



Appeal number: CR/2020/0010 P

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(COMMUNITY RIGHT TO BID)**

FUTURE PROPERTIES INDUSTRIAL LIMITED

Appellant

- and -

BABERGH DISTRICT COUNCIL

Respondent

**Before:
JUDGE J FINDLAY**

Determined on the papers, sitting in Chambers on 12 March 2021

AMENDED DECISION

Decision

1. The appeal is dismissed.

Mode of Hearing

2. This has been a paper hearing which has been consented to by the parties. The form of remote hearing was P: Paper determination which is not provisional. A face-to-face hearing was not held because it was not practicable and all the issues could be determined on the papers. The documents referred to are in an open bundle of 144 pages, the contents of which have been recorded.

Background

3. The Localism Act 2011 (“the Act”) requires local authorities to keep a list of assets (meaning buildings or other land) which are of community value. Once an Asset of Community Value (“ACV”) is placed on the list it will usually remain there for five years. The effect of listing is

Future Properties Industrial Limited v Babergh District Council CR.2020.0010

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 are arrangements for the local authority to pay compensation to an owner who loses money in consequence of the asset being listed.

4. Mr Verguson, on behalf of the Delphi Users Group, the Nominator, lodged with the Respondent on 16 March 2020 a nomination of the Delphi Centre, Newton Road, Sudbury, Suffolk, CO10 2RR (“the Property”). The nomination stated the owner of the Property was Delphi Diesel Systems/Delphi Technologies Ltd. The Property has facilities for sporting and leisure activities. The Property is a parcel of land to the rear of the main factory site and includes the centre, the car park, the football pitches, a bowling green and a tennis court. The whole site was part of a factory and the Property was once a social club with sporting facilities for the factory workers. Latterly the facilities of the Property have been used by the local community. The Property is identified on the Ordnance Survey map at A52 of the bundle.
5. The Property was listed as an ACV on 6 May 2020. The owner on that date was Delphi Diesel Systems Limited. Future Properties Industrial Limited, the Appellant, purchased the factory site including the Property on 26 June 2020. Marsden Rawsthorn Solicitors Ltd, on behalf of the Appellant submitted a letter dated 24 June 2020 requesting a review of the listing. The letter stated that the Appellant was the owner of the Property and the Respondent accepted this statement and proceeding to conduct a review. The transfer of the factory site including the Property was completed on 26 June 2020. The Transferor was Delphi Technologies Limited, the Transferee was the Appellant and the purchase price was £2,200,000. The Respondent wrote to Marsden Rawsthorn Solicitor Ltd on 29 July 2020 stating that the application for a review had been accepted and a review would be undertaken.
6. Mr Dulieu, on behalf of the Respondent, sought an extension of time to complete the review. In an email dated 20 August 2020 to Marsden Rawsthorn Solicitors Ltd, Mr Hodgson wrote “My determination will be that the ACV entry should be removed on the basis that the nominating party is not eligible as it does not consist of 21 members registered to vote on the council’s (or neighbouring council’s) electoral register.”
7. The review confirmed the listing of the Property as an ACV on 28 August 2020. The Appellant lodged an appeal on 19 October 2020. The application was late. A decision was made to waive the time limit on 23 October 2020.

The legal framework

8. The Localism Act 2011

Section 87 List of assets of community value

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

(2) The list maintained under subsection (1) by a local authority is to be known as its list of assets of community value.

Future Properties Industrial Limited v Babergh District Council CR.2020.0010

(3) Where land is included in a 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)).

(4) The appropriate authority may by order amend subsection (3) for the purpose of substituting, for the period specified in that subsection for the time being, some other period.

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.

Section 92 Review of decision to include land in list

(1) The owner of land included in a local authority's list of assets of community value may ask the authority to review the authority's decision to include the land in the list.

(2) If a request is made—

(a) under subsection (1), and

(b) in accordance with the time limits (if any) provided for in regulations under subsection (5), the authority concerned must review its decision.

(3) Where under subsection (2) an authority reviews a decision, the authority must notify the person who asked for the review—

(a) of the decision on the review, and

(b) of the reasons for the decision.

