



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

Appeal Reference: CR.2017.0006

**Heard at North Shields
On 31 July 2017
Site visits on 25 August 2017 and 3 October 2017**

Before

JUDGE JACQUELINE FINDLAY

Between

**REGISTERED PROPRIETORS OF UPTIN HOUSE
(ELLA WILLIS, PAUL WILLIS, PETER BELSHAW AND DAVID BELSHAW)**

Appellants

and

NEWCASTLE CITY COUNCIL

First Respondent

and

SHEILA SPENCER (FOR BUILDING BETTERWAYS)

Second Respondent

Appearances:

For the Appellants, Mr Cant, Counsel, instructed by Geoffrey Lurie Solicitors

For the First Respondent, Ms Stockley, Counsel, instructed by Newcastle City Council

Second Respondent – Ms Spencer appeared in person

Witnesses:

Mr Willis

Ms Spencer

Ms Lant

Mr Bolland

Mr Taegar

DECISION AND REASONS

Introduction

1.The Localism Act 2011 (“the 2011 Act”) requires local authorities to keep a list of assets (meaning buildings or other land) which are of community value. Once an asset is placed on the list it will usually remain there for five years. The effect of listing is that, generally speaking, an owner intending to sell the asset must give notice to the local authority. A community interest group then has six weeks in which to ask to be treated as a potential bidder. If it does so, the sale cannot take place for six months. The theory is that this period, known as “the moratorium”, will allow the community group to come up with an alternative proposal – although, at the end of the moratorium, it is entirely up to the owner whether a sale goes through, to whom and for how much. There arrangements for the local authority to to pay compensation to an owner who loses money in consequence of the asset being listed.

The Legislation

Section 88 Land of community value

(1)For the purposes of this Chapter but subject to regulations under subsection (3), a building or other land in a local authority's area is land of community value if in the opinion of the authority—

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

(b)it is realistic to think that there can continue to be non-ancillary use of the building or other land which will further (whether or not in the same way) the social wellbeing or social interests of the local community.

(2)For the purposes of this Chapter but subject to regulations under subsection (3), a building or other land in a local authority's area that is not land of community value as a result of subsection (1) is land of community value if in the opinion of the local authority—

(a)there is a time in the recent past when an actual use of the building or other land that was not an ancillary use furthered the social wellbeing or interests of the local community, and

(b)it is realistic to think that there is a time in the next five years when there could be non-ancillary use of the building or other land that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community.

(3)The appropriate authority may by regulations—

(a)provide that a building or other land is not land of community value if the building or other land is specified in the regulations or is of a description specified in the regulations;

(b)provide that a building or other land in a local authority's area is not land of community value if the local authority or some other person specified in the regulations considers that the building or other land is of a description specified in the regulations.

(4)A description specified under subsection (3) may be framed by reference to such matters as the appropriate authority considers appropriate.

(5)In relation to any land, those matters include (in particular)—

(a)the owner of any estate or interest in any of the land or in other land;

- (b) any occupier of any of the land or of other land;
- (c) the nature of any estate or interest in any of the land or in other land;
- (d) any use to which any of the land or other land has been, is being or could be put;
- (e) statutory provisions, or things done under statutory provisions, that have effect (or do not have effect) in relation to—
 - (i) any of the land or other land, or
 - (ii) any of the matters within paragraphs (a) to (d);
- (f) any price, or value for any purpose, of any of the land or other land.
- (6) In this section—

- “legislation” means—
 - (a) an Act, or
 - (b) a Measure or Act of the National Assembly for Wales;
- “social interests” includes (in particular) each of the following—
 - (a) cultural interests;
 - (b) recreational interests;
 - (c) sporting interests;
- “statutory provision” means a provision of—
 - (a) legislation, or
 - (b) an instrument made under legislation.

Section 89 explains the procedure for listing:-

“89. Procedure for including land in list

(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 the Chapter 2 “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 –

(3) By a person that is a voluntary or community body with a local connection.

