



Neutral citation number: [2024] UKFTT 435 (GRC)

Case Reference: CR/2022/0001

**First-tier Tribunal
(General Regulatory Chamber)
Community Right to Bid**

**Heard by Cloud Video Platform
Heard on: 10 January 2023 and
subsequent written submissions
Decision given on: 30 May 2024**

Before

JUDGE NEVILLE

Between

MR BRIAN NEWTON

Appellant

and

**(1) DERBYSHIRE DALES DISTRICT COUNCIL
(2) STARKHOLMES ALLOTMENT ASSOCIATION**

Respondents

Representation:

For the Appellant: Simon Bird KC, counsel instructed by Geldards

For the Respondent: Anthony Gill, counsel instructed by Anthony Collins Solicitors

For the Second Respondent: Andrew Gore, counsel instructed directly

Decision: The appeal is dismissed.

REASONS

1. This appeal concerns Starkholmes Road Allotments. On or around 25 June 2021 the Starkholmes Road Allotments Association (“SAA”) nominated the Allotments to be listed as an Asset of Community Value by the Council, pursuant to the Localism Act 2011. In a decision dated 16 August 2021 the Council decided that the Allotments met the necessary criteria and listed them as an ACV. Mr Newton, the freehold owner of the Allotments, exercised his right to request a review. That review was conducted

by Mr Lee Gardner, the Council's Legal Services Manager. On 8 December 2021 he issued a review decision upholding the listing.

The appeal

2. Mr Newton exercised his right of appeal against the review decision, and SAA were subsequently added to the proceedings as second respondent.
3. At the hearing of the appeal, evidence was heard from Sharon Shirley and Mary Derrick of the SAA, Timothy Braund of the Council, Mr Cook and Mr Housley on behalf of Mr Newton, and Mr Newton himself. After the evidence, the parties agreed to provide their closing submissions in writing. The subsequent delay in issuing this decision has arisen from a number of pressures, not directly connected with this appeal, affecting both the Tribunal in general and myself in particular. I apologise for the uncertainty that this will no doubt have caused.

Legal Framework & Principles

4. Pursuant to the Localism Act 2011, listing a building or land as an ACV means that when it is put up for sale, a six-week period begins during which a community group can express an interest in putting together a bid to buy it. If one does, then this triggers a six-month moratorium on sale to give them time to do so. After the moratorium expires however, the ACV can be sold as the owner pleases. There is no requirement that it be sold to the community group or on any particular terms. There is provision in the Act for compensation to be paid to the owner by the local authority for any loss or expense which would be likely not to have been incurred if the land had not been listed. As well the Act, the Assets of Community Value (England) Regulations 2012 set out further procedural and substantive requirements.

Criteria for listing an ACV

5. The relevant criteria for listing as an ACV are provided by section 88(2) of the Act:
 - (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.
6. Subsection (1) therefore applies when there is current community use, and subsection (2) where such use has presently ceased. If the relevant criteria are met then the Council must list the ACV.
 7. When the listing decision was taken, the Allotments were still in use and it is accepted that this use furthered the social wellbeing or interests of the local community. By the time of the appeal hearing, the allotment holders had been evicted and community use had ceased, but it is accepted by everyone that this occurred ‘in the recent past’. Therefore whether the applicable subsection is (1) or (2), it is common ground that the first condition is met. The issue is therefore what will happen in the future.
 8. The meaning of “realistic to think” when considering future use was considered in R. (TV Harrison CIC) v Leeds School Sports Association [2022] EWHC 130 (Admin). Lane J reviewed several authorities concerning section 88(1)(b), including as follows:
 30. In Gullivers Bowls Club Ltd v Rother District Council and Anor (CR/2013/0009), Judge Warren heard an appeal by Gullivers Bowls Club Ltd, the owner of land used as a bowls club, which appealed against the inclusion of its land in the statutory list, following nomination by a Community Association. Judge Warren held:
 - "11. Turning to the future condition in Section 88(1)(b) Mr Cameron [representing the Bowls Club] submits that the existing bowls club has no realistic prospect of continuing. He points to the poor state of the buildings and the finances and relies on a report prepared by GVA. This finds that Gullivers is not commercially viable. Mr Cameron submitted that since listing lasts for five years, my starting point in considering whether the future condition was satisfied, should be whether the bowls club could continue in existence for that length of time.
 12. I do not accept that the statute requires me to foresee such long-term viability. Indeed, it seems in the very nature of the legislation that it should encompass institutions with an uncertain future. Nor, in my judgment, is commercial viability

the test. Community use need not be and often is not commercially profitable.

