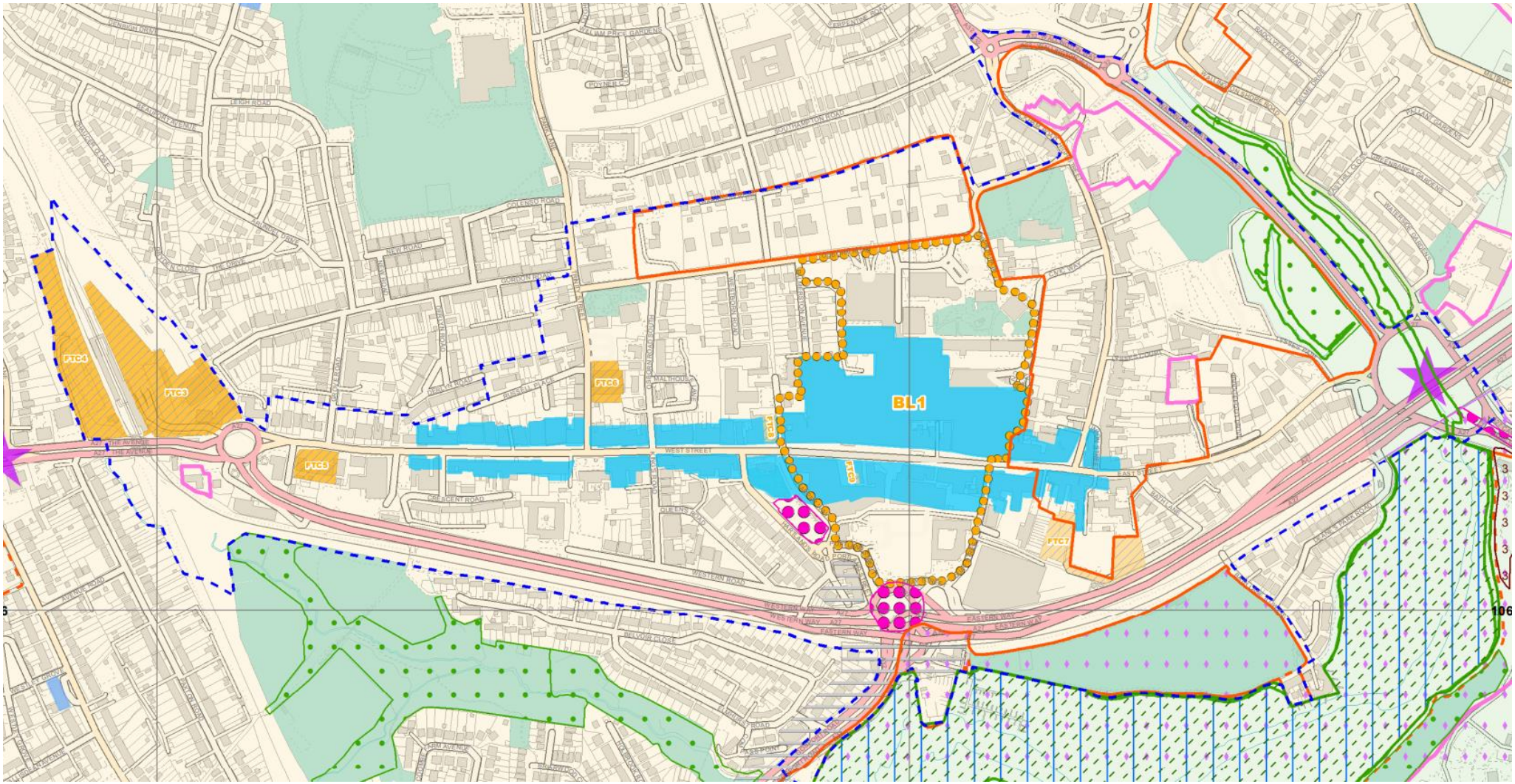
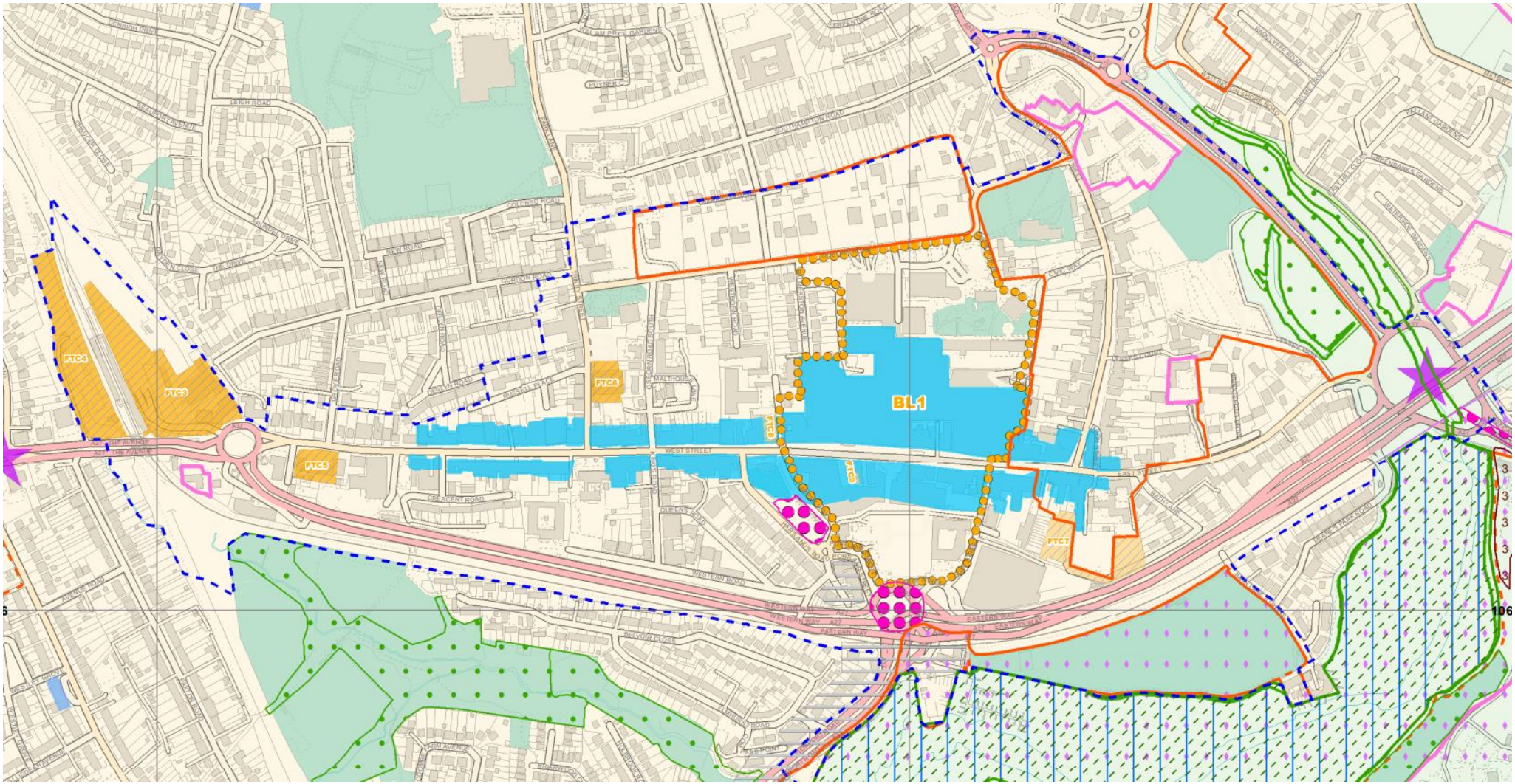

