IAC-AH-CJ/SC-V1

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Community Right to Bid

Appeal Reference: **CR/2016/0014**

Heard at Blackburn Magistrates' Court
On 1 February 2017

Before

JUDGE PETER LANE

Between

NEW BARROW LTD

Appellant

and

RIBBLE VALLEY BOROUGH COUNCIL

First Respondent

BARROW PARISH COUNCIL

Second Respondent

Representation:

For the Appellant: Mr James Corbet Burcher, Counsel, instructed by Daniel Watney LLP
For the Respondent: Mr Anthony Gill, Counsel, instructed by Ms Mair Hill, Ribble Valley Borough Council

DECISION AND REASONS

Introduction

1. In February 2016, Ribble Valley Borough Council ("the Council") received a nomination from Barrow Parish Council under section 89 of the Localism Act 2011 to

list land as an asset of community value for the purposes of Chapter 3 of Part 5 of that Act. The land in question was at that time in use as allotments, cultivated by members of the Barrow Allotment Holders' Association, which held the land under a licence from the appellant, New Barrow Ltd. The land is situated to the west of the village of Barrow. Access to it is by means of a trackway, over which there is no public right of way, leading off Whalley Road.

2. The Council concluded that the land fell to be listed by reason of section 88(1) of the 2011 Act:–

> "(1) For the purposes of this Chapter but subject to regulations under subsection (3), a building or other land in the 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."

3. Following a review under section 92, requested by the appellant, the Council decided on 21 July 2016 to continue to include the land in the list held by the Council pursuant to its duty under section 87. The appellant appealed to the Tribunal against the decision on the review and a hearing of the appeal took place at Blackburn Magistrates' Court on 1 February 2017.

4. The listed land is entirely surrounded by a much larger area of land, also in the appellant's ownership. Following a public inquiry, the Secretary of State for Communities and Local Government on 20 February 2014 granted outline planning permission in respect of the larger area (which I shall call the development land) for the construction of 504 dwellings and associated development. The appellant and Redrow Homes Ltd (which will undertake the development of the development land) are in the process of preparing a "reserved matters" application to the Council, as local planning authority.

5. On 10 March 2016, Barrow Allotment Holders' Association was served by the appellant with a termination notice, in accordance with the terms of the licence of 1 March 1977, requiring the Association to vacate the allotment land by 15 March 2017. On 1 February 2017, the appellant and Redrow Homes Ltd entered into a "licence to occupy" the listed allotment land. Under the terms of this licence, Redrow are entitled to occupy the land as licensees from 16 March to 15 June 2017, on a "peppercorn" basis, and then from 16 June 2017 to the termination date, for a sum of £6,000 per annum. The "termination date" is the earliest of (a) 15 March 2022; (b) Redrow failing within a reasonable time to rectify a breach of its obligations or undertakings under the licence; and (c) the expiry of not less than one month's notice

given by the appellant to Redrow on or after 16 March 2019 or by Redrow to the appellant on or after 16 March 2017.

The appeal hearing

6. At the appeal hearing, I heard oral evidence from Mr Gary Hoerty, of Gary Hoerty Associates, the appellant's Land Agent. Mr Hoerty spoke to the licence which he had that day signed on behalf of the appellant, and also to other materials which the appellant had served, in addition to those contained in the Tribunal bundle. No objection was taken by the respondent to me considering these materials for the purposes of determining the appeal.

7. As is by now well-known in appeals of this kind, the Tribunal makes its own assessment of whether the listed land satisfies the statutory requirements for listing. In this regard, the Tribunal may (subject to matters of procedural fairness) consider the evidential position as at the date of hearing (or other determination), whether or not such evidence was in existence at the date of the review under section 92.

8. Speaking to the appellant's reason for terminating the allotment licence, Mr Hoerty said that, during construction on the development land, it would not be appropriate to allow access from Whalley Road to the allotment land. This was due to concerns regarding health and safety, whilst construction work was taking place on the development land. There would need to be gates at the junction of the trackway and Whalley Road, with the trackway being used for delivery vehicles, wagons and other transport connected with the development.

9. Mr Hoerty said a period of six to seven years was envisaged for the completion of the development. The decision had been taken to use the listed land as a site compound. As envisaged in the licence, it was likely that the topsoil of the listed land would need to be stripped off, before laying a stone surface over a "terram"-type membrane, which would protect the stone surface from the land below. The listed land would be surrounded by a "heras" type security fence, or similar.

