

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE UPPER TRIBUNAL**  
**HH Judge Levenson**  
**[2016] UKUT 0232 (AAC)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 23/05/2018

**Before :**

**LORD JUSTICE DAVIS**  
**LADY JUSTICE SHARP**  
and  
**SIR RUPERT JACKSON**

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**Between :**

<b>BANNER HOMES LIMITED</b>	<b><u>Appellant</u></b>
<b>- and -</b>	
<b>(1) ST ALBANS CITY AND DISTRICT COUNCIL</b>	<b><u>Respondent</u></b>
<b>(2) VERULAM RESIDENTS' ASSOCIATION</b>	

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**Douglas Edwards QC and Caroline Daly** (instructed by **Pitmans LLP**) for the **Appellant**  
**Robin Hopkins** (instructed by **Legal, Democratic and Regulatory Services, St Albans City**  
**and District Council**) for the **Respondent**

Hearing date: 20 February 2018  
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**Judgment Approved**

## Lady Justice Sharp:

### *Introduction*

1. In St Albans in Hertfordshire is an area of open and undeveloped land known as Bedmond Lane Field (the Field). The Field has been owned by Banner Homes Limited (Banner Homes), the appellant, since 1996 and is situated in the Metropolitan Green Belt area. The Field is some 4.83 hectares or 12 acres in extent. It is bisected by two public footpaths, and there are other well trodden informal paths or ‘desire lines’ which cut across the Field.
2. The Field has been used by the local community for more than 40 years for various peaceful and beneficial recreational activities, such as children’s play, walking, kite flying, exercising dogs, and the photography of flora and fauna. Banner Homes did not give express permission or grant a licence for the local community to use the Field (beyond the public footpaths); but it was well-aware the Field was used in this way by the local community, it made no objection, and until recently, it took no steps to stop it.
3. In March 2014 the first respondent, St Albans and City District Council (the Council) listed the Field as an “asset of community value” pursuant to section 88 of the Localism Act 2011 (the 2011 Act), following a nomination by a local residents’ association, namely the Verulam Residents’ Association (the Residents’ Association) the second respondent.<sup>1</sup> In early September 2014, Banner Homes fenced off the Field so that only the public footpaths could be accessed by members of the public. This remains the position today.
4. On 2 October 2014 the Council’s listing decision was confirmed after a review held pursuant to section 92 of the 2011 Act; and subsequent appeals by Banner Homes against that listing decision were unsuccessful. The First-tier Tribunal (Judge Peter Lane, as he then was, President of the General Regulatory Chamber) dismissed Banner Homes’ appeal on 6 April 2015; and the Upper Tribunal (Judge Levenson) confirmed the First-tier Tribunal’s decision on 14 May 2016.
5. It is common ground that using the Field beyond the public footpaths, for the recreational activities mentioned above, constituted a trespass (or ‘trespassory’ use). The single issue that arises in this appeal is whether such unlawful use can constitute a qualifying use (or “actual use” to use the statutory language) for the purpose of listing an asset as an “asset of community value” pursuant to section 88 of the 2011 Act.
6. This turns on a short point of statutory construction, namely whether, as Banner Homes argues, section 88 of the 2011 Act should be construed in accordance with the *in bonam partem* principle. The issue of construction requires this court to consider the reasoning of the Supreme Court in *Welwyn Hatfield Borough Council v Secretary of State for Communities and Local Government* [2011] UKSC 15; [2011] 2 AC 304.

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<sup>1</sup> The second respondent did not appear at the hearing of this appeal, but indicated, by letter, their support for the position of the first respondent.

*The legal and factual background*

7. The “assets of community value” scheme (the Scheme) is contained in Chapter 3 of Part 5 of the 2011 Act. The 2011 Act applies to England and Wales, and (for England only) is supplemented by the Assets of Community Value (England) Regulations *SI/2012/2* (the 2012 Regulations). This legislation came into force on 20 September 2012. Chapter 3 is headed “Assets of Community Value” and Part 5 is headed “Community Empowerment”. This case is the first occasion on which the Scheme has been considered by the Court of Appeal.
8. On 4 October 2012, The Department for Communities and Local Government published a non statutory advice note for local authorities on the “*Community Right to Bid.*” The Ministerial Foreword, which provides a convenient introduction to the Scheme, says:

“From local pubs and shops to village halls and community centres, the past decade has seen many communities lose local amenities and buildings that are of great importance to them. As a result they find themselves bereft of the assets that can help to contribute to the development of vibrant and active communities. However, on a more positive note, the past decade has also seen a significant rise in communities becoming more active and joining together to save and take over assets which are significant for them.

Part 5 Chapter 3 of the Localism Act, and the Assets of Community Value (England) Regulations, which together deliver the Community Right to Bid, aim to encourage more of this type of community-focused, locally-led action by providing an important tool to help communities looking to take over and run local assets. The scheme will give communities the opportunity to identify assets of community value and have them listed and, when they are put up for sale, more time to raise finance and prepare to bid for them.