(4) If the decision on a review under subsection (2) is that the land concerned should not have been included in the authority's list of assets of community value—

(a) the authority must remove the entry for the land from the list, and

(b) where the land was included in the list in response to a community nomination—

(i) the nomination becomes unsuccessful, and

Future Properties Industrial Limited v Babergh District Council CR.2020.0010

(ii) the authority must give a written copy of the reasons mentioned in subsection (3)(b) to the person who made the nomination.

Section 107 Meaning of “owner”

(1) In this Chapter “owner”, in relation to land, is to be read as follows:

(2) The owner of any land is the person in whom the freehold estate in the land is vested, but not if there is a qualifying leasehold estate in the land.

(3) If there is just one qualifying leasehold estate in any land, the owner of the land is the person in whom that estate is vested.

(4) If there are two or more qualifying leasehold estates in the same land, the owner of the land is the person in whom is vested the qualifying leasehold estate that is more or most distant (in terms of the number of intervening leasehold estates) from the freehold estate.

(5) In this section “qualifying leasehold estate”, in relation to any land, means an estate by virtue of a lease of the land for a term which, when granted, had at least 25 years to run.

The Assets of Community Value (England) Regulations 2012 (“the Regulations”)

Appeal against listing review decision

Regulation 11.—(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.

(2) The owner referred to in paragraph (1) may be either the owner who requested the review, or a subsequent owner of part or the whole of the land.

Schedule 2

Procedure for reviews

3. In the following provisions of this Schedule, “the review” means a listing review or a compensation review.

4. An officer of the authority of appropriate seniority who did not take any part in making the decision to be reviewed (“the reviewer”) shall carry out the review and make the review decision.

5.—(1) The owner may appoint any representative (whether legally qualified or not) to act on his or her behalf in connection with the review.

(2) The local authority must provide to the representative any document which is required to be sent to the owner, and need not provide that document separately to the owner.

6. As soon as is practicable following the written request for the review, the authority shall notify the owner of the procedure to be followed in connection with the review.

7.—(1) An oral hearing must be held at the owner’s written request.

(2) Where no written request for an oral hearing is made by the owner, the authority may decide whether or not to include an oral hearing in the review process.

8. Both the owner and the owner’s representative may make representations to the reviewer orally or in writing or both orally and in writing.

Future Properties Industrial Limited v Babergh District Council CR.2020.0010

9. The authority must complete the review by the end of the period of eight weeks beginning with the date the authority receives the written request for the review, or such longer period as is agreed with the owner in writing.

The Tribunal Procedure (First-tier Tribunal)(General Regulatory Chamber) Rules 2009, as amended

Regulation 8 Striking out a party's case

- 8.—(1) The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by the appellant to comply with the direction would lead to the striking out of the proceedings or that part of them.
 - (2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal—
 - (a) does not have jurisdiction in relation to the proceedings or that part of them; and
 - (b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.
 - (3) The Tribunal may strike out the whole or a part of the proceedings if—
 - (a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;
 - (b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or
 - (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.
 - (4) The Tribunal may not strike out the whole or a part of the proceedings under paragraph (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out.
 - (5) If the proceedings, or part of them, have been struck out under paragraph (1) or (3)(a), the appellant may apply for the proceedings, or part of them, to be reinstated.
 - (6) An application under paragraph (5) must be made in writing and received by the Tribunal within 28 days after the date on which the Tribunal sent notification of the striking out to that party.

Appeal

9. The Appellant appeals on the following grounds:
 - a) The nomination is not valid as was not been made as a valid community nomination and is in breach of the Regulations.
 - b) Under regulation 6(d) a community nomination is required to provide evidence that the Nominator is eligible to make a community nomination, i.e. that it meets the tests set out in the Act and Regulations. The Appellant had a lease arrangement in relation to the Property with a Delphi Centre Sudbury which is a company limited by guarantee and which does not distribute any surplus it makes to its members. This company has been responsible for the management of the Property and did not submit the nomination. There exists also a body known as the 'Delphi Users Group' and the Chairman of that group confirmed that the

Future Properties Industrial Limited v Babergh District Council CR.2020.0010

nomination was not made by that group but was put together by an individual who obtained signatures in support of the nomination and badged it as the 'Delphi Users Group.' There was no authority from this group to make that submission.