10. A plan of the listed land showed large areas designated for, respectively, a compound, car park and materials store. Mr Hoerty said that it was cost-effective for Redrow to use the listed land as a depot, rather than having to move such a facility around the overall development land, as construction of the residential units progressed.

11. The final document submitted by the appellant after compilation of the bundle is a "pre-application enquiry response" from the Council, as local planning authority. This is dated 23 November 2016 and relates to the listed land. The pre-application advice officer noted that the appellant proposed to create new allotments in a triangular portion of land, to the southwest of the development land, and to seek

permission to construct dwellings on the listed land. Although the officer had concerns about the effect of the allotments on a Biological Heritage Site, she said:–

> "I understand that the units erected upon the existing allotment site would be part of the already permitted units on the wider site and not additional units. On this basis alone, the principle of dwellings on the site as part of the approved scheme is considered acceptable subject to compliance with other material considerations such as design, appearance, landscape impact etc."

12. The response concluded with the following:–

> "The above observations have been provided on the basis of the level of information submitted and the comments contained within this response represent officer opinion only, at the time of writing, without prejudice to the final determination of any application submitted."

13. Under cross-examination, Mr Hoerty said that, even without the listed land being developed for housing, it was unlikely that the limit of 504 dwellings would be reached on the development land. In fact, only some 420 to 440 dwellings would be likely to be constructed on the development land.

14. In re-examination, Mr Hoerty said that the area in respect of the forthcoming "reserved matters" application would yield some 185 houses; and the land to the south would yield 250, making a total of 435. This would leave a shortfall of 69 dwellings; but Mr Hoerty's opinion was that a maximum of only 24 dwellings could be built on the listed land.

15. Mr Hoerty opined there was no risk that any contamination of the listed land, during its use as a depot etc. facility, would render its later residential development unfeasible. The licence required Redrow to remediate the site. Mr Hoerty's professional experience led him to consider it was very unlikely that planning permission for the residential development of the listed land would be refused.

16. As for the pre-application advice officer's concerns regarding the potentially adverse effect of the new allotment site, Mr Hoerty said he believed the presence of sheds and greenhouses was an issue but he did not consider this, in effect, to be a serious problem.

Discussion

17. As Mr Gill rightly was at pains to stress, the question of whether the requirement in section 88(1)(b) is satisfied in a particular case calls for a fact-sensitive analysis. No two cases are likely to have exactly the same factual matrix. The Tribunal's task is to look at all relevant matters in the round, in order to conclude whether "it is realistic to think that there continue to be" use of the land (whether or not in the same way) that will further social wellbeing or social interests of the local community.

18. Mr Gill was also correct to point out that, unlike the requirement in section 88(2)(b), there is not any express five year (or, indeed, any other) time limit in section 88(1)(b). In this regard, Mr Gill criticised the appellant's earlier concentration upon the next five years after the termination of the Association's licence, as imposing an impermissible restriction or gloss upon the language of the statute. He also expressed scepticism at the provisions in the licence of 1 February 2017, where the latest date upon which the licence must end is 15 March 2022, which happens to be five years after its start date.

19. As matters stood at the time of nomination and, moreover, at the time of review, the Council was in my view entitled to conclude that the requirements of section 88(1)(b) were met. The actual current use of the land was as allotments. There is no question but that such a use satisfies the test of furthering social wellbeing or social interests of the local community. The fact that the appellant had served the Association with notice of termination in March 2016 did not of itself at that time render the continuation of the allotment use unrealistic. In this regard, the Council was entitled to note that, at the public inquiry, positive statements have been made on behalf of the appellant about the contribution being made by the allotments. Subsequently, there had been a suggestion from the appellant that the listed land might be used to grow Christmas trees. In short, a number of realistic possibilities co-existed during 2016.

20. I have, however, come to the firm conclusion that, as at February 2017, the requirement of section 88(1)(b) is not met. Even if one can still say that the "actual current use" of the listed land is as allotments, the future position has materially changed.

21. Although section 88(1)(b) contains no restriction on looking ahead further than five years, in deciding whether a relevant use can continue, regard must be had to section 87(3). This provides as follows:–

> "(3) Where land is included in the local authority's list of assets of community value, the entry for that land 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 (unless the entry has been removed with effect from some earlier time in accordance with provision in regulations under subsection (5))."