This scheme requires an excellent understanding of the needs of the local community. As such local authorities will have a pivotal role in implementing the Community Right to Bid, working with local communities to decide on asset listing, ensuring asset owners understand the consequences of listing, enforcing the Moratorium period and in taking decisions as part of any appeals process.”<sup>2</sup>

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<sup>2</sup> To similar effect, see the Government’s plain English guide (the Guide) to the Localism Act.

It goes on to say (at p.5)

“We want to give many more communities the opportunity to take control of assets and facilities in their neighbourhoods by levelling the playing field by providing the time for them to prepare a proposal.”

9. The first paragraph of the judgment of the First-tier Tribunal in this case ([2015] UKFTT CR2014/0018 (GRC)) replicates those in other First-tier Tribunal decisions on the 2011 Act, and gives the following overview of the Scheme’s essential features.
10. The Localism Act requires local authorities to keep a list of assets (meaning building or other land) that are of community value. Once an asset is placed on the list, it will usually remain there for five years. The effect of the 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 a moratorium, will allow the community group to come up with an alternative proposal; although at the end of 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.
11. The Scheme therefore confers a right to bid (to a local community group as defined in the 2011 Act), but not a right to buy.
12. Section 87 of the 2011 Act provides in part as follows.

“(1) A local authority must maintain a list of land in its area that is land of community value.

(2) The list maintained under subsection (1) by a local authority is to be known as its list of assets of community value.”
13. Section 88 of the 2011 Act defines “assets of community value” (though the section uses the phrase “land of community value”). It provides in part that:

" (1)... 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.

...

(6) In this section—

“social interests” includes (in particular) each of the following—

- (a) cultural interests;
- (b) recreational interests;
- (c) sporting interests;

14. As can be seen, *actual use* either currently or in the recent past is required before a building or other land can, in the opinion of the local authority, be an asset of community value: see section 88(1)(a) and section 88(2)(a) of the 2011 Act.
15. However, the fact that there has been *actual use* in either scenario is not sufficient in itself to enable a local authority to form the requisite opinion. As the wording of section 88(1) and (2) makes clear, the local authority must form an opinion in relation to an appropriately nominated asset, either that its current use furthers *the social wellbeing or social interests of the local community* or has furthered such use in the recent past (see sections 88(1)(a) and section 88(2)(a)); and that it is realistic to think that such use (whether or not in the same way) will continue, or there could be a time in the next 5 years when such use will do so (see sections 88(1)(b) and 88 (2)(b)).
16. Section 89 of the 2011 Act identifies the groups or bodies that can nominate. It provides that land can be nominated for listing by a parish council in England in respect of land in that council's area; a community council in respect of land in Wales in that Council's area or a person that is a voluntary or community body (as defined by Regulation 5 of the 2012 Regulations) with a local connection (as defined by Regulation 4 of the 2012 Regulations). Section 89 provides as follows:

“(1) Land in a local authority’s area which is of community value may be included by a local authority in its list of assets of community value only—

(a) in response to a community nomination, or

(b) where permitted by regulations made by the appropriate authority.

(2) For the purposes of this Chapter “community nomination”, in relation to a local authority, means a nomination which—

(a) nominates land in the local authority’s area for inclusion in the local authority’s list of assets of community value, and

(b) is made—

(i) by a parish council in respect of land in England in the parish council’s area,

(ii) by a community council in respect of land in Wales in the community council’s area, or

(iii) by a person that is a voluntary or community body with a local connection.

(3) Regulations under subsection (1)(b) may (in particular) permit land to be included in a local authority’s list of assets of community value in response to a nomination other than a community nomination.

(4) The appropriate authority may by regulations make provision as to—

(a) the meaning in subsection (2)(b)(iii) of “voluntary or community body”;

(b) the conditions that have to be met for a person to have a local connection for the purposes of subsection (2)(b)(iii);

(c) the contents of community nominations;

(d) the contents of any other nominations which, as a result of regulations under subsection (1)(b), may give rise to land being included in a local authority’s list of assets of community value.

(5) The appropriate authority may by regulations make provision for, or in connection with, the procedure to be followed where a local authority is considering whether land should be included in its list of assets of community value.”

17. In order to determine what is meant in section 89(2)(b)(iii) of the 2011 Act, by “a person that is a voluntary or community body with a local connection” it is necessary to look at Regulations 4 and 5 of the 2012 Regulations.

i) Regulation 4 provides that a body other than a parish council has a “local connection” with the land in the authority’s area if (a) the body’s activities

are wholly or partly concerned - (i) with the local authority's area; or (ii) with a neighbouring authority's area;

- ii) Regulation 5 provides "a voluntary or community body" means (a) a body designated as a neighbourhood forum pursuant to section 61F of the Town and Country Planning Act 1990; (b) a parish council; (c) an unincorporated body (i) whose members include at least 21 members, and (ii) which does not distribute any surplus it makes to its members; (d) a charity; (e) a company limited by guarantee which does not distribute any surplus it makes to its members; (f) a co-operative or community benefit society which does not distribute any surplus to its members; or (g) a community interest company.