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- (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 nomination;
-”

The regulations in question are the Assets of Community Value (England) Regulations 2012 (SI2012/2421). Regulation 5 provides as follows:-

“Voluntary or community bodies

1. For the purposes of section 89(2)(b)(iii) of the Act, but subject to paragraph 2, ‘a voluntary or community body’ means –
 -
 - (c) An unincorporated body –
 - (i) whose members include at least 21 individuals, and
 - (ii) which does not distribute any surplus it makes to its members”.

The appeal

2. The appeal concerns a property known as Uptin House, Stepney Road, Newcastle, NE2 1TZ (“the Land”). The appellants are the registered proprietors of Uptin House registered at HM Land Registry under title number TY170274.
3. The Land comprises a large building in Stepney Road, Newcastle which has three sections comprising the North Wing, the Middle Section (commonly called Uptin House) and the South Wing (commonly called the Tower). The North and South Wings comprise respectively 362.5 square metres and 324 square metres. The Middle Section comprises 673 square metres. There is a yard at the front and at the back of the building. The Land is owned by the appellants and parts of the building are subject to various tenancy and subletting agreements.
4. The Middle Section comprising 50% of the building and the rear yard are occupied by the owners who carry on a car body repair business. This business has been carried on at the premises for over 30 years. The public go into this part of the building to deliver and collect vehicles and to pay for work in the office. The business is open from 7.30 am to 7 pm.
5. The South Wing was let to Mr Thomas Cuthbert under a lease dated 10 July 2011 for the sale of art and antiques. Mr Cuthbert ran an art and vintage article shop from the premises. At the time of the site inspection Mr Cuthbert was no longer operating a business or occupying the South Wing. Mr Cuthbert previously had five subtenants occupying rooms in the South Wing carrying on various businesses. At the date of the site inspection the only businesses remaining were a patisserie on the ground floor and a recording studio. Previously the subtenants had included a screen printer, an artist’s studio available for occasional hire, and a café.

6. The North Wing was let to Ms Martene Lant under a lease dated 28 July 2011 for use as training and fitness studios. At the time of the site visit the fitness centre had closed.
7. By an application dated 30 August 2016 the second respondent made a community nomination which the Land for inclusion in the first respondent's list of Assets of Community Value.
8. The Land was described in the nomination as a former school, currently being used for a mix of community and private businesses. The building had been divided into spaces occupied by a number of different businesses. The garage business operated by the owners of the land occupied the central part of the building. The nomination stated that in the section of the building to the north and the section to the south various separate uses were carried out including a fitness centre which was also used for a variety of other activities and events, a café, a recording studio, an artist's studio and a number of other small units occupied by individual businesses together with meeting spaces which were available on an informal short-term basis.
9. There is a charge on the land in relation to an agreement dated 29 April 2016 between the appellants and Adderstone Developments Limited whereby the latter has been granted an option to purchase the land.
10. Adam Taeger, the first respondent's Community Officer recommended that the land be listed as an asset of community value (ACV"). The report concluded that the current uses of the building contributes to the social welfare and interests of the community and they are not ancillary. He further stated that there is a realistic prospect that these or similar uses could continue in the future. The land was accordingly listed by the first respondent as an ACV on 1 November 2016.
11. On 11 November 2016 planning permission was granted for the demolition of the building and the erection of a student accommodation block.
12. By letter dated 13 December 2016 the appellants requested a review of the first respondent's decision. No request was made for an oral hearing and the review proceeded by way of a consideration of all the documentation provided to the first respondent. The decision on the review of Christine Herriot the first respondent's Interim Chief Operating Officer dated 22 February 2017 was that there was no justification to overturn the previous decision to add the land to the list of Assets of Community Value and the land should remain on the first respondent's list.
13. On 22 March 2017 the appellants appealed against the first respondent's review decision.