BL1
FTC4
FTC3
FTC6
FTC5
FTC1
FTC2
FTC7
WEST STREET
EAST STREET
WESTERN ROAD
EASTERN WAY
QUEENS ROAD
ALBERT ROAD
THE AVENUE
LEIGH ROAD
SOUTHAMPTON ROAD
VOLENTS ROAD
BELVOIR CLOSE
106


BL1
FTC4
FTC3
FTC6
FTC5
FTC1
FTC2
FTC7
WEST STREET
EAST STREET
WESTERN ROAD
EASTERN WAY
QUEENS ROAD
ALBERT ROAD
THE AVENUE
LEIGH ROAD
SOUTHAMPTON ROAD
VOLENTS ROAD
BELVOIR CLOSE
106

Primmer Olds B·A·S

FOR SALE/TO LET

Prominent Double Fronted Shop with Potential

117 WEST STREET, FAREHAM, HAMPSHIRE, PO16 0AU

KEY FEATURES

- NIA - 4,204 sq.ft (390.56 sq.m)
- Prominent road side position
- High footfall traffic
- Suitable for a variety of uses
- Nearby occupiers include, McDonald's, Cex, Nationwide and local businesses
- West street precinct is a short walk away benefiting from more national occupiers

Primmer Olds B·A·S
Mountbatten House, 1 Grosvenor Square, Southampton, SO15 2JU
Enquiries: Call us on 023 8022 2292

CALL US ON 023 8022 2292 | WWW.PRIMMEROLDSBAS.CO.UK

117 WEST STREET

DESCRIPTION

Fareham is situated midway between Southampton and Portsmouth on the M27. West street is the main retail patch in the town of Fareham, with a variety of independent shops, cafes and restaurants. The property is located on a busy road with heavy foot traffic, and good public transport links.

The property comprises of self contained offices on the first floor and a retail unit on the ground floor. The two storey premises has been fitted out as a post office for many years, but is suitable for a variety of uses. The ground floor is set two metres further back from the first floor, which could potentially be extended to create a new shop front if required. The overhang of the building can be used as cover for bikes, tables and chairs, etc subject to the occupier.

ACCOMMODATION

Floor Areas	Sq Ft	Sq M
Ground Floor	3,479	323.20
First Floor	725	67.35
Total Internal Area	4,204	390.56

Areas stated on a Net Internal basis and measured in accordance with the RICS Code of Measuring Practice 6th Edition.

TERMS

Available by way of a new full repairing and insuring lease for a term to be agreed at £40,000 per annum exclusive of rates VAT (if applicable) and all other outgoings.

Alternatively the property is available for £450,000 for the freehold, subject to contract.

VAT

We understand VAT is payable.

PLANNING

Under the new planning regulations, we believe the current permitted use to be use class 'E' which includes uses such as retail, professional services, cafe`, health clinics, indoor recreation/sport and office. All parties are advised to make their own enquiries of the local authority for confirmation.

RATES

Rateable Value £27,250

Source – voa.gov.uk

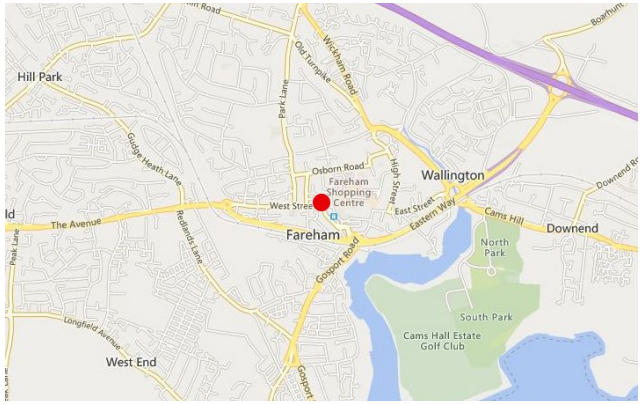
The 2023/2024 standard multiplier is 0.499 (49.9p payable per £1). This determines what business rates are payable. All parties are advised to make their own enquiries for confirmation.

