performed in a lawful manner".

28. Mr Edwards submits that the application of the *in bonam partem* principle means that the references in section 88 of the 2011 Act to "an actual use" cannot be construed as encompassing any unlawful use. As a recent authority for the application of this principle at the highest level, Mr Edwards draws attention to the judgment of the Supreme Court in Welwyn Hatfield Borough Council v Secretary of State for Communities and Local Government and another [2011] UKSC 15. A builder who had deliberately deceived a planning authority by applying for planning permission to construct a barn, when in reality he was constructing a residential dwelling, sought a certificate of lawfulness of existing use, relying on an enactment which provided for a four year time limit for enforcement action against a breach of planning control consisting in the change of use of any dwelling to use as a single dwelling house. In finding in favour of the local authority, the Supreme Court (per Lord Mance) invoked (albeit on an *obiter* basis) the principle set out in *Bennion*, refusing to confine that principle to situations where there has been the commission of a crime:-

> "[53] ...The principle described in the passages cited from *Halsbury* and *Bennion* is one of public policy. The principle is capable of extending more widely, subject to the caution that is always necessary in dealing with public policy. ...
>
> [54] Whether conduct will on public policy grounds disentitle a person from relying upon an apparently unqualified statutory provision must be considered in context and with regard to any nexus existing between the conduct and the statutory provision. ...Although the principle was not mentioned in Counsel's submissions and my conclusions have been reached independently of it, it is not uninteresting also to recall the way in which, before the enactment of section 26 of the Limitation Act 1939 (the predecessor of section 32 of the Limitation Act 1980), the courts held that the apparently general wording of the limitation statutes could not be relied upon in cases where the cause of action had been fraudulently concealed or, later also, was itself based on fraud. ..."

29. Mr Edwards submits that, applying the *in bonam partem* principle, the phrases "actual current use" and "actual use" in section 88 of the 2011 Act must mean actual *legal* use. Clear words would, he says, be required before it could be held that section 88 encompasses unlawful use.

30. In this regard, Mr Edwards draws a distinction between the 2011 Act and enactments relating to the registration of town or village greens. In the latter, as we can see from section 15 of the Commons Act 2006, Parliament

expressly uses the phrase "as of right", which - somewhat counter-intuitively - has long been held to mean as *if* of right; that is to say, that the activity in question has been carried on in a trespassory manner otherwise than by force or stealth (in latin, *nec vi, nec clam*).

31. Submissions along those lines were advanced by Banner Homes at the council's review hearing. Mr Mike Lovelady, who conducted the review, had this to say:-

> "7.9 ...I observe that although Banner Homes claim that there has been trespass by local residents on Bedmond Lane Field they do not appear to have particularised this allegation apart from making the general submission that all use (other than on the two public rights of way) amount to unlawful acts of trespass. The use of the site as described in the evidence before me in the Hearing Agenda...alleged to have been trespassory appears to have been minor. The evidence before me suggests that Banner Homes was aware of such use and until September this year never did anything to stop it. In my view even if such use was strictly unlawful it does not disqualify the land from being listed as an Asset of Community Value. Such use does not in my opinion undermine the primary use via the public footpaths which is non-trespassory.
>
> 7.10 Overall, whilst I accept that generally use for section 88 purposes must be 'lawful use' it seems to me that this general Rule is not entirely inflexible. Suppose for example that due to an oversight an owner failed to obtain the appropriate premises licences before opening an entertainments facility whose use subsequently delivers social wellbeing without anyone ever complaining about the licensing deficiency. Would it automatically be said that because some of the features of a community's enjoyment of that facility are tainted by a form of unlawfulness section 88 can never be fulfilled? It seems to me at least arguable that the answer is no.
>
> 7.11 In other words, I consider that it may be argued that some uses could qualify for the purposes of section 88 notwithstanding a taint of technical unlawfulness, especially where that use has caused no harm and had been condoned for many years. Therefore, my overall view is that there has been sufficient purely lawful use to satisfy the conditions under section 88 in this case, and that such technical unlawful conduct - if there has been any - which has formed part of the overall pattern of use of Bedmond Lane Fields does not disqualify it from being an Asset of Community Value".