The Issues

The appellants' submissions

14. The appellants submit that the building was constructed in the 19th Century and is now in a generally dilapidated state. It requires expenditure in the region of £550,000-£600,000. The level of cost is such that it is not economic to have repairs carried out and the building is not economically viable.

15. Redevelopment is an appropriate option for the building and planning permission was granted on 11 November 2016 authorising the demolition of the building and the erection of a student accommodation block.
16. There are a significant number of community facilities which already cater for the aspirations of the nominator.
17. The appellants have granted an option dated 29 April 2016 to Adderstone Developments Limited to purchase the property. It is the intention of Adderstone Developments Limited to purchase with vacant possession and to have carried out the development authorised by the above planning permission.
18. The appellants have the ability to break the lease of the North Wing and Mr Cuthbert has vacated the South Wing. The appellants are able to give vacant possession of the property to Adderstone Developments Limited and the development authorised by the said planning permission will be carried out.
19. The appellants submit, in particular, the following objections to the listing of the land:
 - a. The uses of the various parts of the land are commercial which do not further the social wellbeing or social interests of the local community as defined in the Act.
 - b. If contrary to such contention any use is considered to do so then any such use is an ancillary use and separately the area of such use is not accurately described.
 - c. It is not realistic to think there can continue to be a non-ancillary use which will further the social wellbeing or social interests of the local community taking into account the grant of planning permission, the option in favour of Adderstone Developments Limited, the estimate costs of works to the building, the absence of any evidence from the nominator of either funding or local support for their aspirations or the local community intending to take on these uses and the ability of the appellants to obtain vacant possession.
20. The appellants submit that the Land should be removed from the Council's list of Assets of Community Value.

The First Respondent's Submissions

21. The first respondent submits that there are a number of current uses of the land which satisfy the statutory criteria and are an actual current use of the building which furthers the social wellbeing or social interests of the local community. It is not a requirement that the primary use of the building needs to be so and therefore the operation of the appellant's garage in the central part of the building does not prevent the statutory criteria being satisfied.
22. The current uses meet the statutory criteria. The café and other activities enable the building to be used as a valuable meeting place for people within the community and to meet fostering, social cohesion and understanding. That includes activities which enables students the opportunity to meet with other residents and local business people.

23. The range of dance and fitness activities taking place contribute to health and wellbeing, and as they are relatively low cost they are available to users who would otherwise find it difficult to access more expensive facilities elsewhere.
24. The building provides low costs and flexible accommodation for a variety of small businesses, several of which are in the creative sector. This contributes to local employment and to the ambition to build and strengthen the creative cluster in the Ouseburn area.
25. The statutory criteria can be satisfied by uses being commercial.
26. Even if the fitness activities in the building have ceased the statutory criteria would still be satisfied as these activities had been “in the recent past” within the meaning of section 88(2)(a) of the Act.
27. The various uses of the building are not merely ancillary uses. The uses relied upon are each undertaken in specific parts of the building by separate occupiers and with no connection whatsoever with the other uses in the building. There is no use to which they are “ancillary too”. They are not dependent upon any other of the uses in anyway are run entirely independently, separately and distinctly from the other uses and by different occupiers. In these circumstances, none of the uses stated above are ancillary.
28. The relevant statutory requirement is that it has to be realistic to think that there can continue to be non-ancillary use of the building for community benefit, but it need not be the same as the current use. It is sufficient for it to be realistic to consider that the current, or an equivalent, use will continue and there is not a requirement to prove that it is more likely than not to happen.
29. The first respondent relies upon the submissions of the second respondent as set out in the nomination that there is a clear interest and proposed intention for the future use of the building for community benefit including a proposal to prepare a financial plan ensuring the building’s sustainability. The second respondent made reference to an investor expressing interest in the building for such purpose. These matters indicate that it is realistic that there continue to be such uses of the building.
30. The granting of planning permission does not prevent the future use of the building for community benefit being a realistic one taking into account the relevant test to be applied. There is no requirement to implement the planning permission which may or may not ultimately be implemented, and many planning permissions are not. Similarly the Option to Purchase may not be exercised. There are uncertainties, and in such circumstances it remains realistic that a use of community benefit could continue.
31. In relation to the cost of works required to ensure the continued viability of the building this does not prevent the statutory criteria being met. The case law suggests that there is a very marked acceptance that financial problems can be overcome, particularly if there is a strong sense of local community.
32. The uses of the community benefit are presently ongoing and there is a strong community interest in ensuring that they continue, and the preparation of detailed plans for such have already commenced. It is entirely realistic that such uses or similar, will continue.