EPC

Asset Rating D81

CODE OF LEASING

All interested parties should be aware of the Code of Leasing Premises 1st Edition, February 2020, for England and Wales, which recommends that they should seek professional advice from property professionals before agreeing or entering into a business tenancy.



VIEWING & FURTHER INFORMATION: CALL 023 8022 2292

Oliver Noble
Investment & Development Agent
onoble@primmeroldsbas.co.uk
07909 809 511

Roseanna Liddiard
Surveying Executive
rliddiard@primmeroldsbas.co.uk
023 8022 2292

117 WEST STREET

VIEWING & FURTHER INFORMATION: CALL 023 8022 2292

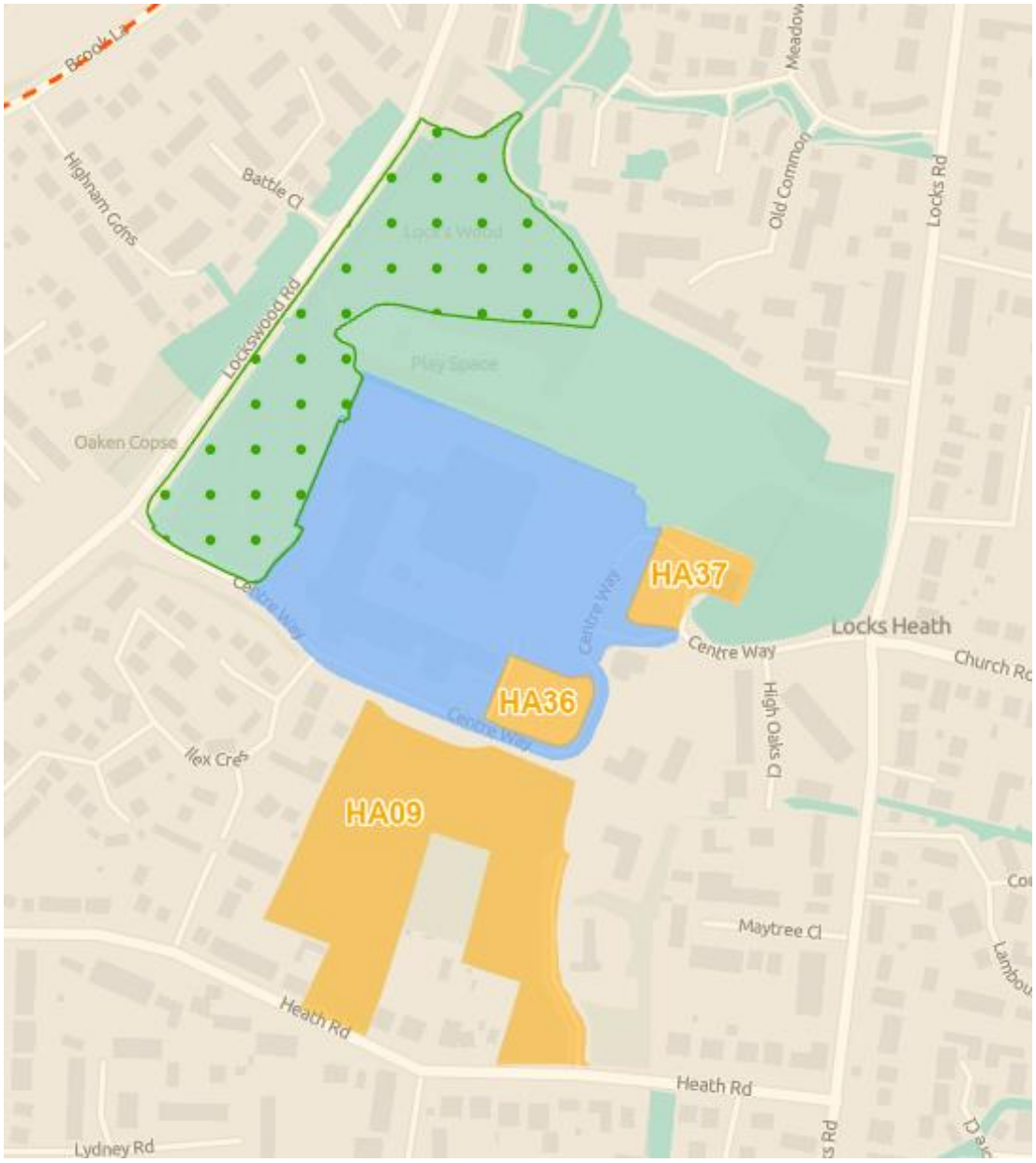
Oliver Noble
Investment & Development Agent
onoble@primmeroldsbas.co.uk
07909 809 511

Roseanna Liddiard
Surveying Executive
rliddiard@primmeroldsbas.co.uk
023 8022 2292