- c) The Appellant questions whether the Nominator can be considered to be an unincorporated body with a local connection.
- d) The Appellant acknowledges that relevant activities were taking place at the Property in the recent past.
- e) The Appellant submits that it is not realistic to suggest that there could be a community use of the Property in the next five years.
- f) The Property is not an asset that is open to the general public, anyone wanting to use it would have to become a member of a club or association. This in turn would require there to be a lease of the asset. No such club or association currently exists and nor does any lease and consequently there is no one with authority to use the asset.
- g) For this to be possible there would need to be a right to occupy via a lease, which does not currently exist. They cannot secure the future of the asset without a lease or right of occupation, and the owner has no intention of granting such a lease, nor has anyone approached the owner for such a lease.
- h) No evidence has been provided to show there is an organisation that still requires the use of the asset without such, it cannot be an asset.
- i) There is nothing in the legislation which enables a decision to be based on an assumption that the individuals are 'members' of an organisation. Historically, the asset was used in conjunction with the factory and non-employees could also be members however, this arrangement ceased when the factory closed and the lease subsequently ended. There is no evidence to suggest the individuals are 'members'. If this is disputed, each individual should provide details of their membership and entitlement to use the asset.
- j) The nominating party has no authority under the previous private operation that utilised the asset. There is no association in place with membership or finances to operate the asset.
- k) The previous occupants did not operate for the benefit of the community, it was a private tenant operating it for profit by hiring out the venue for events and functions. It was not an asset that the community had any right of access to, they had to hire the facility. Prior to this, the asset was for the benefit of the employees of the factory, not the community. There is no prospect for the asset to be used for the benefit of the community, it will remain part of the factory site.
- l) Once the factory closed the asset also had to close. It had not provided any community use and would not be able to do so in the future.
- m) When Delphi were operating on site the lack of separate services did not have any affect as they were responsible for the site and the asset was solely for the benefit of their employees. If the building is now to be separated from the rest of the site, for the purposes of installing and connecting separate service, the cost would be prohibitive as it would require set up and its own independent connection for all utilities. This would also require consent from all providers and a connection direct onto the highway not through the remaining Delphi site. It is believed the cost of this would be considerable and, more importantly, wholly dependent

Future Properties Industrial Limited v Babergh District Council CR.2020.0010

on those connections being available. The officer has stated an assumption that this can be overcome but has failed to provide any evidence as to how. The electricity, gas and waste facilities are directly connected and supplied from the main factory. The Property does not have an independent supply and cannot operate in isolation.

- n) It is essential that the whole site remains secure and that there is no intention to provide a separate access, which again would require planning permission. Even if the whole site were to be opened up, it would have to be secure and not allow any access to the public. The Respondent has made an assumption that this can be overcome but has failed to provide any explanation or evidence.
- o) The Respondent has stated that the land can be split, at the Land Registry, from the main Title, it cannot. It is impossible to split a Title unless there is a disposal. The current owner has no intention of disposing of the listed land as they have purchased the whole site, nor is there any intention of leasing the listed land.
- p) The Respondent has stated, it is not unrealistic to assume a separate entrance will be created in the next five years. There is no evidence to support this claim. The Application has to be considered on the basis that, currently, there is no separate access, an assumption cannot be made that the owner could create a separate access especially when it is not in the owner's interest to do so.
- q) It is not intended that the site can be safely re-opened to allow access to the Property while re-building work is carried out on the site. The Appellant does not intend to enter into a new lease acceptable to it with a party to use and operate the Property.