33. The first respondent submits that the relevant statutory criteria are all met and the land should remain listed.

The Second Respondent's Submissions

34. The second respondent submits that the building should continue to serve a purpose as a venue for a wide range of cultural activities, a base for different residents of the surrounding area to come together to enjoy cultural and physical activities, and a building providing space for a number of small industries.
35. The building exemplifies the Ouseburn character. It has historic and architectural interests, provides a base for employment for cultural and other industries at reasonable rents, allows organic growth of different industries and also of collaboration and support the aims of the Council and of Ouseburn groups such as Ouseburn Futures and Ouseburn Trusts of encouraging and sustaining employment in the creative sector as well as others.
36. The second respondent submits that the building provides intangible cultural and heritage value. Many of the activities which have been carried out in the building contribute to health and wellbeing, and also to tackling inequality.
37. At the time of the nomination the building was in use by around 15 active businesses and enterprises with at least 25 people working in the building.
38. The use of the building has been growing with both the Council and building users investing in what was formerly a derelict building, in order to bring the building into use, make it more viable and sustainable, and offer low rent space.
39. The North Wing was originally sublet from the Council as a training and activity centre and over the past 5 years has been used frequently as a training venue for people who were training to be fitness instructors as well as providing rooms for hire for meetings and conferences. There have been many music and art events in the building. The North Wing hosted events for the last 2 years for the Late Show, the local Museum's at Night Event. It has been for some years the base for a choir which met weekly and regularly hosted concerts with local bands, fund raising events, Ping Pong evenings and bridge clubs. The landlord encouraged the tenant of the North Wing to open up the building to the wider public paying for a front entrance to be put in place.
40. The North Wing has been regularly used for dance classes and other sports training. It has also operated as a hub of various activity for the local LGBT Community hosting events such as 2 LGBT choirs, one a local choir meeting weekly in Uptin House and the other a London based internationally known choir the Barberfellas.
41. The second respondent disputes the cost estimates. An experienced structural engineer has provided an informal view that the building has a sound structure and could be repaired at reasonable costs. Several businesses based in the building have spent considerable amounts on refurbishing their parts of the building.
42. There is no other building in the vicinity providing the mix of low rent events base, low rent office space, space for one off cultural events, and low-cost meeting space. The

building has provided a melting pot for community creativity and for collaboration between artists, between local residents and students and between artists and fitness and dance enthusiasts. The building has filled a gap in the local resources in relation to providing meeting space and particularly rooms for small conferences.

43. At least 3 tenants have informed the second respondent that they have invested in excess of £10,000 in their premises. Of these, the second respondent submits, that Ms Lant has invested around £40,000. In addition Newcastle City Council invested in roof repairs so that the owners could offer start up spaces at low rents. Ms Lant was one of the original tenants and she received funding from the Council to install central heating throughout the North Wing as part of the work to turn a derelict previously unoccupied building into one that would provide space for creative and other businesses.
44. The building has contributed to community cohesion and health and wellbeing.
45. The building has been the base for several prestigious music businesses notably Polestar Studios and Principle 3.
46. A number of start-up businesses have been based in the building and then moved on elsewhere when they needed to expand.
47. The nomination form sets out the principles of “intangible cultural heritage” as defined by UNESCO and these describe the way that the building and its uses have contributed to the character of the Ouseburn Valley.
48. There have been several well attended meetings involving local residents, businesses and people who make use of the facilities and people have pledged their support for the application and for attempts to preserve this well-loved building. A petition against the planning application attracted just under 3,000 signatures and there were almost 200 objections to the planning application.
49. A business plan has been developed and conversations have been held with potential funders including Heritage Lottery.
50. The second respondent submits that the appeal should be dismissed and the listing should stand.