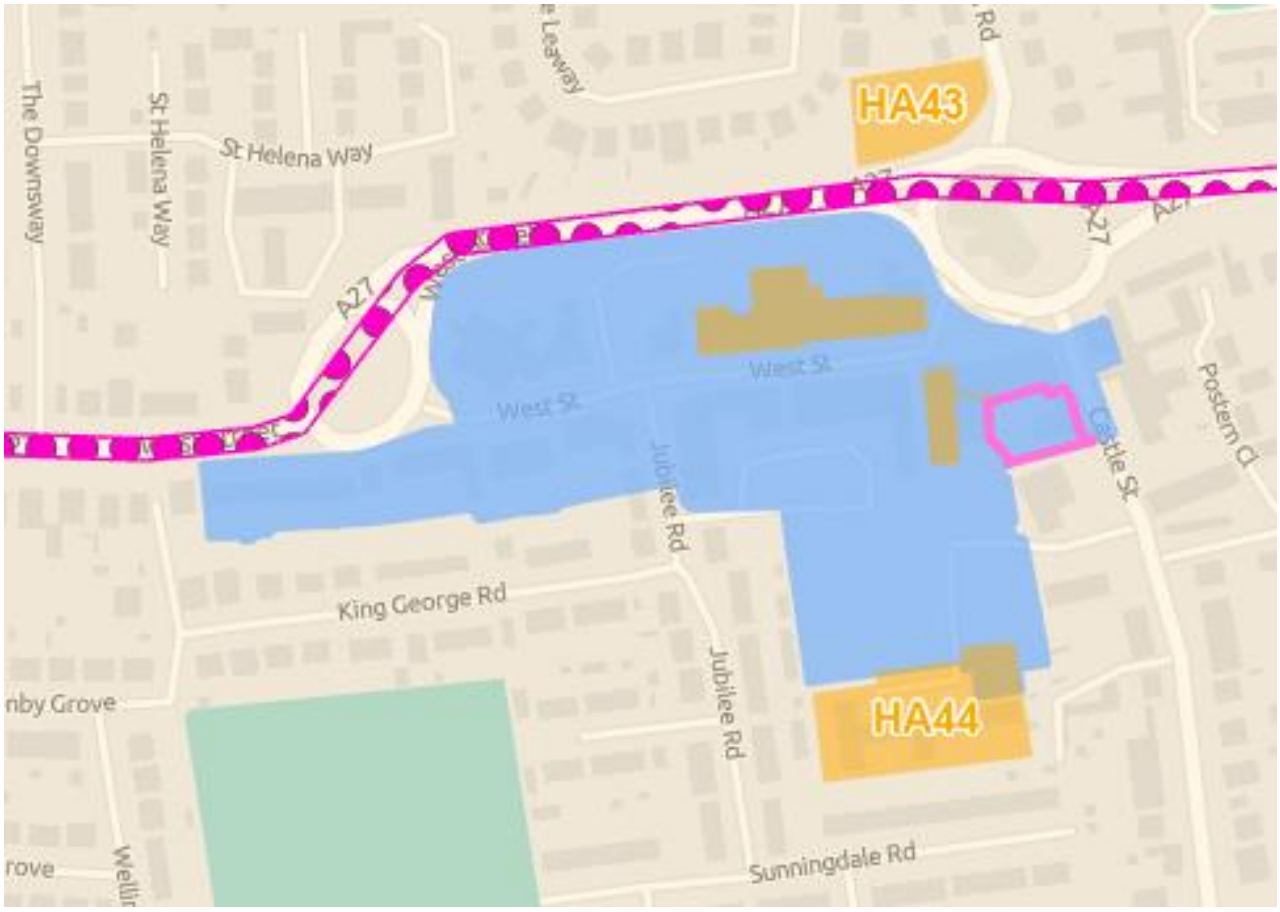
1. Primary Shopping Area, Fareham Town Centre	The town centre serves the Borough as a whole, being the main comparison shopping destination and is the main focus for leisure, entertainment and cultural activities.
2. District Centres – Locks Heath, Portchester, Stubbington, Welborne	The district centres provide day to day food and grocery shopping facilities and non-retail services serving their local communities.
3. Local Centres - Broadlaw Walk (Fareham), Gull Coppice (Whiteley), Highlands Road (Fareham), Park Gate, Titchfield, Warsash and Welborne	The local centres and parades providing a basic range of shops, community uses and services, meeting the needs of the local catchment.
4. Small Parades - Fareham (Anjou Crescent, Arundel Drive, Fairfield Avenue, Gosport Road, Greyshott Avenue, Miller Drive, Westley Grove/Redlands), Hill Head (Crofton Lane), Portchester (White Hart Lane), Sarisbury Green (Barnes Lane, Bridge Road), Titchfield Common	The small parades providing a basic range of small shops and services of a local nature within walking distance, reducing the need to travel by car for everyday essentials.
(Hunts Pond Road) and Warsash (Warsash Road/Dibles Road)	

Table 7.1: The Retail Hierarchy

Locks Heath


Brook La
Highnam Gdns
Battle Cl
Lockswood Rd
Play Space
Oaken Copse
Centre Way
HA37
HA36
HA09
Centre Way
Centre Way
Locks Rd
Old Common
Locks Heath
Church Rd
High Oaks Cl
Maytree Cl
Heath Rd
Heath Rd
Lydney Rd

Portchester



Stubbington

Upcoming Events

Just Announced | Comedy | Dance | Family | Music | Musical | Other | Pantomime | Play

Tue 27 Feb 2024

The Ronnie Scott's All Stars - Soho Songbook

Wyvern Theatre

Thu 29 Feb - Fri 1 Mar 2024

The Importance Of Being..... Earnest?