18. The procedure for considering a community nomination is set out in section 90 of the 2011 Act. Section 90 provides in part that:

"(3) The authority must accept a nomination if the land nominated-

(a) is in the authority's area, and

(b) is of community value.

(4) If the authority is required by subsection (3) to accept the nomination, the authority must cause the land to be included in the authority's list of assets of community value."

19. Local authorities are required to notify owners of the inclusion of their property on this list: section 91(2) of the 2011 Act; and owners are entitled to ask local authorities to review their decisions: section 92(1) of the 2011 Act. By Schedule 2, para 1(1) of the 2012 Regulations, there is a right to an oral hearing of such a review and to make representations. The review is by an officer of the local authority who has had no previous involvement in the nomination. An owner (or his successor) may then appeal to the First-tier Tribunal against the local authority decision to include their asset in the list, and the First-tier Tribunal can review findings of fact as well as of law: see Regulation 11 of the 2012 Regulations.

20. If an asset is listed, the owner is subject to certain restrictions as to the manner in which he may deal with that asset. If the owner chooses to sell the land, he may only do so subject to the moratorium period set out at section 95 of the 2011 Act. This means that if a community group makes a written request to a local authority to be treated as a potential bidder in relation to the land, the land may not be sold for a six-month period to afford the community group sufficient time to put together a bid. However once the moratorium period is ended, the owner is under no obligation to sell the land to the community group. The listing can however be treated as a material planning consideration in the determination of local planning applications: see para 2.20 of the advice note referred to at para 8 above.

*How the Scheme worked in this case*

21. The Residents' Association has some 820 members. It appears that it was stimulated to nominate the Field as a result of a talk given to various local organisations about the 2011 Act by a member of the Council. On 2 December 2013 the Residents' Association made its nomination for the Field to be included in the Council's list of assets of community value. The nomination was a "community nomination" for the purposes of section 89 because the Field is within the Council's area, and the Residents' Association is a voluntary or community body (as defined by Regulation 5 of the 2012 Regulations) with a local connection (as defined by Regulation 4 of the 2012 Regulations): see further, section 89 (1)(a), (2)(a) and (b)(iii) of the 2011 Act.
22. In this connection, it is instructive to see what information was required of the Residents' Association when it made the nomination in this case. The Residents' Association was required by the Council to give the name and address of the lead contact within the Residents' Association, together with the number of its members, a copy of its constitution, the name and home addresses of 21 members registered to vote in the nomination area and an explanation of why it felt the Field was an asset of community value. The Residents' Association said the Field was an asset of community value, because of the extensive use made of it by local residents for recreational outdoor activities. The Residents' Association also said residents had been actively involved in ensuring the area remained maintained, they had encouraged the Council to clear and mark the footpaths; and local volunteers had subsequently planted a new hedge line to enhance the look and feel of their local environment.
23. After the nomination was made, the Council's Property and Asset Manager, Ms White, inspected the Field, and the Council subsequently accepted her recommendation that the nomination be accepted. The Council gave this reason: "The land is open with no apparent barriers to public access. It appears to fulfil a community benefit and there is no reason to assume this will not continue." Banner Homes was notified of the listing decision on 10 March 2014, and in April 2014, asked the Council for an oral review which took place on the 26 September 2014.
24. At the time of the nomination and when the listing decision was made, the local community had unfettered access to the Field. As I have said, it is common ground that Banner Homes knew this; it also knew the local community were using the Field for the beneficial recreational activities I have described, and had made no objection to this use. The unchallenged finding of fact by the First-tier Tribunal (at para 25 of its decision) was that: "Banner Homes have, for years, been well aware of the use made by the local community of the Field...in the relatively recent past the owners have contemplated formalising that use. The local residents have also sought permission for hedge-planting."
25. However, in early September 2014, therefore shortly before the review hearing was due to take place, Banner Homes erected wire fencing along the entire length of the public footpaths, interspersed with notices stating "private land no unauthorised access" to prevent public access to the Field beyond the public footpaths.

26. There is no suggestion that Banner Homes, as the landowner, was not within its legal rights in taking this step (which it said, at the review hearing, was done to avoid trespassory use and to prevent a possible claim to rights of access). Nevertheless it is seriously to be doubted that the Residents' Association appreciated that its nomination of the Field would have such a consequence; that is, that the local community would be excluded from every part of the Field, apart from the now fenced in public footpaths, and therefore from using the Field for the beneficial and pleasurable pastimes they had used it for hitherto. Indeed in his evidence to the review hearing, the Chairman of the Residents' Association said Banner Homes' "change of the goalposts" was much resented by the local community.
27. Whatever else may be said about this turn of events, unfortunate as it clearly was from the residents' perspective, this was the factual background to the various appeal hearings that then took place.
28. I should add that after the listing decision was made, Banner Homes also applied to change the use of the Field from agricultural use to the keeping of horses. The local authority refused this application on 13 August 2014 and Banner Homes' appeal against that refusal was dismissed on 3 June 2015. On 21 May 2016 Banner Homes made another planning application for change of use, for the keeping of horses (and for the erection of stables and associated construction of access points to the Field). This further application was refused on 13 September 2016: Banner Homes' appeal against this refusal to the Secretary of State was dismissed on 21 December 2017, and is now the subject of an application for a statutory review under section 288 of the Town and Country Planning Act 1990 (the 1990 Act).