Procedure

51. I conducted an oral hearing on 31 July 2017. I attended the building for a site inspection on 25 August 2017 but was unable to access the North Wing. I attended a second site visit on 3 October 2017 and inspected the North Wing. I heard oral submission from Ms Stockley, Mr Cant and Ms Spencer. I heard oral evidence from Mr Willis, Mr Taegar, Ms Spencer, Mr Bolland and Ms Lant. As a consequence of a number of incidents which are not relevant to these proceedings the relationship between Mr Willis and Ms Lant has soured. In these circumstances I am grateful to the both for conducting themselves at the hearing with civility and restraint. I am particularly grateful to Ms Lant for overcoming her reservations and anxiety and giving her evidence at the tribunal table. The circumstances were difficult for her and she showed great fortitude.

Findings of Fact and Reasons

52. I find that the Land comprises the North Wing, the Middles section and the South Wing (commonly called the Tower). The appellants carry on a car body repair business in the Middle section and have done so for more than 30 years. In the North Wing I find that Ms Lant set up through hard work and commitment a training provision centre to teach people to be personal trainers and she used the tower as a dance studio, therapy rooms, gym and showers. She undertook much of the work herself. At the time of the second inspection there was no activity within the North Wing. The South Wing was let to Mr Thomas Cuthbert by a lease date 10 July 2011 and he had a number of sub-tenants. At the time of the first inspection most of the South Wing was empty save for two businesses in operation namely a recording studio and a kitchen and work area of a patissier.
53. Up until very recently the Land has housed a number of businesses, has hosted music concerts, art exhibitions, education health and fitness activities and has provided affordable rooms to rent. Although at the time of the second inspection only two businesses remain these were not de minimis. I find that the provisions of section 88(1)(a) of the 2011 Act are satisfied. There is a current use of the Land that is not an ancillary use and furthers the social wellbeing or social interests of the local community and the present condition is satisfied.
54. The evidence from Ms Spencer and Ms Land in relation to the activities and events was credible and persuasive. I found them to be witnesses of truth doing their best to give an accurate account of the past and present activities, and events which have been held in the North Wing and the South Wing. I considered they were the best people to know what activities had been held in the North and South Wings. I accept their evidence.
55. Section 88(1)(b) requires that for the Land to qualify as an ACV it must be ‘realistic to think that there can continue to be non-ancillary use of the building or other land which will further ... the social wellbeing or social interests of the local community’. The standard of proof in applying this test is the normal civil standard of proof i.e. the balance of probabilities, that is to say, more likely than not. On the basis of the case law I have considered that what is “realistic” may admit a number of possibilities none of which needs to be the most likely outcome. I have borne in mind that the case law suggests that it is important not to concentrate too closely on a hard-headed commercial or financial analysis and the legislation does not require a detailed business case. I have also borne in mind that the agreement between Adderstone Developments Limited and the owners is not determinative of the matter and is only one factor to be taken into account among others.
56. The First and Second Respondent have put forward various proposals for the future of the Land. Mr Bolland suggested there was scope for the Land to be used in a variety of ways with a restaurant, a gym, a café, a recording studio and a micro-brewery. He thought it would be possible to produce work spaces and meeting rooms for rent.
57. Ms Spencer submitted that there was wide support for the project and there had been several well-attended meetings involving local residents, businesses and that people had pledged their support. Ms Spencer submits that the Land has a future with mixed use, for example offering rooms, at low rent, areas for exhibitions, a café for meeting and when renovated could be a hub for the local community with a mix of low rent and free accommodation. The future use contemplated is to provide small basic quality low rent

adaptable spaces in a building with some character, and low rent spaces for creative businesses.