22. It follows from this that it is difficult to see how section 88(1)(b) could be successfully invoked where, on the facts of a case, an existing use will cease for a period of five years, even if it is very likely that the use would then resume after that period. The effect of the legislation is to impose a finite restriction, in terms of the moratorium period, upon an owner's ability to dispose of land that is serving a relevant community purpose.

23. I found Mr Hoerty to be a credible witness. His oral evidence illuminated aspects of the appellant's case. I see no reason to reject his estimate of the time it will take to

undertake development of the development land. Although whilst the licence between Redrow and the appellant remained unsigned, there might have been grounds for scepticism regarding Redrow's intention to use the listed land during the course of that development, any such grounds disappeared on 1 February 2017.

24. There is manifest strength in Mr Hoerty's evidence that it is more cost-effective to have a depot facility on a single site, rather than having to move it around as phases of the site are completed.

25. It is also entirely understandable that the appellant takes the view that continued use of the allotments by members of the Association (or anyone else) during the development is likely to cause significant problems, given that construction traffic will be making use of the trackway.

26. I therefore find that, on the particular facts of this case, the impending use of the listed land by Redrow is highly likely to last for five years and that, given the overall scheme of the 2011 Act, it is not realistic to think that use of the listed land as allotments could "continue", as required by section 88(1)(b), whether or not it is realistic to think that allotment use might return to the land afterwards.

27. In any event, I find that no such resumption of allotment use is at all realistic. Although I agree with Mr Gill that one must not elevate the significance of the pre-application enquiry response so as to turn it into something that it is not, on the particular facts of this case the officer's response cannot be disregarded. The listed land lies entirely within the boundaries of the development land. I accept the evidence of Mr Hoerty that the limit of 504 dwellings would not be breached by residential development of the listed land. One does not need to be a qualified planner to see the incongruity of leaving the listed land out of the overall residential development proposals. Notwithstanding the provisions in the licence for restoration of the land by Redrow, there is such a strong likelihood of the listed land never reverting to allotments as to make the contrary proposition entirely unrealistic. Mr Hoerty's professional experience is such that weight should, I find, be given to his conclusion that the pre-application advice officer's concerns about the creation of new allotments to the southwest will not turn out to be a stumbling block to the creation of such a facility in the future. This prospect is, I consider, such as to render any re-establishment of allotments on the listed land (at best) highly unrealistic.

Decision

26. This appeal is allowed.

Judge Peter Lane
2 March 2017

DECISION ON APPLICATION BY THE COUNCIL FOR COSTS

1. The Council applies pursuant to rule 10(1)(b), (3) and (4) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 for an order for costs against the appellant. The application is said to be made "on the narrow basis of unreasonable behaviour on the appellant's part in insisting upon the holding of a live hearing for the determination of the appeal".

2. In essence, the Council contends that it was unreasonable of the appellant to insist upon an oral hearing rather than, as it had throughout proposed, a decision "on the papers", without an oral hearing. The Council says that the evidence which Mr Hoerty gave at the hearing could have been the subject of a written statement (insofar as the matters covered by him were not already contained within the documentary materials).

3. The appellant opposes the application, stressing the relevance of the oral evidence given by Mr Hoerty at the hearing.

4. I agree with the Council that the decision to call Mr Hoerty to give evidence came only as a result of a matter raised by the Tribunal at the hearing. The fact is, however, that the questioning of Mr Hoerty, not only by the Tribunal but by both Counsel, served to illuminate aspects of appeal, as I have indicated in my substantive decision. I do not consider that there was any procedural unfairness to the Council. Indeed, Mr Gill did not contend that there was; and the costs submissions, likewise, contain no such assertion.

5. In all the circumstances, I consider I was, in the event, materially assisted by the fact that an oral hearing took place. That assistance came not only as a result of Mr Hoerty being examined and cross-examined but also from the submissions of Counsel, which took account of the totality of the evidence, as it then stood. It is not possible, in my view, to assume, with the benefit of hindsight, that the matters dealt with by Mr Hoerty and Counsel at the hearing could have been adequately addressed in prior written form.

6. In all the circumstances, I decline to make an order for costs.

Judge Peter Lane
2 March 2017