*The hearings below*

29. The consistent and central position of Banner Homes at the review hearing, before the First-tier Tribunal and before the Upper Tribunal, was that as a matter of law, "actual use" for the purposes of section 88 of the 2011 Act must mean lawful use; and since the actual use of the Field by the local residents, apart from the public footpaths, was a trespass, and unlawful, it could not therefore form the basis (or a qualifying use) for the purpose of listing an asset as being of community value.
30. Two other issues raised at these earlier hearings, namely whether there was actual *current* use of the Field, within the meaning of section 88(1)(a) or whether it was realistic to think there could be actual use *in the future*, for the purposes of section 88(2)(b), have fallen by the way side.
31. I need therefore only mention these issues briefly, by way of background. The respondents successfully maintained at the review stage that the Field was an asset of community value for the purposes of both section 88(1)(a) and section 88(1)(b) because there was *actual current use* and there had been *actual use in the recent past*. The First-tier Tribunal accepted there had been actual use of the Field *in the recent past* but it rejected the contention that there was actual *current* use: see paras 13 to 20 of the First-tier Tribunal's decision. In brief summary, the First-tier Tribunal did not accept the respondents' argument which had found favour at the review hearing, that the visual amenity provided by the whole of the Field when

viewed from the (now fenced off) footpaths constituted *actual current use* of the (whole) Field for the purposes of section 88(1)(a). The respondents did not then challenge this aspect of the First-tier Tribunal's decision on appeal.

32. Banner Homes also argued at the review hearing, and before the First-tier Tribunal that in view of the fact that the Field had now been fenced in, it was not realistic to think the Field could be used *in the future* to further the social wellbeing or social interests of the local community i.e. that regardless of its central argument on "actual use", the respondents could not satisfy the requirements of section 88(2)(b). In this connection, Banner Homes relied on a statutory declaration made on 3 September 2014 by its planning director, Mr Paul McCann which confirmed Banner Homes' intention not to dispose of the Field, to keep the fencing in place, to maintain the exclusion of the public from the Field apart from the public footpaths, and to promote the Field for development through the Council's Local Plan process. This point was called, below "the future use point."
33. As to that, the First-tier Tribunal found as a fact that the requirements of section 88(2)(b) were satisfied, giving these reasons at para 38:

"Given the long history of peaceable, socially beneficial (if formally unauthorised) use of the Field, and of the previous views of the 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."

34. The Upper Tribunal rejected Banner Homes' argument that in referring to what was "not fanciful" rather than what was "realistic" for the purposes of section 88(1)(b) and 88(2)(b), the First-tier Tribunal had made an error of law. The Upper Tribunal also rejected the argument that the First-tier Tribunal's decision on "the future use point" was contrary to the evidence, holding that what is realistic for the future, is a matter of judgment for the local authority (or on appeal, for the First-tier Tribunal) and is not a matter of "veto for the landowner", concluding that: "The First-tier Tribunal made a finding that was open to it on the particular facts of this case, especially in view of the history of use, and for the reasons that it gave." See paras 34 to 39.
35. The Upper Tribunal refused Banner Homes' application for permission to appeal to the Court of Appeal on "the future use point", as did I on the papers, on 27

February 2017. The application for permission on this Ground has not been renewed.

36. Thus the single live issue (the Ground for which I did give permission) is whether, as Banner Homes contends “the Tribunal was wrong in law in failing to apply, alternatively failing to apply correctly, the principle of *in bonam partem* to the construction of section 88 of the Localism Act, and as a consequence the Tribunal was wrong to construe section 88 such that trespassory, and therefore unlawful, use of the Land was a qualifying use for the purposes of listing the Land as an asset of community value.”
37. My reasons for giving permission to appeal on this Ground, were these: “The judgment of the FTT, on the construction of section 88(2)(a) of the Localism Act 2011 was a formidable one, and it was largely followed by the UT. However, whether ‘actual use’ within section 88(2)(a) of the 2011 Act can comprehend use which is unlawful is an issue of some importance which, in my view, merits consideration by the Court of Appeal in a second appeal.”
38. Before turning to this central issue, I should outline what was said about this below.
39. The review process was a careful one (we have seen the notes taken of the evidence) and it produced an impressive decision by the reviewing officer, Mr Michael Lovelady, the Council’s Head of Legal, Democratic and Regulatory Services, albeit certain aspects of his decision were not upheld by the First-tier Tribunal, as outlined at para 31 above.
40. In passages from the review decision, subsequently cited by the First-tier Tribunal (see in particular, para 31 of the First-tier Tribunal’s decision) Mr Lovelady gave these reasons for rejecting Banner Homes’ argument on lawful use:

“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 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 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 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.”