32. Attractively put as Mr Edwards' submissions are, I am in no doubt that they should be rejected. As Lord Neuberger has counselled, caution must be employed when invoking public policy as an aid to statutory construction. The town and village green legislation is, in my view, a clear example of Parliament legislating to confer community rights on those who

have, over time, engaged in socially valuable activities ("lawful sports and pastimes") in a "trespassory" manner, which did not involve force or deception. As Mr Hopkins submitted, the effects of listing under the 2011 Act are considerably less burdensome on the land owner than is registration as a town or village green.

33. It is also noteworthy that the courts have been willing to recognise rights, such as easements by prescription, in respect of persons who have carried on activities during the relevant limitation period, where those activities have constituted offences (Bakewell Management Ltd v. Brandwood & Ors [2004] UKHL 14); or rights of registration as proprietor, notwithstanding the fact that for part of the limitation period the occupier has been committing criminal trespass (Best v Chief Land Registrar & Secretary of State for Justice [2014] EWHC 1370 (Admin)).

34. Mr Edwards asks rhetorically how it could be said that the 2011 Act can confer a benefit on persons who, for example, had committed criminal damage so as to enter land (for example, by destroying fences). In this regard, I should record that there is some evidence of Banner Homes' fences along the footpaths being damaged since their erection in September 2014. There is, however, no evidence whatsoever that the use upon which the council relies for the purposes of section 88(2), prior to the erection of fencing, was carried out in a way that involved the commission of criminal damage or other criminal activity. On the contrary, as the evidence (especially that of Dr Wareing) makes perfectly plain, the uses made of the Field by the local community were entirely peaceable in nature, at least equivalent in value to the sorts of games and pastimes envisaged by the town and village green legislation. In this regard, the facts of the present case are similar to those in Higgins Homes Limited v Barnet LBC [CR/2014/006].

35. The fact that I decline to interpret section 88 so as, in effect, to insert the word "lawful" after "actual" does not give *carte blanche* to use that section in ways that would violate the *in bonam partem* principle. The inherent requirement that the use of the land in question must further social wellbeing or social interests will, in practice, preclude many unlawful activities, for the simple reason that unlawful activities are, by their nature, unlikely to satisfy the tests of furthering social wellbeing/interests. Thus, for example, premises used for "raves", at which illegal substances are consumed, violence is prevalent and noise nuisance frequent, would not fall within section 88. Furthermore, it would be in any case be wrong to rule out any application of the *in bonam partem* principle to section 88, merely because, on the facts of this case, I have concluded that a particular technically unlawful use of land is not *per se* outside the ambit of the section.

36. I therefore turn to the final issue, as articulated by Mr Edwards:

> **Issue 3 – on the evidence, can it be concluded, given the purpose behind the erection of fencing and prohibitory notices, that, in respect of trespassory use of the land beyond the footpaths, it is realistic to think that, in the next five years, such use could occur again (s.88(2)(b))?**

37. I have fully taken into account the "statutory declaration" of Mr McCann; and in particular, the following:-

> "4. In view of the continued promotion of the Land for development it is not the intention, and has never been the intention, of Banner Homes Group PLC or, latterly, Cala Group Limited to grant rights of access to or use of the Land to any persons other than employees of Banner Homes Group PLC and/or Cala Group PLC or their respective agents or contractors. Further, neither Banner Homes Group PLC or Cala Group Limited are prepared to accept liability for any injury to those unlawfully accessing the Land, particularly given its overgrown condition and therefore, the decision to fence the Land was taken to prevent trespassory access".

38. I nevertheless find, as a fact, that the requirements of section 88(2)(b) are satisfied. Given the long history of peaceable, socially beneficial (if formally unauthorised) use of the Field, and of the previous views of its owners, I do not consider that it is at all fanciful to think that, in the next five years, there could be non-ancillary use of the land, along the lines that pertained up to September 2014. The timing of the decision to fence the footpaths – coming hard upon the listing under the 2011 Act – strikes me as material. Also of significance is the uncertain present planning position of the land, where a recent application for the grazing of horses has been refused. Whilst I note Banner Homes' current stated stance, it is not fanciful, given the history of the Field, to think that Banner Homes may well conclude that their relations with the local community will be best served by restoring the *status quo* or by entering into some form of licence arrangement with the Residents' Association or similar grouping.

39. I accordingly find that the requirements of section 88(2) of the 2011 Act are satisfied. This appeal is dismissed.

Judge Peter Lane

Chamber President

Dated 16 April 2015

Review hearing 10 am 26 September 2014 Council Chamber, St Albans City & District Council

Verulam Residents Association Case for the Retention of Bedmond Lane Field as a Community Asset.