13. On this issue, I accept the submissions made by Mr Flanagan. Gullivers may be limping along financially but it still keeps going and membership is relatively stable. Of course it is possible that something could go drastically wrong with the buildings and Gullivers would not have the capital to repair them; but that has not happened yet and, in an institution that has lasted for 50 years, it would be wrong to rule out community spirit and philanthropy as resources which might then be drawn on. In any event, should the site cease to be land of community value, Rother would have power to remove it from the list."
31. In Worthy Developments Ltd v Forest of Dean District Council and Anor (CR/2014/0005), Judge Warren dismissed the appeal of a developer, which had bought a former pub known as the "Rising Sun" outside Chepstow, and wished to build two four-bedroomed houses on the site. A planning application to that effect had been refused but was likely to be appealed. The respondent accepted nomination by the "Save our Sun Committee" of the land and building comprising the pub. On the issue of section 88(1)(b), Judge Warren held:
- "17. In respect of the future condition, Worthy Developments Ltd asked me to have regard to their intention to develop the plot to provide two houses. I take that into account although I balance it with the fact that they have not yet obtained the necessary planning permission. I also take into account the remoteness of the public house which must compound the general malaise affecting public houses nationally.
 18. The written submissions ask me to consider which was the more likely to happen, that planning permission should be obtained and houses be built, or that the building be revived as a pub? In my judgment, however, to approach the issue in this way is to apply the wrong test.
 19. I agree with the council. The future is uncertain. Worthy Developments Ltd may or may not obtain their planning permission. They may or may not sell the land. The Save our Sun Committee may or may not see their plans reach fruition. It remains still a realistic outcome that The Rising Sun might return to use either as a traditional pub or as a pub/shop/community centre as envisaged by the committee.
 20. My conclusion in this respect is reinforced by the pledges of support and petitions gathered by our (sic) Save our Sun

Committee. It is true that they have not yet made an offer with a firm completion date but their proposals are not fanciful. It is enough that return to use as a pub or some other venture furthering the social wellbeing or interests of the local community be realistic."

9. Lane J held that Judge Warren's interpretation of "realistic to think" was correct, emphasising that the legislation does not require a potential future use to be more likely than not to come into being, in order for it to be realistic.

Review

10. Section 92 gives a right to the owner of land listed as an ACV to request a review of the listing decision. Schedule 2 to the regulations sets out the procedure for a review, including that: the review must be undertaken by an officer of the authority of appropriate seniority who did not take any part in making the decision to be reviewed; there is a right for the owner to be legally represented, be provided with relevant documents and make submissions; and the owner has a right to request an oral hearing.

Appeal

11. Regulation 11 provides that:

(1) An owner of listed land may appeal to the First-Tier Tribunal against the local authority's decision on a listing review in respect of the land.

12. Nothing in the regulations specifies the grounds on which such an appeal may be brought or the matters that the Tribunal may take into account. As argued by Mr Bird, this Tribunal has previously applied what he terms "the Broad Approach", described as follows in Admiral Taverns Limited v Cheshire West and Chester Council and Farndon Town Council [2018] UKUT 15 (AAC):

"7. Regulation 11 of those regulations provides that an owner of listed land may appeal to the First-tier Tribunal against the local authority's decision on a listing review in respect of the land. No grounds of appeal or restrictions on the right of appeal are specified and the parties did not dissent from my suggestion that on such an appeal the First-tier Tribunal stands in the shoes of the local authority and makes its own findings of fact and decision afresh, although it must of course consider all the relevant evidence and representations. ..."