58. Ms Lant in oral evidence provided the names of 21 people who had various skills and expertise who she believed would lend support in furthering a future project for the Land.
59. In relation to the future of the Land I find that it cannot to be used as a public building for any purposes without extensive work to the structure. In this regard I attach weight to the report of Craig Higgins (page 148) of 12 October 2016 in which he states that “the tower in its current condition represents a significant risk to the buildings and building users.” Mr Higgins is an Incorporated Engineer and an Associate Member of the Institute of Structural Engineers. I must attach weight to Mr Higgins’ opinion as he is a qualified professional in his field. His report was completed after a thorough and full inspection. It is the best evidence before me about the structural health of the Land and the North and South Wings.
60. I find that the cost of the necessary renovation work is likely to be in excess of £550,000. In this regard I attach weight to the report of Mr Wharton of Malcolm Hollis, building consultants. Mr Wharton states as follows:

“Budget Cost

In review of the above information we have calculated a budget cost for refurbishment of Uptin House to comply with modern standards which would include for:

- Upgrade of thermal elements.
- Alterations for improved DDA access.
- Improved fire safety.
- Structural works.
- General redecoration and refurbishment including replacement of roof coverings.
- Demolition and rebuild of the central section.

We would anticipate the budget cost for the above to be in the region of £550-600k including an allowance for contractor’s preliminaries and professional fees. The above budget cost allows for a basic refurbishment that would render the upper floors useable for storage, studios or basic office space only. This cost does not include any allowance for improvement of the workshop area or any noise attenuation works that might be required given the potential for conflicting uses.”

Mr Wharton is a professional and his report is the best evidence before me about the estimated costs of renovation. The report was prepared after two inspections of the Land and took into account the structural report prepared by James Christopher Limited referred to above.

61. Ms Spencer stated that “An experienced structural engineer has given us an informal view that the building has a sound structure and could be repaired at reasonable cost.” I am unable to attach weight to this opinion. I do not know the qualifications of the person who expressed this view and I do not know what inspections were undertaken or the basis for this assertion.
62. I do not attach weight to Mr Dale Bolland’s statement (page 121) that “in my opinion, having dealt with many refurbishments in my career at NCC, this building is structurally

sound and in a condition that would allow it to continue to be used for a mix of uses or be upgraded economically to provide higher standard accommodation.” Although Mr Bolland worked as a planner and economic development and regeneration officer he is not professionally qualified to give an informed opinion and an estimated cost of the renovation work he refers to.

63. Ms Spencer and the second respondent have aspirations for the building but there can be no future use of the Land without first undertaking the necessary renovation work to make the buildings safe and fit for purpose. Although it is not necessary for there to be a hard-headed commercial or financial analysis there has to be at the very least a realistic prospect that the necessary funds will be available. On the basis of the evidence before me I am not satisfied that there is a realistic prospect that the necessary funds have been sourced or will be forthcoming. On the basis of the evidence before me I am not satisfied that sources for the necessary funds have been identified.
64. In reaching my decision I have not ignored that there is community support for the future of the Land and community spirit is a resource. Ms Lant has provided names of people with skills who have indicated they may be willing to assist. However, in my view this is not enough to show that there is a realistic prospect that the necessary funds will be sourced and made available. It is not sufficient to indicate that a person has shown an interest in investing in the Land.
65. I cannot find that there is a realistic prospect of the necessary funding being forthcoming to enable the structural and refurbishment work to make the buildings not only safe but usable. Accordingly, I find that section 88(1)(b), the “future condition”, is not satisfied.

Decision

66. The Land does not meet requirements of section 88(1)(b) of the 2011 Act in that it is not realistic to think that there can continue to be non-ancillary use of the Land which will further (whether or not in the same way) the social wellbeing or social interests of the local community.
67. Accordingly, the appeal is allowed.

Signed: J R Findlay

Judge of the First-tier Tribunal
Date: 3 November 2017