41. The First Tier Tribunal similarly had no hesitation in rejecting this aspect of Banner Homes’ case. At paras 32 to 35 Judge Lane said:

“32. As Lord Neuberger cautioned [in *Barkas v North Yorkshire County Council & Anor* [2014] UKSC 31] 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 landowner 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, when 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 of Justice* [2014] EWHC 1370 (Admin)).

34. Mr Edwards QC 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). 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 ...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.”

42. Part of Dr Wareing’s evidence of actual use had earlier been recounted by the First-tier Tribunal at paras 8 and 9 of its decision. Dr Wareing had lived in the vicinity of the Field, or Meadow as he called it, for over 40 years and said:

“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.”

43. The First-tier Tribunal went on to record at para 9 that:

“Dr Wareing had 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 willow herb, 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.”

44. For his part, HH Judge Levenson gave these reasons for rejecting Banner Homes’ argument on the issue of statutory construction:

“30. The starting point on an issue of statutory construction must always be the actual words of the statute. Section 88(1)(a) of the 2011 Act uses the words “an actual current use”. Section 88(2)(a) uses the words “when an actual use”. It would have been easy to insert into each of these provisions the word “lawful”. No such word was inserted and there was no indication anywhere in the relevant provisions that any such general limitation was intended. On the face of it the words in the statute are unambiguous. Thus the use need not be lawful unless there is some other way in which the law provides that it should be.”

45. At para 31 he went on to say:

“The doctrine of *in bonam partem* in relation to statutory interpretation may well be of great use and very relevant to a provision like section 191 of the [Town and Country Planning Act] 1990 ... where, in its absence, the most blatant and dishonest frauds could otherwise (after four years) be cloaked in legality. However, as Lord Mance said in *Welwyn Hatfield* (see above), 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. The context in relation to assets of community value is that the 2011 Act already defines the way in which the public

benefit should be taken into account. This is by providing that an asset may only be listed if there is or was (as appropriate) and will be a use to further the social wellbeing or interests of the local community. Whether those facts are established is a matter for the local authority or, on appeal, for the First-tier Tribunal. That is the inbuilt protection against the type of behaviour seen in *Welwyn Hatfield* and some other cases. Further, in the case of assets of community value, listing provides purely public benefit and creates no private rights of the kind that were sought in *Welwyn Hatfield*. It would be against the whole policy and scheme of the relevant provisions of the 2011 Act for the creation of a public benefit to be undermined by the actions of unidentified private trespassers. It cannot be said that in a case such as the present that a literal interpretation would seriously damage the public interest. There are indeed clear words in the statute to indicate that the interpretation for which the appellant argues is incorrect. The present case is a million miles from the situation in *Welwyn Hatfield* which “appears to constitute a category of its own” (see above).”

### *Discussion*

46. The issue here is a straightforward one of statutory construction. The words “actual use” in section 88 of the 2011 Act are on their face, unambiguous, and if construed literally, are plainly apt to cover the use (the actual use, dare I say it) that the local community made of the Field, before it was fenced off. Mr Edwards QC does not suggest otherwise.
47. Instead he relies, as he did below, on the presumption that the law should serve the public interest and the *in bonam partem* doctrine, a principle of construction that presumes against the construction of a statutory provision so as to reward an unlawful action with a benefit, unless a contrary Parliamentary intention is revealed. Absent, he submits, a clear indication to the contrary, Parliament is not to be taken to have intended unlawful conduct to be rewarded by the grant of a right or benefit, as would occur in this case if the listing decision were to be maintained. In this connection, he relies principally on the *Welwyn Hatfield* case, and on the commentary on the foregoing principles as an aid to statutory construction in *Halsbury’s Laws of England* (5<sup>th</sup> ed. vol. 96, paras 1152 and 1155) and *Bennion on Statutory Interpretation* (6<sup>th</sup> ed. pp. 725 to 727).
48. If Mr Edwards QC is right, the choice is a binary one. Any taint of unlawfulness, no matter how trivial or technical, in the use of the asset in question would mean that it could not be listed under the Scheme as an asset of community value. I do not consider his argument is right however. Nor do I accept the principles he refers to, lead to the sort of inflexible (and binary) approach for which he contends in this case. It seems to me that whichever canon of statutory construction is

adopted, the legislative intention is plainly that “actual use”, in this statutory context, should mean what it says.