13. At my request, the parties' written submissions have addressed whether application of the Broad Approach in regulation 11 appeals has been called into question by the authority of R. (Begum) v Special Immigration Appeals Commission [2021] UKSC 7, in which the Supreme Court discussed the correct approach to be taken by a tribunal to a statutory appeal.

14. In Begum, Lord Reed considered how some other statutory appeals were approached by tribunals. This included the following:

- “47. The first is the decision of the Court of Appeal in *John Dee Ltd v Comrs of Customs and Excise* [1995] STC 941. The case concerned the jurisdiction of the VAT Tribunal on an appeal from a decision of the Commissioners that a taxpayer should provide security for the payment of tax. The Commissioners had a discretion to require security, in terms of the relevant legislation, “[w]here it appears to the Commissioners requisite to do so for the protection of the revenue”. No statutory guidance was given as to the scope of an appeal against the exercise of the power or as to the powers of the tribunal on such an appeal. The tribunal was, however, given powers to hear evidence and make orders relating to discovery.
48. Neill LJ, with whom the other members of the court agreed, held that the question for the tribunal was not whether it appeared to it that the provision of security was requisite for the protection of the revenue: the statutory condition was whether it appeared to the Commissioners to be requisite. In examining whether that condition was satisfied, the tribunal would, to adopt the language of Lord Lane in *Customs and Excise Comrs v J H Corbitt (Numismatists) Ltd* [1981] AC 22, 60, “consider whether the Commissioners had acted in a way in which no reasonable panel of Commissioners could have acted or whether they had taken into account some irrelevant matter or had disregarded something to which they should have given weight” (p 952). The tribunal might also have to consider whether the Commissioners had erred on a point of law. The tribunal could not, however, exercise the statutory discretion itself. The legislature had conferred on the Commissioners alone, and not on the tribunal or the court, the assessment of whether security was requisite. Although that case arose in the circumstances of taxation, the reasoning was not confined to that context, but turned on the nature of the discretion and the fact that it had been confided to the primary decision-maker.
49. The case of *Customs and Excise Comrs v J H Corbitt (Numismatists) Ltd*, which Neill LJ followed, concerned an appeal to the VAT Tribunal against the Commissioners’ exercise of their discretion to recognise a taxpayer’s records as sufficient for the purposes of a statutory scheme. It was in that context that Lord Lane, with whom Lord Diplock, Lord Simon of Glaisdale and Lord Scarman agreed, said at p 60 that the tribunal could only properly review the Commissioners’ decision “if it were shown that the Commissioners had acted in a way in which no reasonable panel of Commissioners could have acted; if they had taken into account some irrelevant matter or had disregarded something to which they should have given weight”.”

15. The Supreme Court considered this to be of vital importance in approaching the appeal right with which it was concerned:

- “66. ...The opening words (“The Secretary of State may ...”) indicate that decisions under section 40(2) are made by the Secretary of State in the exercise of his discretion. The discretion is one which Parliament has confided to the Secretary of State. In the absence of any provision to the contrary, it must therefore be exercised by the Secretary of State and by no one else. There is no indication in either the 1981 Act or the 1997 Act, in its present form, that Parliament intended the discretion to be exercised by or at the direction of SIAC. SIAC can, however, review the Secretary of State’s exercise of his discretion and set it aside in cases where an appeal is allowed, as explained below.
67. The statutory condition which must be satisfied before the discretion can be exercised is that “the Secretary of State is satisfied that deprivation is conducive to the public good”. The condition is not that “SIAC is satisfied that deprivation is conducive to the public good”. The existence of a right of appeal against the Secretary of State’s decision enables his conclusion that he was satisfied to be challenged. It does not, however, convert the statutory requirement that the Secretary of State must be satisfied into a requirement that SIAC must be satisfied. That is a further reason why SIAC cannot exercise the discretion conferred upon the Secretary of State.
68. As explained at paras 46-50, 54 and 66-67 above, appellate courts and tribunals cannot generally decide how a statutory discretion conferred upon the primary decision-maker ought to have been exercised, or exercise the discretion themselves, in the absence of any statutory provision authorising them to do so (such as existed, in relation to appeals under section 2 of the 1997 Act, under section 4(1) of the 1997 Act as originally enacted, and under sections 84-86 of the 2002 Act prior to their amendment in 2014: see paras 34 and 36 above). They are in general restricted to considering whether the decision-maker has acted in a way in which no reasonable decision-maker could have acted, or whether he has taken into account some irrelevant matter or has disregarded something to which he should have given weight, or has erred on a point of law: an issue which encompasses the consideration of factual questions, as appears, in the context of statutory appeals, from *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14. They must also determine for themselves the compatibility of the decision with the obligations of the decision-maker under the Human Rights Act, where such a question arises.”
16. Mr Bird’s submissions describe the approach described in the penultimate sentence of [68] above as “the Narrow Approach”. In deciding which applies to regulation 11 appeals it is, as held by the Supreme Court at [63], necessary to examine the nature of the decision and any statutory provisions which throw light on the matter.
17. Both Mr Bird and Mr Lewin argue that the Broad Approach is the correct one. The first such indicator put forward is that unlike the deprivation of citizenship provisions put forward in Begum, once the statutory condition is met listing is