Background

The VRA was formed in 1981. I was a founder member and its first chairman. Today it represents the whole area between and including King Harry Lane, Mayne Avenue, the A414 St Albans south bypass and both sides of the Watford Rd, some 1100 households. Recently it has started to enrol households in the new Kings Park development, a further 260 homes, and currently has about 850 member households.

Two years ago at the VRA AGM a District Council officer was invited to address the meeting on the new Localism Act and its provision for registration of community assets. Several suggestions including Bedmond Lane Field came forward at the meeting and the committee was asked to consider registering them. A citizens panel was advocated by the council to consider the suggestions, and this was formed, consulted, and endorsed three community assets for registration, the field subject of this review, the St Stephen's Recreation area, and the Wadley Scout Hut, which the VRA duly nominated to the district council. All three were assessed as suitable and put on the District Register of Community Assets by the appointed officer Ms White on 11 March this year.

I am here this morning on behalf of the VRA and our local community to support her decision which we believe to be reasonable and lawful under the Localism Act and entirely appropriate, given the strong support the local community has given our association both in opposing the applicants' change of use application for the field, and in supporting our petition to the council to keep the field on its register as a much-valued local open space, and nature reserve of local and wider significance in the context of Chilterns chalk meadows, which today are a rare and

declining habitat, as evidenced by the Herts & Middlesex Wildlife Trust. Over 900 local people, representing about 550 households have signed the petition to show their dismay at Banner Homes fencing off the field and hope this review will confirm the CA designation.

Use that "furthers the social wellbeing or social interests of the local community".

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Many residents have described walking over the site without let or hindrance since the late 1960's when Mayne Ave was constructed, appreciating the flora and fauna, as my family did when we lived in Antonine Gate opposite the field between 1976 and 1983, and their quiet pleasure in being able to do so without causing damage of any kind to the owner's land. Two such residents' evidence is in the bundle. They are typical of many more.

Over the 33 years since 1981 while I have been on the VRA committee, the local community has tried to work with the field's owners to preserve and enhance the open rural nature of the site, to prevent on their behalf intrusions, remove dumped rubbish, keep the footpaths open for use, discourage residents from misusing the site eg by dumping garden waste or groups riding scramble bikes everywhere, and planting and maintaining the hedges along Mayne Ave from 1998 to 2011. With the help of local councillors, the community police team, rights of way officer, trees and woodlands officers and the St Albans Ramblers Association we have sought to see that the field remained a public open space safe and pleasant for the local community to ramble and play over for the past 30 years. Evidence of this activity is in the bundle by way of extracts from committee minutes. It is clear that Banner Homes knew about this interest and activity when they acquired the site from Wm Olds in 1996 following the illegal dumping of waste material by the latter, as there was great concern at that time about the restoration measures and methodology, and future safeguarding of the site which was communicated to Banner.

At no time since 1981 was the VRA asked to discourage members from accessing the site and no notices to this effect have ever been displayed on the site by Olds or Banner Homes. Indeed Mr

McCann on behalf of Banner offered the VRA the opportunity to become more formally involved in the management of part of the field in 1999 in exchange for a promise not to oppose a major housing development on the rest, which the then committee considered carefully but declined as at the time they did not have active members with experience in managing such a site, and could not bind future committees or residents as to their response to a planning application. Over the years the VRA has supported the council in refusing the various planning applications made for this site, and its retention in the Metropolitan Green Belt as, nominally, agricultural land, although it is clear that it has not been used as such since at least the 1950's or early 60's when Wm Olds acquired it. Instead it has functioned as an uncultivated informal public open space and a haven for wildlife, forming a barrier between the Verulam Estate and the arable fields beyond. This is a valuable, actual, current use, which is not trespassory.

Recent developments in response to the VRA's application Formatted: Underline

We have to say that Banners' moving of the goal posts during the review process by putting up the fences, though legal under planning law, has been much resented by our members and has done nothing to enhance their reputation. We ask the reviewer to disregard this action and consider the physical situation as it was when the VRA applied for registration. We think this is appropriate under the provisions of the Localism Act, otherwise a landowner who does not want the land to be registered will very often be in a position to scupper an application by eg closing the pub, or as here, fencing the land.