49. The facts of *Welwyn Hatfield*, are notorious, A builder, Mr Beesley, deliberately deceived the planning authority by applying for planning permission to construct a barn, on open land in the Metropolitan Green Belt, when in fact he intended to construct a residential dwelling. He then completed a building which had the external appearance of a hay barn but which was fitted out internally as a single dwelling house. He moved in with his wife, and lived there undetected for four years. In his evidence to the planning inspector, the builder said he deliberately deceived the planning authority when he applied for planning permission, he always intended the building to be a house, not a barn, and he had carried out a planned and deliberate deceit over an extended period to establish immunity from enforcement action.
50. After a period of four years had passed, the builder sought from the local authority, but was refused, a certificate of lawfulness of existing use pursuant to section 171B of the 1990 Act, which provides for a four year time limit for enforcement action against a breach of planning control consisting in the change of use to use as a single dwelling house. It is unnecessary to refer to the appellate history of the case before it came before the Supreme Court. It is sufficient to say that the builder and the Secretary of State succeeded before the Court of Appeal; but the decision of the Court of Appeal was overturned by the Supreme Court, which held, unanimously, that the construction of the building had been begun and completed as a dwelling house, and not as the barn permitted by the planning permission. There had therefore been no change of use within the meaning of section 171B(2) of the 1990 Act from that of the permitted barn, to that of the dwelling house. The planning authority was in those circumstances entitled to initiate enforcement proceedings.
51. It is to be noted, as a matter of passing interest, that the exceedingly unattractive nature of Mr Beesley’s case on the facts led the Secretary of State to introduce amendments to the 1990 Act to deal with issues of concealment, namely sections 171BA, 171BB and 171BC of the 1990 Act, which were inserted into the 1990 Act on 6 April 2012, by the 2011 Act itself. Parliament thus, in the 2011 Act, introduced legislation into the planning process which specified, in terms, the particular consequences of concealment
52. What matters for present purposes however, is the argument raised for the first time by the Council (Welwyn Hatfield) before the Supreme Court, that the builder’s deceptive conduct disentitled him on public policy grounds from relying on section 171B or section 191 (1) of the 1990 Act. As Banner Homes does in our case, the Council relied in support of its argument on passages in *Halsbury’s Laws* and *Bennion on Statutory Interpretation* (in the editions that were then current) where the relevant principles were discussed. The premise of the argument being that if Mr Beesley’s application satisfied the literal language of the statutory provisions, it was only because of his deceptive conduct. In view of the Supreme Court’s conclusion that there had been no change of use within the meaning of section 171B(2) of the 1990 Act, it was not strictly necessary to decide whether the public policy argument mounted by the Council could prevail. However Lord Mance JSC who gave the leading judgment (and with whom Lord Phillips of

Worth Matravers PSC, Lord Walker of Gestingthorpe, Baroness Hale of Richmond and Lord Clarke of Stone-Cum-Ebony JJSC agreed) considered the issue was one of general importance, and he dealt with it at paras 31 to 58.

53. Lord Mance cited *Halsbury's Laws*, and *Bennion* at paras 45 and 46; and at para 53, then described the ultimate question, as whether it can have been the intention of the legislator, that a person conducting himself like Mr Beesley could invoke the benefits of section 171B and 191(1).
54. At paras 54 to 58 Lord Mance said this (with my emphasis):

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. Here, the four-year statutory periods must have been conceived as periods during which a planning authority would normally be expected to discover an unlawful building operation or use and after which the general interest in proper planning control should yield and the status quo prevail. Positive and deliberately misleading false statements by an owner successfully preventing discovery take the case outside that rationale. 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: *Booth v Warrington* (1714) 2 ER 111 *Gibbs v Gould* (1881-82) LR 9 QBD 59, *Bulli Coal Mining Co v Osborne* [1899] AC 351 and *Lynn v Bamber* [1930] 2 KB 72.

55. If the owner of an unauthorised house were to bribe or by menaces coerce a planning authority officer into turning a blind eye to unlawful development for four years, it is inconceivable that the building owner could then rely on the four year period, even though the owner would not have to (and surely would not) mention anything but his four year period of occupation in his attempt to bring himself within the literal language of the sections. It is true that the council would then be able to show that a criminal offence had been committed (in the case of a bribe under the Public Bodies Corrupt Practices Act 1889, section 1 and in the case of menaces probably under the Theft Act 1968, section 21, since the purpose of "gain" includes under section 34(2)(a) "keeping what one has"). However, if a planning authority were to discover an unauthorised development or use, and the property owner were, in order to avoid enforcement action within the four years, falsely to assure the planning authority that the four years had not expired, and that he intended to remove or cease the development or use before they did, and so succeed in

avoiding enforcement action during the four years, I very much doubt whether the owner could thereafter rely upon sections 171B and 191(A), merely because no criminal offence had been committed.

56. Here, Mr Beesley's conduct, although not identifiably criminal, consisted of positive deception in matters integral to the planning process (applying for and obtaining planning permission) and was directly intended to and did undermine the regular operation of that process. Mr Beesley would be profiting directly from this deception if the passing of the normal four-year period for enforcement which he brought about by the deception were to entitle him to resist enforcement. The apparently unqualified statutory language cannot in my opinion contemplate or extend to such a case.