mandatory rather than the product of discretion. This is correct, but I am not referred to any part of the Supreme Court's judgment where the approach to the statutory condition is guided by the consequences then being discretionary. The clear and direct statement of principle at [67] does not rely upon it, and in the subsequent paragraph the reasoning moves on to the subsequent exercise of discretion – the Court of Appeal having applied the wrong approach to each. I reject the argument that this puts the Tribunal in as good a position to decide the statutory condition as the local authority. The statutory scheme requires an opinion, and it specifies that it should be the opinion of the local authority. It is the local authority that is obviously best placed to make proleptic assessments of community needs and usage, with all the local planning, environmental, civic and demographic considerations that are potentially relevant. Even if the Broad Approach is adopted, the Tribunal would have to place appropriate weight upon the local authority's conclusions.

18. Second, I am referred to a Government 'non-statutory advice note for local authorities' which states that appeals are on points of law and on findings of fact. I take account of this existing understanding, but in the absence of any reasoning in the note can attach only minor persuasive relevance. I take more account of the explanatory memorandum to the regulations, which also states that the Tribunal "will consider facts as well as law".
19. Third, it is observed that the wording of regulation is the same as in regulation 17, which gives a right of appeal against compensation review decisions. Mr Bird argues that this right of appeal would have little meaningful function if it were limited to the Narrow Approach. I disagree that this is necessarily so. First, the appeal right would still provide a means by which any legal error by the local authority, for example in complying with the review procedure, Wednesday unreasonableness, or bias or predetermination, could be corrected without the expense and cost of bringing judicial review proceedings. This supports access to justice for a class of disputes where proceedings in the Administrative Court would be disproportionate to the potential expense for both the parties and the state. Second, no matter which approach is correct the Tribunal would still be bound to consider a human rights argument on a broader basis: Belfast City Council v Miss Behavin' Limited [2007] UKHL 19, at [13]-[15]; Begum, at [64]-[69]. A decision on compensation might readily engage Article 1 of Protocol 1 to the European Convention on Human Rights, the moratorium that applies to an ACV being an interference with the landowner's peaceful enjoyment.
20. Fourth, Mr Bird argues that there is no power in the regulations to quash the decision or for the local authority to re-consider the listing decision if it does. I disagree, sufficient powers to provide an effective appeal can be implied into the legislation.
21. Considering the wording and context of the legislation and the situation it is meant to address, in accordance with the principles at R. (Quintaville) v Secretary of State for Health [2003] UKHL 13 at [8] and R. (O) v Secretary of State for the Home Department [2022] UKSC 3 at [29], I hold that the correct approach is neither so strict as that described in Begum at [68], nor *de novo* as on the Broad Approach.

22. I begin with a particular feature of the statutory context, being Parliament’s decision to provide a right of appeal to the First-tier Tribunal. In Waltham Forest LBC v Hussain & Ors [2023] EWCA Civ 733, Lewison LJ held that:

“99. ...Under the tribunal system established by the Tribunals Courts and Enforcement Act 2007 I consider that, when hearing an appeal, the FTT is a true appellate tribunal. It is not exercising an administrative function.