Wyvern Theatre

Sat 2 Mar 2024

Tap Factory

Wyvern Theatre

Sun 3 Mar 2024

Ben Portsmouth: This Is Elvis

Wyvern Theatre

Mon 4 Mar 2024

Memory Café

Lower Foyer

Mon 4 Mar 2024

An Evening with Anton Du Beke and Friends

Wyvern Theatre

Tue 5 Mar 2024

David Suchet

Wyvern Theatre

Wed 6 Mar 2024

Ross Noble

Wyvern Theatre

Thu 7 Mar 2024

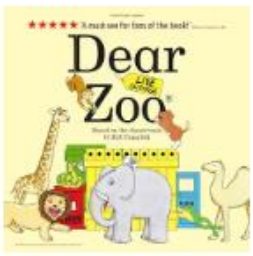
Taylormania

Wyvern Theatre

Fri 8 Mar 2024

Showaddywaddy

Wyvern Theatre



Sat 9 - Sun 10 Mar 2024

Dear Zoo

Wyvern Theatre

Wed 13 - Thu 14 Mar 2024

Junior Voice Festival - Songs From Our Song Book

Section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
("the 1990 Act")

Statement in support of a Ground D appeal in relation to the enforcement notice served in by Fareham Borough Council

In relations to 71 and 73 St Margaret's Lane

Date: 2nd April 2024

Introduction

1. The basis of this ground D appeal that, at the date on which the notice was issued, no enforcement action could be taken in respect of any breach of planning control that may be constituted by those matters.

2. The National Planning Practice Guidance ['the Guidance'] advises that the Applicant is responsible for providing sufficient information to support an application for a Certificate of Lawful Use which is the equivalent of ground (d) in an enforcement appeal.

3. It states: "*In the case of applications for existing use, if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability*"

4. This applies equally to an Inspector at appeal stage. Under this ground of appeal, the onus of proof falls on the Appellant to show that: "…at the time the enforcement notice was issued, it was too late to take enforcement action against the matters stated in the notice" [as per section E(d) of the appeal form]. The relevant date for this purpose is 10-years before the date of issue of the enforcement notice, 22 November 2023 hereinafter referred to as 'the material date'. In order to succeed under this ground of appeal the Appellant needs to

show, on the balance of probability, that the use alleged in the notice (theatre use) commenced prior to the material date and continued.

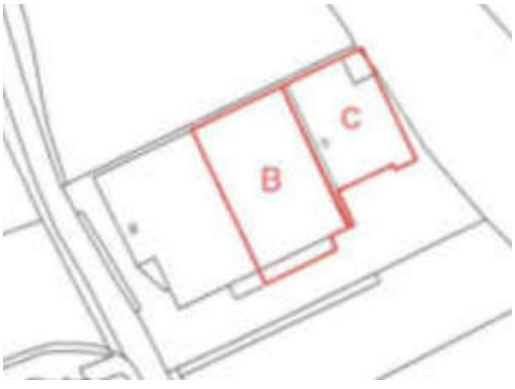
The property

5. Details of the location of the theatre is covered in the appeal statement previously submitted.

The enforcement notice

6. The Enforcement Notice in question relates to the land identified within the red edging in the plan below.

7. The area identified has in previous correspondence between both parties, been referred to as separate areas known as unit B and C, and references in this statement to those corresponding with the below. The area of the building not edged with red is known as unit A. Units A and B together form 73 St Margaret's Lane, and unit C number 71.



History of the property up until the service of the enforcement notice

8. Area A (also known, along with Area B, as 73 St Margaret's Lane) has planning permission for conversion to theatre use (Sui Generis), this was granted in 2012. A condition controlling the temporary use of the site for Theatre use was subsequently appealed and the appeal upheld permitting the permanent theatre use (P/12/0050/CU). (APP/A1720/A/12/2186833).

9. Area B has planning permission for storage use falling within Use Classes B1 or B8. This use was permitted at the same time as that for Area A in 2012 (P/12/0050/CU). Since 2010 this area has been used for a mix of theatre use, storage and community uses.

10. Area C (also known as 71 St Margaret's Lane formally owned by 'Welbro Limited') has permission for the erection of a building to provide workshop and storage accommodation, which was permitted in 1963 (FBC.3312/1). Area C was most recently used as a warehouse by Welbro. Up until recently this unit was separated from number 73 with a 1.5 metre gap.

11. TFT purchased the Welbro site in 2021 and in 2022 planning permission was granted to connect Area B to Area C (P/22/0255/FP) together with alterations to the roof.

The current situation is as follows: -

12. Planning application P/22/0255/FP has been implemented and units B and C have been connected externally. Internally the western external wall of Area B and the eastern external wall of Area C have been removed and Area B has been extended to connect with Area C. This has created one large building on the site (Units A, B and C). The warehouse use previously carried out in Area C has ceased and 'Welbro' have vacated the site.

13. The site of Areas A, B & C now comprise one building. There are the two pre-existing theatres, the Oak Theatre and the Acorn Theatre. This is as permitted

under the 2012 appeal. Area B has since 2010 been used continuously use for scenery storage for plays in the Acorn and Oak theatre, performance rehearsals and for performances in the Oberon (a large studio space with seating).

14. The limited extension of Area B into Area C has facilitated the creation of a third theatre "the Arden Theatre". The Arden theatre opened in August 2023 and has been in use since that date.

15. The remainder of Unit C is used for ancillary purposes related to the theatre purposes including rehearsal space and changing rooms.

16. A sworn statement (**appendix 1** to this statement) from Kevin Fraser provides a timeline for the use of units A and B from 2010 up until the creation of the Arden Theatre in 2023. This includes a history from the date of purchase and includes plans showing how the layout of unit B changed over the period the relationship with use of unit A. The proof of evidence demonstrates that over the past 12 years, Both Areas A and B 73 St Margaret's Lane has been continuously in a use for community uses as storage for third parties, as well as rehearsal space, scenery storage and the Oberon performance and rehearsal area.