Banner's Grounds of Review Formatted: Underline

Banner claim:

1. The legislation (section 88) should be interpreted so as to exclude conduct which amounts to a trespass from enabling land to qualify as being of community value and/or that trespassory use of land cannot further the social well being of the community.

2. That as a matter of fact it is not realistic to assume that the land can continue to be of value to the community. It is noted that Banner has not addressed the second limb of section 88, section 88(2)(b), which I will come to in a moment.

Summary of the VRA's response

In summary, the VRA's response to Banner's submissions is that:

1. There is no justification to read any limitation into section 88 of the Act that has the effect that use which amounts to a trespass cannot also amount to use which furthers social wellbeing.

2. It is not the function of this Reviewer/Tribunal to undertake the extensive investigation that would be required in order to separate the multitude of uses to which the land has been put, into those which do amount to a trespass and those which do not.

3. Even if the Reviewer/Tribunal were to interpret section 88 of the Localism Act in the manner suggested by Banner, there remain many uses that have been made of the land which do not amount to a trespass and which therefore satisfy the criteria of furthering social wellbeing and justify the listing as a community asset.

4. Banner Homes is wrong in its assertion that the land is not likely to (or could not) contribute to the social wellbeing of the community in the next 5 years.

Ground 1: no justification for reading "lawful" requirement into section 88~~Ground 1~~

1. **~~We think it~~It is important to note that the wording of section 88(1) refers to an ~~is~~ "actual current use" of the land (which furthers social wellbeing). The legislation ~~is therefore not focussing on~~therefore does not focus on private rights or matters of ownership of the land, rather it focusses on what is happening "on the ground." It is submitted that it is not a natural interpretation of such wording to read into it a further qualification that**

the "actual current use" must be "lawful" (at least so far as affects private rights). In reality, We ~~think that~~ the argument put forward by Banner Homes ~~is seeking~~seeks to substitute their preferred wording, "lawful", for the chosen words of Parliament, "actual current". By doing so, Banners Homes seeks to ~~and thereby completely~~ change the intention and purpose behind the Act. ~~Arguably~~It is clear that, the whole point of the Act is that it doesn't matter who owns the particular piece of land, instead the Act is intended as an aid to communities to ~~preserving~~ preserve ~~their~~ the character and amenities of their local areas. The Act does this by, gently, interfering with private rights over land. It does not, however, require any consideration of the private rights over that land.

2. Throughout this section of ~~the~~ its argument Banner Homes ~~is also seeking~~seeks to equate trespass (i~~t~~.e. infringement of the civil law rights of Banner Homes over the land) with criminal conduct. These are obviously not the same thing - trespass only amounts to criminal conduct in very limited circumstances (where the land includes a building occupied for residential purposes). The cases that are referred to for the "ex turpi causa" reasoning put forward by Banner Homes are mainly to do with criminal conduct and/or deception. In particular, they establish nothing more that in certain circumstances the Court might deem benefits under an Act not to be available to a person on public policy grounds.

~~2.~~3. However, context is everything. In the present case, r~~R~~esidents have not committed ~~criminal trespass in~~a crime by wandering over the land. Therefore ~~these cases~~the cases referred to are not relevant to this reviewer/tribunal's decision. What Banner are saying is that one should read into the Localism Act that "unlawful" conduct will not be recognised as being for the community benefit. However, whilst we can agree that criminal conduct obviously is not for the community benefit and is therefore not within the Act, it is a facile argument to try to encompass within that mere trespass. This is because (for all the negative connotations in everyday usage), trespass simply means "in

breach of the landowner's private rights." There are plenty of circumstances in which trespass is a constituent element of the claim - eg when a person claims adverse possession, when a community acquires rights to a new public right of way arising out of long (trespassory) usage and when a community makes an application for land to be registered as a village green. Those cases show that, in context, trespass can be, or is not a hindrance to, community value.

~~3.~~4. The argument that because the statute doesn't refer to use "as of right", this must mean that trespassory use is excluded is, we think, a bad argument. The examples given in the skeleton (adverse possession and commons) are situations in which the rights can only arise from trespassory use (that is, use "as of right"). Hence it is unsurprising that this is an explicit requirement of the law. However, the Localism Act obviously encompasses conduct that is much broader than use "as of right". For example, a pub could be registered. That is an example of land which the community would not be accessing as of right, rather by the permission of the landlord. ~~Hence~~ The point is that the absence of the words "as of right" simply shows that permissive use is included; it does not show that trespassory use is excluded. The ~~argument~~ conclusion ~~is a non-sequitur~~simply does not follow from the premise.