100. At the heart of any appeal against a decision must, in my judgment, be a contention that the decision under appeal was wrong in some sense. As Judge Cooke explained in *Marshall v Waltham Forest LBC* [2020] UKUT 35 (LC), [2020] 1 WLR 3187 at [61]:

“The answer to the conundrum is that the idea "unless it is wrong" is being used in two different senses. Both in *Joffe* and in *Sagnata* the court rejected the idea that the lower court was exercising a narrow jurisdiction and could assess only whether the original decision was one that could have been reached on the evidence. The idea that the original decision stands "unless it was wrong", that is, wrong in law, is expressly rejected. In both cases the court stressed that this was a rehearing and not (to use a modern term) a review. But in both cases – in *Joffe* in the words I quoted at para 57 and in *Sagnata* by reference to those quoted words – the court stressed that the original decision carries a lot of weight; and it is in this sense that it is true that the courts will not vary it unless it is wrong. Here "wrong" means a decision with which the court disagrees; the court can vary that decision where it disagrees with it, despite having given it that special weight.”

23. Lewison LJ expressed his agreement with the separate judgment of Andrews LJ, who held as follows:

63. ...That points inexorably to the conclusion that the task of the FTT is to determine whether the decision under appeal was wrong at the time when it was taken.

64. “Wrong”, as Upper Tribunal Judge Cooke explained in *Marshall v Waltham Forest LBC* [2020] UKUT 35 (LC), [2020] 1 WLR 3187 at [61]–[62], means in this context that the appellate tribunal disagrees with the original decision despite having accorded it the deference (or “special weight”) appropriate to a decision involving the exercise of judgment by the body tasked by Parliament with the primary responsibility for making licensing decisions. It does not mean “wrong in law”. Put simply, the question that the FTT must address is, does the Tribunal consider that the authority should have decided the application differently?

24. I confess to finding some unresolved tension between what is said by the Court of Appeal above and the breadth of what Lord Reed says in Begum at [68]. I do not consider that the answer lies the Court of Appeal having been concerned with appeal

rights specified by statute or previous authority to be a “rehearing”; the Court had been referred to Begum and the word “any” at [100] was chosen nonetheless. It also follows previous discussion of “rehearing” having a wide spectrum of meanings in any event, and at one end being akin to “review”. I consider it appropriate to follow the later decision of the Court of Appeal, given that it was reached with full consideration of Begum. Nor is the Court of Appeal’s consideration specific to licensing appeals, with their particular history; Judge Cooke considered it appropriate to extend the principle to more modern decision-making powers and the judgment of Lewison LJ is clearly worded as having more general application. The approach was also applied in the later case of Cook v General Medical Council [2023] EWHC 1906 (Admin), Lane J citing the Court of Appeal’s judgment in support of the following description of the approach to be taken to an appeal against the decision of the Interim Orders Tribunal to maintain the interim order of suspension of the appellant's ability to practise medicine:

“20. The relevant legal principles this court must follow in deciding an application of this kind are essentially as follows. The court must disturb the decision of the IOT only if satisfied that the decision is “wrong”. This does not mean that the court is confined to acting only if a public law error is identified, such as would be the position on judicial review. The way in which the principle operates so as to prevent an unconstrained "merits" review is by requiring this court to give weight to the views of the specialist Tribunal.”

Nothing in the legal framework considered in Cook specified the relevant right of appeal as a “rehearing”.