Key points from history

17. The following key points are relevant to the use of the 71-73 St Margarets Lane Theatre up until the formation of the Arden Theatre: -

- That unit B was never used for either B1 or B8 purposes.
- That unit B was used in association with unit A from when the theatre first commenced operations in 2010.
- That unit B was principally used for Theatre related uses: mainly rehearsals scenery storage and performance in the Oberon. There was an area of external storage and community use (as shown on the exhibits in the sworn statement by Kevin Fraser) however in terms of the overall combined size of

units A and B the areas for external storage and community use are small. In addition, the 'Mens Shed', although a community use, have also always made stage props and scenery for the Theatre company for use across all theatres and performance spaces at the site.

- There was always has been internal access between units A and B used for example by moving props and scenery.
- The creation of the Arden involved the removal of an internal wall. However approximately 90% of the Arden is within unit A/B. The uses previously operating in the unit A/B namely rehearsals, storage and community uses have moved into unit C.
- Consequently, up until the creation of the Arden theatre units A and B were operating as one planning unit i.e. A/B. Using the judgment in Burdle **(Burdle v Secretary of State for the Environment [1972] 3 All E.R. 240**),the use of unit A/B falls within the following categories: either **Ancillary Use** (if the storage and community uses are considered ancillary) or a **Composite Use** (if the storage and community use are not considered ancillary but they are not physically and functionally separate within the building).
- It is argued that the storage areas and community uses within B due to their small size and linked use could be classed as **ancillary**.
- Unit C was, until the link to unit A/B, in use for storage purposes (B8). Unit A/B and C now operate as one unit. This would still fit within the above definition within Burdle (ancillary).
- Under the changes to the GPDO (updated on 1 September 2020), the whole of the site (unit A/B and C) is used for Theatre purposes (sui generis)

<u>The appellant's argument in relation to the lawful use</u>

18. The linking together of unit A/B with C has not resulted in the loss of the lawful use or existing use rights. The circumstances in which existing use rights are capable of being lost, is based on the position as summarised by Christopher Lockhart Mummery QC sitting as a Deputy High Court Judge in **Panton &**

Farmer v SoSE (1999) 78 P. & C.R. 86 at 193 that: "*Further, in accordance with long established principles, such an accrued planning use right could only be lost in one of three ways, by operation of law. First by abandonment, second by the formation of a new planning unit, and third, by way of a material change of use (whether by way of implementation of a further planning permission, or otherwise): Pioneer Aggregates Limited v. Secretary of State [1985] A.C. 132*". Each of those three ways is applied to the property and explained below.

Abandonment

19. The possibility of abandonment of an established use right arises under case law. In **The Trustees of Castell-y-Mynach Estate v Taff-Ely (1985) JPL 40**, the High Court established four criteria for assessing whether a use had been abandoned. These are:

- The physical condition of the property.
- The period of non-use.
- Whether or not there has been any other use.
- The intention of the parties.

20. In the case of the site at 73 St Margarets Lane there has been no change to unit A/B it is still in Theatre Use.

Formation of a new planning unit

21. The phrase "formation of a new planning unit" can only be understood by reference to the line of authorities that Mr Lockhart Mummery QC was summarising in *Panton*. Those authorities make it clear that that the threshold at which existing use rights are lost is not a mere change to the planning unit, but requires change in the character of the land so fundamental as to open a new chapter in the planning history.

22. **In Jennings Motors Limited (see Jennings Motors v SSE [1982] JPL 181)** Oliver L.J said at 557

"In my view the authorities show not that a new building, per se, has to be equated with a new planning unit but that it is one of the factors—it may in many cases be a conclusive factor—to be taken into account in considering whether there has taken place in relation to the particular land under consideration a change of so radical a nature as to constitute a "break in the planning history" or a "new planning unit" (the expressions are used interchangeably)."

23. The creation of the Arden theatre, the majority of which is within unit A/B, has not resulted in any radical change to the buildings on the site, nor to the uses to which they are put. As such there has not been a "break in the planning history" or a "new planning history" created.

Material change of use

24. In accordance with *Burdle* the use of unit B is ancillary in relation to the Theatre Use in A.

25. Due to the length of time unit A/B had been in theatre use (in excess of 10 years) then an additional theatre (in this case the Arden Theatre) could have been created within unit A/B without the need for a further planning permission.

26. The creation of the Arden Theatre has not resulted in an intensification of the use. The basic principle on 'intensification' is that there may come a point when an increase in a use results in a marked change in the character of that use, giving rise to such materially different planning consequences that, as a matter of fact and degree, it constitutes a material change of use requiring planning permission.

27. The judgement in Brooks and Burton (**Brooks and Burton Ltd v Secretary of State for the Environment [1978] 35 P&CR 27**) is relevant here. In that, Simon Brown J stated: *"what the Inspector was not only entitled but was obliged to do was to contrast, not what might have been done under the previous use, but what was actually done in the way of the previous use with what was done following the introduction" of the new activity."*

He went on to say: *"…the issue whether or not there had been a material change in use fell to be considered by reference to the character of the use of the land. It was equally well recognised that intensification was capable of being of such a nature and degree as itself to affect the definable character of the land and its use and thus give rise to a material change of use. Mere intensification, if it fell short of changing the character of the use, would not constitute material change of use."*

28. Unit A/B was in use for theatre purposes prior to the Arden Theatre therefore the addition of the Arden Theatre has not resulted in a '*marked change in the character of the use*'.