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How is this Reviewer/Tribunal to determine Banner's assertion that the use has been a trespass?

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It is not accepted that the use made by the community of the land has been (or the majority of it has been) a trespass. For example, Banner has referred to the fact that there are 2 registered public rights of way over the land. Use of these rights of way has obviously not been a trespass, together with the associated amenity use made of the remainder of the land whilst residents have enjoyed the footpath. However, as the Council Officer has noted in paragraph 3.2 of her response to the request for a review (at page 176 of the bundle), "*there are clear desire lines cutting across the land, in addition to the public footpaths.*" Some of these unmarked ways are in

fact shown in the photos attached to the report. It is highly likely that these unmarked ways have in fact become public rights of way by long usage (20 years) and therefore have been impliedly dedicated as rights of way either at common law or under the Highways Act. These rights of way (and the use of them by local residents) therefore do not amount to a trespass either. Banner has not addressed this issue in its submissions. However, it is submitted that clearly this tribunal does not have jurisdiction to determine which paths can be used with committing a trespass and which can. This suggests, again, that matters of private rights are not relevant to the question to be answered by this Tribunal. The sole question is, "Does the use of this land further the social wellbeing or social interests of the local community?"

Non-trespassory uses of the land

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4. Finally, ~~it is arguable~~ the land is not only a community asset by virtue of being walked on. The Council Officer has referred in her report (at paragraph 3.7, page 177 of the bundle) to the fact that the land has importance as a visual amenity. This decision is correct. ~~Instead~~Indeed, **the phrase "actual current use" in the legislation is fit to encompass the fact that the land is open, uncultivated and a haven for wildlife (forming a barrier between the Verulam Estate and the fields beyond). That is a valuable, actual current use which is not trespassory and contributes to the social wellbeing of the community.**

Ground 2: Continuing use of the land which contributes to social wellbeing

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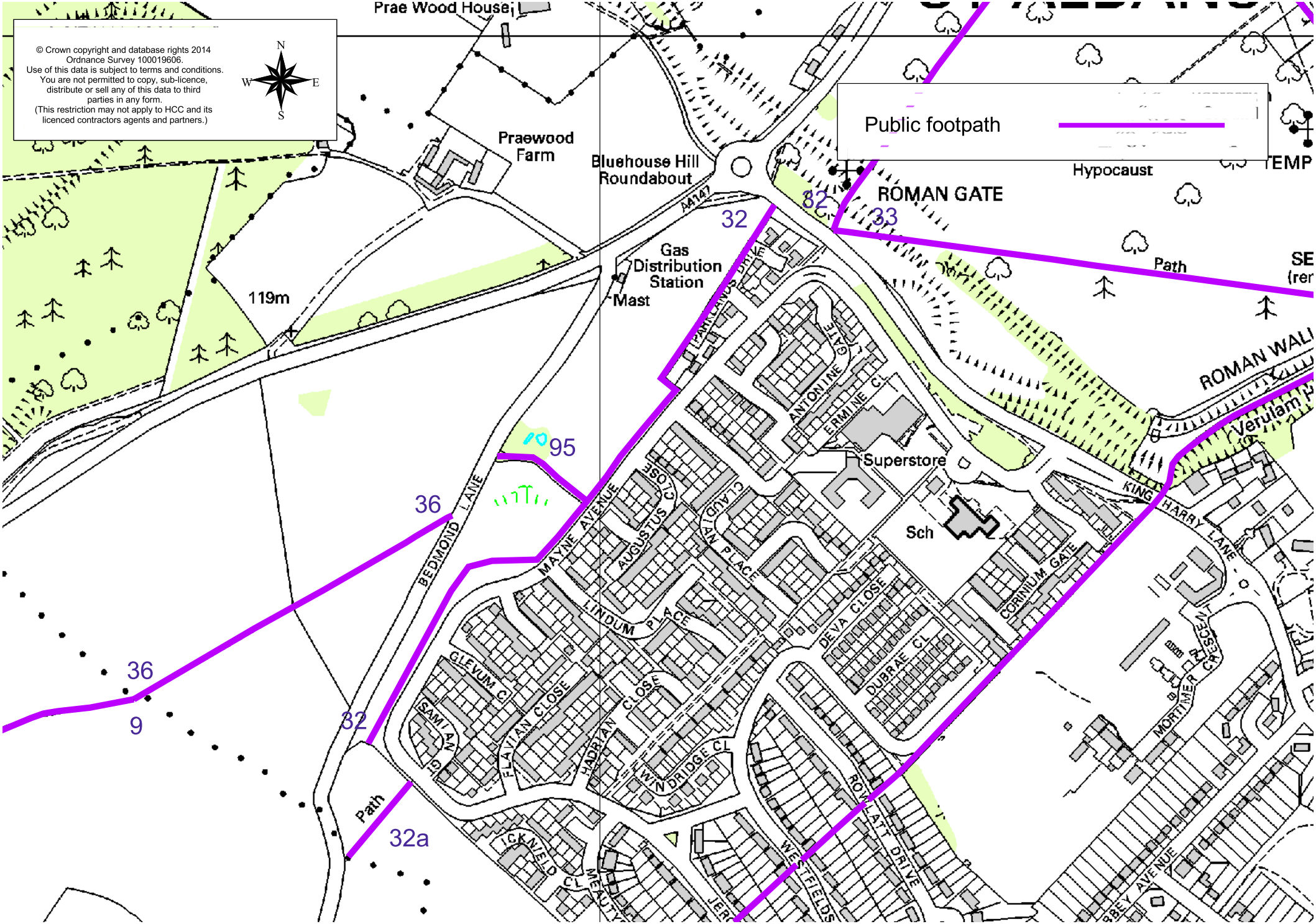
Banner have asserted that by the mere fact that it has, some 2 weeks before this hearing, decided to erect a fence around the land, section 88(1)(b) of the Act is not satisfied. **In relation to this argument, we have this response:**