Grounds of Opposition

- 10. The Respondent has submitted that Marsden Rawsthorn Solicitors Ltd lodged the application for a review by a letter dated 24 June 2020, as Solicitor and representative of Future Properties Industrial Limited. On 24 June 2020 the owner of the Property was Delphi Technologies Limited and not Future Properties Industrial Limited. The transfer of the factory site and the Property was completed on 26 June 2020.
- 11. As the review request was dated two days before the Appellant completed the purchase the Appellant could not have been the 'owner' at the date of the letter of the request review application nor could the Appellant be the 'subsequent owner' at the time of the review application. Accordingly the review request should not have been actioned.
- 12. The Respondent has applied for the appeal to be struck out/dismissed under regulation 8(3)(c) of the Tribunal Procedure (First-tier Tribunal)(General Regulatory Chamber) Rules 2009 on the grounds that there are no reasonable prospects of the Appellant's case, or part of it, succeeding
- 13. For a community nomination to be valid it must be made by a "community body" with a "local connection.". There is no need for formality. It must have at least 21 members who are locally registered on the electoral roll; its activities must be connected with the local area; and any surplus must not be distributed to the members, but rather be applied for the benefit of the local area.
- 14. It is accepted by the Appellant that the recent historic use furthered the social wellbeing or social interests of the local community and that use was not ancillary.

Future Properties Industrial Limited v Babergh District Council CR.2020.0010

15. In relation to the question of whether the Property can realistically be used in the next five years to further the social wellbeing of the local community (the Aims), the Respondent asks me to have regard to the First-tier Tribunal decision in *Banner Homes Ltd v St Albans City and District Council* where it was held that the fact that the owner had blocked the use was insufficient to render it unrealistic that the field might in future be used to further the social wellbeing or social interests of the local community. The Upper Tribunal (AAC) agreed on appeal and Court of Appeal made no criticism of the decision.
16. It is the Respondent's view that, without the involvement of the Appellant, it is clear that the Property could realistically be used in the next five years to further the social wellbeing of the local community.
17. The Respondent submits that the fact that the Appellant intends to carry out work on site for an extended period of time may make it unrealistic that the use can continue while the work is being undertaken. However, the planning status of the whole factory site has remained unchanged since 2006 and, as of 10 November 2020, there was no outstanding planning application for a scheme excluding the use of the Property for the Aims, with the local planning authority for any development or change of use at the Property. It is the Respondent's position that it is reasonable to conclude future use of the Property in furtherance of the Aims remains realistic.

Conclusions

18. Delphi Diesel Systems Limited was the registered freehold owner of the factory site and the Property at the date of the nomination application. The Listed Land, the Property consists of the building known as the Delphi Centre, the car park, the football pitches, a bowling green and a tennis court and was used as a multi-purpose venue available for hire prior to March 2020. The Property was originally used as a social facility for the employees of Delphi Diesel Systems Limited before becoming a venue available for use by the wider community.
19. I refuse the Respondent's application to strike out the appeal on the basis that the Appellant has put forward arguable points and the Respondent has not established grounds that it would be fair and just to do so.
20. I find that on 24 June 2020 Delphi Technologies Limited was the company in whom the freehold estate of the factory site and the Property was vested. Accordingly, the Appellant was not the owner with the power to request a review under S. 92 of the Act.
21. However, I find that the review request was valid because on the date the request was acknowledged and actioned on 29 July 2020 (B84 – B85) the Appellant was the legal owner as defined. I find it is fair and just to find the review request valid and the review process valid on the basis that the Respondent wrote in the letter of 29 July 2020 that "Your application for a review is made in accordance with section 92 of the Localism Act 2011 and has been accepted" and by 25 June 2020 which is the earliest date the letter of 24 June 2020 would have been received by the Respondent, contracts would have been exchanged for the sale the following day.
22. To find that the review process was invalid would deny the Appellant of a right of appeal and a fair hearing. Taking into account my decision to dismiss the appeal, I find no prejudice to the Respondent in my finding that the review request was valid.