Legal authorities referred to in this statement

- Burdle v Secretary of State for the Environment [1972] 3 All E.R. 240
- Panton & Farmer v SoSE (1999) 78 P. & C.R. 86 at 193
- The Trustees of Castell-y-Mynach Estate v Taff-Ely (1985) JPL 40
- Jennings Motors Limited (See Jennings Motors v SSE [1982] JPL 181)
- Brooks and Burton Ltd v Secretary of State for the Environment [1978] 35 P&CR 27

Jennings Motors Ltd v Secretary of State for the Environment and another

COURT OF APPEAL, CIVIL DIVISION
LORD DENNING MR, OLIVER AND WATKINS LJJ
30 OCTOBER, 2, 27 NOVEMBER 1981

Town and country planning – Development – Material change of use – Planning unit – Determination of what constitutes appropriate unit – New chapter in planning history – Extinction of existing use rights – Industrial site having existing use rights for repair and maintenance of vehicles – Old workshop on site replaced by new workshop without planning permission – Workshop covering only small portion of site – Whether new workshop a new planning unit starting with nil use – Whether new chapter in planning history commencing – Whether new workshop falling within existing use right attaching to whole site.

Since 1962 the occupiers had used a half-acre site for the repair and maintenance of vehicles and the sale and hire of cars. In 1975 they demolished an existing garage workshop on part of the site and without obtaining planning permission erected a new building in its place. The new building occupied about 6% of the site and was used for substantially the same purposes as the demolished building. The local planning authority did not take enforcement proceedings for the removal of the building but instead served an enforcement notice on the occupiers requiring them to discontinue use of the new building, on the grounds that the use of the new building without the grant of permission amounted to a material change of use and was a breach of planning control. The occupiers appealed to the Secretary of State for the Environment, who upheld the enforcement notice on the grounds that, when the new building was erected, it was to be considered as a new planning unit which had no actual, established or permitted use, so that a new planning history commenced starting with a nil use and the use to which it was put thereafter necessarily involved a material change of use from nil use which, if it was done without planning permission, amounted to a breach of planning control, despite the fact that the new building was used for the same purposes as the building it replaced. The occupiers appealed to the Divisional Court, which upheld the Secretary of State's decision. The occupiers appealed to the Court of Appeal, contending that the Secretary of State had been wrong to consider the use of the building alone and that the correct test was whether the use of the new building effected a material change in the use of the site as a whole. The occupiers submitted that the site as a whole had an established use right for the purposes for which the new building was being used and that therefore there had been no material change of use.

Held – The appeal would be allowed for the following reasons—

(1) (Per Lord Denning MR) A new building which replaced an old building did not create a new planning unit which started with a nil use. The new building could open a new chapter in the planning history, thus bringing to an end previous existing use rights, but only if there was such a radical change in the nature of the buildings on the site or the uses to which they were put that the change amounted to a fresh start in the character of the site. Where, however, that was not the case the existing use rights continued. Having regard to the size of the building in relation to the site as a whole, there had not been any change in the planning history and therefore the existing use rights attaching to the site as a whole extended to the new building (see p 476 *a* to *c* and *e f*, post).

(2) (Per Oliver and Watkins LJJ) The replacement of an old building by a new building on materially the same part of the site did not necessarily create a new planning unit starting with a nil use or commence a new planning history in relation to it, since whether there was a change in the planning status of the site caused by the new building which had the effect of extinguishing existing use rights and creating a new planning

unit was a question of fact and degree in every case. Since the Secretary of State had held that the new building was in itself sufficient to create a new planning unit, he had misdirected himself (see p 478 *f* to *j*, p 480 *e f j* and p 481 *b*, post).

Per Lord Denning MR. The theory that a new building creates a new planning unit starting with a nil use should be discarded. The better view is that, if a radical change occurs in the nature of the buildings on the site or the uses to which they are put, a new chapter in the planning history is opened in respect of it (see p 476 *c d*, post).

Per Oliver and Watkins LJJ. The difference between the expressions 'new planning unit' and 'change in the planning history' is largely semantic. Because the expression 'new planning unit' is hallowed by long usage it should be retained and used to include the concept of a change in the planning history (see p 477 *f* and p 479 *j* to p 480 *a* and *j* to p 481 *b*, post); dictum of Bridge J in *Burdle v Secretary of State for the Environment* [1972] 3 All ER at 244–245 approved.

Notes

For development by a material change of use, see 37 Halsbury's Laws (3rd edn) 259, para 366, and for cases on the subject, see 45 Digest (Repl) 328–334, *14–30*.

Cases referred to in judgments

Aston v Secretary of State for the Environment (9 April 1973, unreported), DC.

Burdle v Secretary of State for the Environment [1972] 3 All ER 240, [1972] 1 WLR 1207, DC, Digest (Cont Vol D) 918, *30x*.

Gray v Minister of Housing and Local Government (1969) 68 LGR 15, CA, Digest (Cont Vol C) 963, *30r*.

Hilliard v Secretary of State for the Environment (1978) 37 P & CR 129, CA, Digest (Cont Vol E) 592, *30a(iii)*.

Joyce Shopfitters Ltd v Secretary of State for the Environment [1976] JPL 236.

Leighton and Newman Car Sales v Secretary of State for the Environment (1976) 32 P & CR 1, CA.

Newbury DC v Secretary of State for the Environment [1980] 1 All ER 731, [1981] AC 578, [1980] 2 WLR 379, HL.

Petticoat Lane Rentals Ltd v Secretary of State for the Environment [1971] 2 All ER 793, [1971] 1 WLR 1112, DC, Digest (Cont Vol D) 932, *119a*.

Prossor v Minister of Housing and Local Government (1968) 67 LGR 109, DC, Digest (Cont Vol C) 971, *61b*.