1. **Banner Homes only appears to have focussed its argument under this ground on section 88(1)(b). It has ignored section 88(2)(b) (which provides for the situation where the**

relevant community use has stopped but there is a realistic prospect that the use will or might start again in the next five years). As is clear from the St Albans DC guidance notes (at 160 in the bundle), the Council's view is that the question whether it is realistic to think that the land could be of community value in the next 5 years must be asked on the assumption that it has come up for sale. Therefore provided it is realistic to think that Banner Homes will not have obtained planning permission and built on the land in the next 5 years then it is realistic to believe it would continue to be of community value. It is clear that this interpretation of the Act is correct, since it is also the interpretation placed on the legislation by the Tribunal in the case referred to by Banner's Counsel: Patel v London Borough of Hackney.

~~1.~~2. The only possible conclusion is that it is realistic to think that the land could in the next 5 years be used so as to further social wellbeing of the local community. We say this must be the case, having regard to the fact that it is currently green belt land and not proposed to be released for development in the draft District Strategic Plan until at least 2021 and probably not before 2031. The DSP is now out for public consultation after approval at this Wednesday's PPC meeting. Banner Homes intentions are largely irrelevant to this assessment, since they depend on the very uncertain prospect of planning permission being obtained. It is therefore not enough for Banner Homes to say, "Well we've fenced the land now so too bad." This is no different to the landlord closing his pub or the shopkeeper his shop. As is mentioned in the Patel v London Borough of Hackney case, if the landowner could simply block the community use and thereby deprive an asset of registration, it would effectively render the Act as voluntary. It does not represent a correct interpretation of the Act. Instead the question must be asked on the assumption that the land was put up for sale and available for purchase by the community. At current agricultural values of say £3500 per acre this would require only about £50 per resident household to purchase the field, a not unfeasible amount to request.

We do not think Banner has made ~~a conclusive~~any case for the field to be removed from the Register of Community Assets and ask the Reviewer to reject their application.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W
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Public footpath
Prae Wood House
Praewood
Farm
Bluehouse Hill
Roundabout
A414
Gas
Distribution
Station
Mast
119m
ROMAN GATE
Hypocaust
Path
ROMAN WALL
Verulam
Superstore
Sch
BEDMOND LANE
MAYNE AVENUE
AUGUSTUS CL
CLAUDIAN PLACE
LINDUM PLACE
GLEVUM CL
SAMIAN CL
FLAVIAN CLOSE
HADRIAN CLOSE
WINDRIDGE CL
ICKNIELD CL
ANTONINE GATE
ERMINE CL
DEVA CLOSE
DUBRAE CL
CORINIUM GATE
KING HARRY LANE
MORTIMER CRESCENT
ROMAN WAY
WESTFIELDS
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