25. In this appeal, I conclude that the approach described in Hussain at [64] and Cook at [20] applies to a regulation 11 appeal. I reject that the Broad Approach applies. The matters raised by the parties above provide little support for it when compared to the Hussain approach, which applied to the Act and the regulations reveals a clear, coherent, efficient and fair process for listing an ACV:

- a. First, the nomination is made. The strict requirements applying to the identity of the nominator and the contents of the nomination guard against overly casual or abusive nominations.
- b. Second, the local authority must form an opinion on whether the statutory condition is met and, if it is, list the ACV. It is required to notify the owner of the land and the local Town Council that it is considering listing, but there is no explicit duty to invite, wait upon or consider representations. Instead there is an absolute requirement that the process must be completed within 8 weeks of receiving the nomination.
- c. Third, upon listing the landowner is notified and has the right to seek a review. Where a landowner does object then the procedure at Schedule 2 to the regulations applies. It provides the landowner with 8 weeks to request a

review, and can be seen to aim at a fair process of the challenging the decision by requiring a different officer “of appropriate seniority” to take the review decision, and entitling the landowner to disclosure of documents relied upon when listing, legal representation, and to request an oral hearing at which they may make representations. It must be completed within 8 weeks of the review request.

- d. Fourth, there is a final safeguard by way of an appeal to the Tribunal. While the appeal does not apply a strict approach akin to judicial review, nor does it sweep away all the work done in the review.

26. This decision structure enables nominations to first be decided in a quick and efficient manner that can utilise the expertise and If the landowner objects then a review procedure with procedural safeguards exists. While this is not a truly independent consideration, as it is taken by the same local authority, a different officer of appropriate seniority (in the Tribunal’s experience, a more senior officer) is required. Finally, the Tribunal provides the final safeguard in the relatively informal and accessible route of a statutory appeal. This is a coherent, staged structure of decision-making.

27. It is less likely that Parliament intended the Broad Approach. The review stage puts a considerable burden on the local authority, potentially requiring an appropriately senior council officer with other duties to conduct an oral hearing, consider representations and issue a reasoned decision all within 8 weeks. Yet if the landowner is unsuccessful, on the Broad Approach they can sweep all that away and try their luck again before a judge – this is especially so if the Tribunal must consider matters at the date of the hearing rather than the listing, something that has not been addressed by the parties. It is unlikely that Parliament intended for local authorities to undertake such a futile procedure. The Broad Approach also works against the speed with which prior steps must be taken. A *de novo* appeal requires that the parties prepare accordingly and that the Tribunal finds the time to hear it. While the delay in deciding the instant appeal is exceptional, and to be lamented, the majority of appeals may still take months to conclude rather than weeks, simply as a product of the entitlement to an oral hearing, fair time being afforded to prepare, and the resources available. The legislation places no requirement for the Tribunal to decide the appeal within a particular timeframe. The loss of the work done at review and the subsequent delay that could be expected in any Broad Approach appeal risks undermining a process designed to fairly impose, at most, a six month moratorium on sale. This is unlikely to have been the intention of Parliament.

28. For completeness, I do not consider that Admiral Taverns’ approval of the broad approach is binding upon me. It predates the authorities recorded above, the Upper Tribunal did not hear argument on the point and proceeded by agreement between the parties, and the substantive issues between the parties did not depend on it. The only principled reason given by the Judge for applying the Broad Approach was that regulation 11 contains “no grounds of appeal or restrictions on the right of appeal” – this cannot be reconciled with subsequent authority. Nor is the Broad Approach

mandated by the only other potentially binding authority to touch upon the point: TV Harrison. At [38], Lane J observed that in regulation 11 appeals “the First-tier Tribunal has (at least up to now) treated the appeal as a *de novo* examination, based on the evidence put to the Tribunal”. The words in parenthesis make it clear that Lane J intended to neither approve nor disapprove that approach, and subsequently holds that the issue did not alter the way in which the judicial review before him, concerning a decision *not* to list land as ACV, should be approached.