57. In seeking to counter such a conclusion, the Secretary of State and Mr Beesley draw attention to *Epping Forest District Council v Philcox* [2002] Env LR 2, where the grant of a certificate under section 191 was challenged on the grounds that the relevant user (the breaking of motorised road vehicles and storage of parts) had taken place during the relevant period without a waste management licence required under the Environmental Protection Act 1990 and so involved a criminal offence. The Court of Appeal cited inter alia *Connor* and *Puttick*, but held that there was no "principle that the plain words of a statute which define what is lawful were to be read subject to a proviso that what is criminal cannot be lawful" (para 15, per Pill LJ). However, both Chadwick LJ and Buxton LJ stressed that enforcement under the planning legislation and under the legislation regulating waste management were different matters: paras 35 and 46. No benefit would accrue to the operator by granting planning permission, which might be granted or refused for reasons which had nothing to do with waste management; those responsible for regulating waste management would remain free to take whatever enforcement action they decided: para 46. The case did not involve any fraudulent conduct in the planning process, and the failures to procure an environmental licence and obtain planning permission were independent, rather than one causing the other. I do not regard the case as assisting the Secretary of State or Mr Beesley's case.

58. ...the language [of sections 171B(2) and 191(1)(a)] could not have been intended to cover the exceptional facts of this case, where there was positive deception in the making and obtaining of fraudulent planning applications, which was directly designed to avoid enforcement action within any relevant four year period and succeeded in doing so.

55. Lord Brown of Eaton-Under-Heywood JSC, who gave a concurring judgment, pointed out at para 73:

“Clearly it would be impossible to superimpose upon the statutory scheme any sort of broad principle to the effect that no one guilty of wrongdoing can be allowed to benefit from the limitation provisions of the 1990 Act. That, indeed, would be inconsistent with the plain intention of this legislation. Inevitably the breaches of planning control statutorily said to become immune from enforcement under section 171B involve a spectrum of wrongdoing. These range from cases at one end where the developer is simply unaware of the need for development permission to, at the other extreme, those intent on unpermitted development who plot a whole course of deception designed to circumvent planning control and escape enforcement. The point is illustrated by two cases in particular, *Epping Forest District Council v Philcox* [2002] Env LR 2 (*Philcox*) and *Arun District Council v First Secretary of State* [2007] 1 WLR 523 (*Arun*), both touched on in Lord Mance's judgment.”

56. Lord Brown went on to emphasise, in unambiguous terms, the exceptional nature of this case on the facts:

80. [Mr Beesley's] was a deliberate, elaborate and sustained plan to deceive the council from first to last, initially into granting him a planning permission and then into supposing that he had lawfully implemented it and was using the building for its permitted purpose. His conduct throughout was calculated to mislead the council and to conceal his wrongdoing. As necessary features of his deceit he omitted to register any member of the household for the payment of council tax for the period 2002-2006, contrary to section 6 of the Local Government Finance Act 1992, and he failed to comply with a number of the requirements of the Building Regulations (SI 2000/2531) with regard to the construction of the dwelling. Whether this conduct (and that of his father-in-law with whom he secretly constructed the house) was or was not susceptible to prosecution under the general criminal law cannot be the determining question here. On any possible view the whole scheme was in the highest degree dishonest and any law-abiding citizen would be not merely shocked by it but astonished to suppose that, once discovered, instead of being enforced against, it would be crowned with success, with Mr Beesley entitled to a certificate of lawful use to prove it.

81. Frankly the dishonesty involved in this case is so far removed from almost anything else that I have ever encountered in this area of the law that it appears to constitute a category all its own. I say "almost", because we all now know of the no less astonishing case of *Fidler v Secretary of State for Communities and Local Government and Reigate and Banstead Borough Council* [2010] EWHC 143 (Admin), a case concerning the construction without planning permission of a mock Tudor castle behind a 40 ft high shield of straw bales and tarpaulin...”

57. This then was the answer to the question Lord Mance posed at para 53. Parliament cannot have intended that a person conducting himself like Mr Beesley could invoke the benefits of section 171B and 191(1) of the 1990 Act. If however we ask the same question here, on different facts and in a different legislative context (by reference to the Scheme and the evidence of Dr. Wareing for example) the answer in my view is a different one. In this respect, I commend the reasons given by Judge Levenson at para 31 of his decision, on which it is difficult to improve.
58. As Mr Edwards QC accepted during the course of argument, what is said by Lord Mance in the first sentence of para 54 of *Welwyn Hatfield*, does not support the inflexible ‘bright line’ approach he invites us to take here, namely that any unlawfulness, no matter how slight or trivial in relation to the use in question, will prevent it from qualifying as actual use for the purposes of section 88 of the 2011 Act. Instead, the approach, where public policy is invoked as an aid to statutory construction, is a more open textured one. As Lord Mance said in terms, regard must be had to the context and to the nexus between the conduct and the particular statutory provision.
59. To be clear, Mr Hopkins, for the Council, does not take issue as a matter of generality, with the public policy principles on which Banner Homes relies. However he points, correctly, to the fact that caution should be exercised when construing a statute according to public policy considerations (*Welwyn Hatfield* per Lord Mance at para 53). Further, he submits, and I agree, that such considerations (or principles) do not readily lend themselves to abstract and inflexible rules. They are, necessarily, contextual.
60. The context in this case, as Judge Levenson pointed out, is that the 2011 Act already defines the way in which the public benefit should be taken into account. The legislation has, as Sir Rupert Jackson put it during the course of argument, a “self-policing” mechanism. Precisely where this consideration enters into the decision of the local authority will depend on which of section 88(1) or (2) is in play. The key point is however, that an asset can only be an asset of community value for the purposes of the Scheme, if there is actual use that in the opinion of the local authority furthers “*the social wellbeing or social interests of the local community*”.
61. There may be cases, such as this one, where it is hard to couple the word “unlawful” with the activities (or “use”) under consideration, let alone with any suggestion they are engaged in illicitly to obtain a benefit under the Scheme. In this connection I might be permitted to refer to the evidence of the Chairman of the Residents’ Association which said this:

“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, removed dumped rubbish, keep the footpaths open for use, discourage residents from misusing the site e.g. 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 ...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.”

62. There may be other cases, where the conduct is closer on the facts to those in *Welwyn Hatfield*. However, as Judge Lane said, “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.”
63. Whether the test is satisfied, is left, as Mr Hopkins says, to the good sense of the local authority. I would add that in the unlikely event that the sort of conduct to which Judge Lane referred (“raves” or the like) gave rise to a nomination, or one that was successful, then the listing decision could be challenged by the owner through the carefully tiered process of review and appeal, for which the Scheme provides; and ultimately, by judicial review, in the event, for example, of irrationality or perversity.
64. It is also important to note that the Scheme is clearly very different from the sort of legislation under consideration in *Welwyn Hatfield* on a number of levels. In *Welwyn Hatfield* the (factual) satisfaction of a particular condition, on a literal interpretation of the legislation, secured the relevant benefit, regardless of how that condition came to be satisfied (by criminal or deceptive conduct for example). It is in those circumstances, as Mr Hopkins puts it, that public policy has to come to the rescue, and the literal wording of the statute bends to the public good. But that, quite obviously, is not the position here. Nor, and again in contrast with *Welwyn Hatfield*, does the Scheme enable the putative wrong doer to acquire private rights. If a nomination is successful, then subject to conditions and for a limited time, a “community interest group” – which may have had nothing to do with the unlawful conduct in question - is merely entitled to ask that it be treated as a potential bidder when an asset of community value is put up for sale: see section 95 of the 2011 Act. Of course it is true, as Mr Edwards QC points out, that this fetters, to the extent provided for under the Scheme, what the owner can do with the listed asset. But in empowering the community to this limited extent, this is what Parliament has decided to do.

65. In this connection I should note that Mr Edwards QC did not eventually press the argument (made below) that the absence of the phrase “as of right”<sup>3</sup> in section 88 of the 2011 Act, was significant, accepting the use of that phrase would be inapt, in circumstances where actual use could include conduct that was lawful, and not trespassory.
66. I have not found it necessary (nor did the parties to any extent during the course of oral argument) to venture into the matters considered by Judge Lane at para 33 of his decision (see para 41 above). In this case, the wording of the section, as a matter of literal construction, the policy behind the Scheme, and its purpose all point in the same direction. I would also wish to express my agreement with the observations of Lord Justice Davis. In my opinion, the Upper Tribunal did not err in its construction of “actual use” in section 88 of the 2011 Act, the Council was entitled to list the Field as an asset of community value and I would dismiss this appeal.

**Sir Rupert Jackson:**

67. I agree that this appeal should be dismissed for the reasons given by Lady Justice Sharp. The appellants are asking us to read into section 88 of the Localism Act 2011 a bright line rule which is neither specified in the section nor appropriate, given the express criteria which regulate the exercise of the statutory power.
68. I also agree with the observations of Lord Justice Davis.

**Lord Justice Davis:**

69. It has been an unfortunate consequence in this case that, by reason of the nomination, Banner Homes felt constrained, in order to protect its commercial interests as the land owner, to fence off the Field from the public footpaths. It would be a further unfortunate consequence if other land owners, perhaps holding land with a view to potential development in the future, likewise were to feel constrained to restrict public access to their land. That particular unfortunate result which has arisen in this particular case may prove to be an unintended consequence of the 2011 Act. But be that as it may, that can provide, of itself, no reason for departing from the clear statutory purpose behind, and the clear statutory language of, the 2011 Act.
70. For the reasons given in the judgment of Sharp LJ, with which I entirely agree – and indeed for the reasons also given by the reviewing officer and by the judges in the Tribunals below – invocation of the *in bonam partem* principle cannot avail Banner Homes in this case. I too would dismiss the appeal.

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<sup>3</sup> This concerns trespassory use *nec vi, nec clam, nec precario*: see *Regina (Barkas) v North Yorkshire County Council* [2014] UKSC 31, [2104] 2WLR 1360, a case concerning section 15 of the Commons Act 2006, where the meaning of the phrase is considered at paras 14 to 17.