Future Properties Industrial Limited v Babergh District Council CR.2020.0010

22. I find that the appeal was valid on the basis that the Appellant was the owner as defined at the date the appeal was lodged.
23. A nomination must be made by a Community Nomination which includes a nomination by a community body with a local connection. A Community Body can include an unincorporated body whose members include at least 21 individuals who are registered as local electors at an address in the local authority's area and which does not distribute any surplus it makes to its members.
24. I find that all the 21 signatories to the nomination are private residents of Babergh District Council whose names were on the Council's electoral role. I find that they came together for the sole purpose of securing the future and continued use of the Property as a community recreation hub. I find that that nominating body is an unincorporated body which does not distribute any surplus to its members and the body's activities are wholly or partly concerned with the local area. I accept the evidence from Mr Verguson and find that that the nomination was valid.
25. I find that there was an actual use of the Property at the date of the nomination of 16 March 2020 and at the date of the hearing there was a time in the recent past, before March 2020, when there was actual use of the building that was not an ancillary use furthered the social wellbeing or interests of the local community. The Appellant accepts that the test has been satisfied in relation to the recent past.
26. Until the end of March 2020 the Property hosted a wide range of activities for different age groups. The Nominator aptly described the Property as a 'Wellbeing Centre' that helped the local community maintain a healthy and happy lifestyle and contributed to their health happiness and overall sense of wellbeing. The range of activities held at the Property in the recent past included ballroom dancing, weightlifting, keep fit, table tennis, bowls and dance classes. I find that these activities furthered the social wellbeing and interests of the local community and were not ancillary. It was not necessary to make findings about how often such events took place because the legislation does not require activities which further social wellbeing to take place with any specified frequency or regularity. I find that these events happened in the recent past, namely before March 2020, and were attended by members of the local community. It is not necessary to make a finding about how many people from the local community enjoyed these activities because the legislation does not require any particular proportion of the community to enjoy the facilities.
27. I find that the Property can realistically be used in the next five years to further the social wellbeing of the local community.
28. I attach weight to the fact that there is strong support in the local community to maintain the Property as a community hub for local activities.
29. The Appellant's stated intention not to allow any use of the Property does not automatically mean that it is unrealistic that there could be future use which could further the social wellbeing of the local community. The Appellant's stated intentions are only one factor to be taken into consideration.
30. The planning status of the factory site has remained unchanged since 2006 and there is no present planning application for a scheme excluding the use of Property for any purpose.

Future Properties Industrial Limited v Babergh District Council CR.2020.0010

31. The Appellant submits that the intention is to carry out work on the site that would prevent access. On the basis of the evidence before me I am not persuaded that there are any proposed works which would prevent access to the Property.
32. I attach weight to the fact that the Nominator has indicated there is a willing benefactor who has indicated a willingness to donate to the cause. The Nominator has indicated that there is a strategy to raise funds and an intention to explore various grant funding sources. The Nominator has set out some detail of the bodies to whom approach would be made for suitable funding. I find that it is realistic to suppose that the Nominator will secure funding for the project and the legislation at this stage does not require there to be a business plan or for there to have been an analysis of commercial viability.
33. I find that the fact that there is no independent supply of electricity, gas, water and waste connections to the Property is not fatal to the future operation of the Property as a community hub. It is feasible that these utilities could be arranged for the Property. There would be costs but I do not accept that the costs would necessarily be prohibitive. I find that there would be obstacles but these could be addressed.
34. The fact that the Appellant has indicated that there may be building work undertaken at the factory site is not fatal to the question of what is realistic to think might happen in the future.
35. The Appellant may apply for planning permission in the future. Planning permission may or not be granted. This is only one of the number of potential outcomes. I find that the possibility of future work on the rest of the factory site does not mean that it is not realistic to think that there could be non-ancillary use of the Property which will further the social wellbeing or social interests of the local community.
36. The Ordnance Survey map shows that the Property could be separated from the main factory site. I reject the Appellant's submission that because there is no present intention to dispose of the Property because the whole site has been purchased and there is no present intention to grant a lease of the Property, this means that it is not realistic to think that there is a time in the next five years when this could happen. The Property could be split and disposed of separately and a lease could be granted. In my view these are both realistic outcomes because intentions can change and the Appellant's present stated intentions are only one factor to be considered and are not determinative.
37. The Tribunal is satisfied that the grounds for the listing of the Property under section 88 are made out and the appeal is dismissed.

(Signed)

Judge J Findlay

Dated: 12 March 2021
Amended Decision signed 14 May 2021