29. I therefore take the description above, alongside that in Hussain at [64] and [100], as describing the approach to be taken to a regulation 11 appeal.
30. It must also be right that the Tribunal decides matters as they stood on the date of the listing decision. Regulation 11 gives a right of appeal against the review decision. Section 92 of the Act specifies that review as being of “the authority’s decision to include the land in the list”, and at section 92(4) describes the procedure that should be followed if the decision on a review “is that the land concerned should not have been included in the authority’s list of assets of assets of community value”, including that that “the nomination becomes unsuccessful”. This phrasing can be seen to retrospectively confirm or nullify the decision to list as of the time it was taken, and it is that review which is appealed. Furthermore, under section 87(3) entry on the list “is to be removed from the list with effect from the end of the period of 5 years beginning with the date of that entry”. For the making of an appeal to extend that period would be inconsistent with the statutory language, and it is unlikely that Parliament intended the two five year periods to end at different times. It could (and in this appeal would) also lead to a local authority applying the statutory criteria at section 88(1)(a) because there is current community use, only for the Tribunal to be required to apply the different set of criteria at section 88(2) because that use has ceased in the meantime. I reach my conclusion on this issue from the statutory scheme alone, but it is supported by the judgment of Lewison LJ in Hussain at [101]; the adverse consequences of adopting the date of hearing he describes would apply equally to regulation 11 appeals.

Consideration

31. I therefore look at matters as they stood on the date of listing, but can take into account evidence deployed in the review and at the appeal to decide whether the Council (in the person of Mr Gardner) should have reached a different decision on the review by deciding that the Allotments should not have been listed in light of what had been placed before him. As the focus is on the date of the listing decision, when the allotments were still in use, the applicable criteria are those at section 88(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.”

32. Mr Newton accepts that at the date of listing the Allotments were still in use and that this furthered the social wellbeing or social interests of the local community. I consider the issue to therefore be whether the second condition is met. As a point of construction, I do not consider that the word “continue” in section 88(1)(b) requires future unbroken continuity. The test explicitly permits there to be use that furthers the social wellbeing or social interests of the local community in a different way, and such multiple uses would likely entail periods of interruption. Likewise, a public house may periodically close and later be re-opened under new management.
33. For present purposes, the review decision on this point can be summarised as follows. Mr Gardner started with the 5 year period for which the ACV would remain listed. In the circumstances, before recognising that use continuing for less than 5 years may still satisfy the condition. He gives the example of a public house that is listed, purchased by a community group, operates for a period of time before closing again – it still continued to provide community use for a time. This self-direction is unimpeachable, and I agree that it is unnecessary to find that use will either be uninterrupted or to last the full duration of the listing. I agree with this Tribunal’s statement of the law in Carsberg v East Northamptonshire Council UKFTT CR/2020/0004, that future use:
- “...does need to be a use which is more than trivial or temporary. It is necessary to consider whether the use can continue for a period of time which is reasonable having regard to the nature of the use and the purpose of the listing.”
34. Returning to the review decision, Mr Gardner found that the continuation of allotment use until the Notice to Quit came into effect in September 2022 was sufficient to meet the condition. Even were it not, the Notice to Quit would be prevented (or use as allotments would thereafter resume) if the Town Council were successful in either compulsory purchase or in compulsory lease of the land under the Small Holdings and Allotments Act 1908. This, I can summarise Mr Gardner as having decided, disposed of Mr Newton’s determination to let the land turn to scrub if he were unsuccessful in obtaining planning permission for residential development. This removed or reduced the likelihood of that as an alternative scenario. Given that there was as yet no application for planning permission, it was therefore realistic to think that community use can continue. Mr Gardner also took into account the fact that the land had been used for allotments for over 100 years.
35. In his Grounds of Appeal and in Mr Bird’s submissions, Mr Newton argues discrete errors in that approach, together with having taken the “realistic to think” test “so loosely that it provides no meaningful threshold for listing”. The Grounds of Appeal put forward what are said to be “undisputed facts” that applied at the relevant time, and which ought to have led the Council to decide that the Allotments ought not to have been listed:

- “(a) The Starkholmes Allotment Association (“the SAA”) have been served with a notice to quit which requires them to deliver up possession of the land to the Appellant no later than 29th September 2022;
- (b) The Appellant is a private land owner who has decided that the allotment use should now cease. There is no prospect of that decision changing or of the notice to quit being withdrawn; and
- (c) The Appellant intends to pursue the residential development potential of the land but, in the event that this is not realisable, will maintain the land as scrub land.”

36. The assertion at (a) is correct. Those at (b) and (c) are correct insofar as they record Mr Newton’s stated intentions. Whether there was actually “any prospect” of future use contrary to those stated intentions was a matter to be decided in light of all the circumstances. I agree with this Tribunal in Patel v London Borough of Hackney CR/2013/0005, where Judge Warren noted that it is not that:

“11. ... an owner need only say “I have set my face like flint against any use of community value” and listing will be avoided. This almost makes the scheme voluntary. I think it more reasonable to take into account Mr Patel’s intentions ‘as part of the whole set of circumstances’.”

37. Mr Newton criticises the public house example given by Mr Gardner as conflating whether an ACV was properly listed to begin with and what subsequently happens. I disagree: an inherent part of the “realistic to think” test is its connection with, and recognition of, the inherent uncertainties. A public house may be properly listed even if it is thought probable that it will fail as a community business, provided that it is still realistic to think that it might not: TV Harrison at [30]. All that Mr Gardner had to find was a realistic prospect of allotment use continuing.
38. Mr Newton next criticises the conclusion that compulsory purchase or lease was realistic. Looking first at the material before Mr Gardner, I reject this. He was plainly entitled to attach a realistic possibility to the Town Council exercising their statutory powers to compulsorily lease land for allotment use, as they intended to explore, and rationally took into consideration that the cost would be prohibitive *if* permission was granted for residential development.
39. Mr Bird criticises Mr Gardner for not paying regard to the relevant Government Guidance on the use of compulsory orders and the requirements that must be met for them to progress. It is unclear how the guidance relates to the present circumstances, and it makes only a passing reference to the 1908 Act. I do accept that some points made by reference to the guidance may well be relevant in acquisition of land under the 1908 Act. These are collected in Mr Bird’s submissions and in a report by an expert surveyor Mr Simon Cook. I reject that Mr Gardner took insufficient notice of the points made at paragraphs 42 to 49 of the report. His reasoning took the Town Council’s interest in exploring compulsory purchase or leasing and gave cogent reasons for finding that it gave rise to a realistic possibility.

Now considering Mr Cook's points for myself, together with the post-review evidence overall, I find nothing to justify a conclusion that the review decision was wrong. There is no reason to think it unrealistic that a compelling case for compulsory acquisition might not be established when the process took its course. The criticism that there was no evidence to establish a compelling case, or an unmet need for allotments, before either Mr Gardner or the Tribunal places too high a burden on a local authority considering whether the section 88 criteria are met. There is likewise no evidence seriously tending to the opposite conclusion, and ACV listing is a proleptic assessment that does not require detailed and forensic consideration of the *likely* outcome of an as-yet-not-started procedure: to do so would be incompatible with the test of "realistic to think". All that is required is that it is a realistic possibility, which is more than fanciful. Mr Gardner, and the Tribunal, can appropriately place weight on the strength of community feeling to make it realistic to think that there would be unmet need for allotments once these ones were closed.

40. I further reject that the points made by Mr Cook about funding make the possibility of compulsory purchase or leasing unrealistic. The three alternatives identified at the time of the review were allotments, housing or scrubland. Mr Gardner recognised that the Town Council would not be able to afford the land if housing were given permission, but would if it were allotments or scrubland. I reach the same conclusion. At the hearing there was much evidence about the commercial viability of a Christmas Tree farm instead, but this notion has arisen entirely after the date of listing and I disregard it. I also reject the argument concerning funding for the risk of adverse costs consequences arising from a Public Inquiry as unduly speculative. Detailed advice and sensible decisions would be taken at the time, and cannot be predicted with any meaningful certainty in advance.

Conclusion

41. I take into account my above consideration, as well as the other points made by the parties that I have not found it necessary to specifically mention. Even taking account of evidence that was not before Mr Gardner, I find myself unable to say that his decision to uphold the listing was wrong. Continued allotment use remained one of the realistic alternatives for the site, only requiring failure of his residential development ambitions, a break in his resolve to let the land go to scrub, or compulsory acquisition. I find that those were all realistic possibilities at the time of listing, and am unable to hold that Mr Gardner was wrong to find likewise. The appeal is dismissed.

Signed

Judge Neville

Date:

29 May 2024