Appeal

Jennings Motors Ltd (the occupiers) appealed against the decision of the Divisional Court of the Queen's Bench Division (Donaldson LJ and Bristow J) on 22 April 1980 dismissing an appeal by way of motion for an order that a decision of the Secretary of State for the Environment made on 6 July 1978 be quashed and the case remitted to the Secretary of State for rehearing. By his decision the Secretary of State refused to follow the recommendation of a planning inspector and upheld an enforcement notice dated 12 August 1976 served on the occupiers by the New Forest District Council requiring the occupiers to discontinue the use of a building on a site at Whinfield Road, Dibden Purlieu for the purpose of workshops for the repair, servicing and maintenance of motor vehicles. The occupiers appealed against the notice and, following an inquiry, the inspector in his report found, inter alia: (1) the appeal premises were in a predominantly residential area and were surrounded with dwellings; (2) the premises were used for the repair and maintenance of vehicles, the sale of cars and the hire of self-drive cars and comprised a building used as a commercial vehicle repair workshop, a range of buildings comprising a car showroom, offices and store and a vehicle repair workshop (which was the building the subject of the enforcement notice) and open areas where vehicles were displayed for sale, parked and stored; (3) in 1966 it was decided on appeal that the premises had an established use for the servicing and repair of motor vehicles; (4) the building subject to the enforcement notice was a new building which was erected without planning permission in 1975; (5) much of the new building was on land where

there were previously buildings used by the end of 1963 for parking, garaging and storage of vehicles and to a minimal extent for vehicle repairing and servicing and by 1975 to a greater extent for vehicle repairing and servicing; and (6) the council would be likely to permit the retention of the new building for use as a lock-up garage. The inspector recommended: 'The planning unit is the whole of the appeal premises and as they have an established use for the servicing and repair of motor vehicles that use can lawfully be carried on anywhere within the premises. This includes land within the buildings formerly on the land on which now stands the new building. Therefore although the use enforced against is carried on within a new building which has been erected without planning permission, as that land has an established use for that purpose and the notice is directed against the use, the appeal succeeds . . .' The occupiers' grounds of appeal against the decision of the Divisional Court were, inter alia, that (1) the Divisional Court was wrong in law in holding that when the new building was erected on part of the appeal site a new planning history commenced in respect of the new building, and the building on completion had no established use and could not form part of the planning unit unless and until planning permission was granted for its retention and use for a particular purpose and (2) the Divisional Court was wrong in law in not holding that the Secretary of State should have considered whether there had been a material change in the use of the appeal site as a whole by reason of the use of the new building on part of the appeal site for the repair, servicing and maintenance of motor vehicles, as alleged in the enforcement notice. The facts are set out in the judgment of Lord Denning MR.

Michael J Burrell for the appellants.
Simon D Brown for the respondent.
The council was not represented.

Cur adv vult

27 November. The following judgments were read.

LORD DENNING MR. The village has an attractive name, Dibden Purlieu. It goes back to the times of the Norman French. It is a mile or so inland from Southampton Water on the west side, near the New Forest. Some part of it has been developed in recent years for residential purposes. It is designated in the Hythe town map, Hampshire, for residential use. But in the midst of this residential area there is an industrial site. It only takes up about half an acre all told. It has been used for the last 20 years for commercial purposes in connection with motor vehicles. It is a mixed use in connection with the repair, servicing and maintenance of vehicles. There is a garage workshop in one corner. It takes up one-twelfth of the site. There is a showroom and office in another. It takes up one-thirteenth of the site. No question arises about those. But then there is a new building. It only occupies about one-seventeenth of the site of half an acre. It is about 55 feet long, 23 feet wide and 10 feet high. The rest of the site is for access and parking motor vehicles.

It is that new building which is in question. Previously there was a garage workshop there. The occupiers had applied in 1975 for permission to pull it down and put up the new building. It was refused. They never got permission for it. But, in spite of the refusal of permission, the occupiers completed the building. The local authority did not take enforcement proceedings in respect of the building because 'it was considered that the new building was more satisfactory in appearance than those it had replaced'. Nevertheless, the local authority resolved that enforcement proceedings should be taken to secure the discontinuance of the use.

Now the point of law that arises is this. The whole of the half-acre site is being used for a 'mixed' use for which it has been used for the last 20 years, since 1962. The new building is being used for one of those mixed uses, namely the repair and servicing of motor vehicles. It is not suggested that there has been a change in the 'mix' of use on the site as a whole. Nor is any charge made in the enforcement notice that there has been a

change owing to the 'intensification' of use. The enforcement notice related only to the new building (coloured pink on a plan). It was dated 12 August 1976, and was in these terms: a

> '... It appears to the Council that after the 31st day of December, 1963, there has been a breach of planning control in that the said land has been developed by the making of a material change in the use of the buildings coloured pink on the attached plan situate thereon to a use for the purpose of workshops for the repair, servicing and maintenance of motor vehicles without the grant of permission ... b Now therefore ... the Council hereby require you within two months ... to discontinue the use of the buildings coloured pink on the attached plan for the purpose of workshops for the repair, servicing and maintenance of motor vehicles.'

The minister upheld the enforcement notice. In his decision letter of 6 June 1978 he said: c

> '... in the light of the judgment in the case of Petticoat Lane Rentals Ltd v Secretary of State ([1971] 2 All ER 793, [1971] 1 WLR 1112) it is considered that when the new building referred to in the appeal was erected, a new planning history commenced in respect of it and the building on completion had no actual, established or permitted use ... the issue before the Secretary of State is the continued use of the building for the repair, servicing and maintenance of motor d vehicles and it is considered that this must involve a material change of use from no use, and that there has therefore been a breach of planning control as alleged in the notice....'

The Divisional Court upheld the minister. They did so reluctantly as they thought they were bound by *Aston v Secretary of State for the Environment* (9 April 1973, e unreported). The occupiers appeal to this court.

We have been referred to all the cases. They disclose two theories. The one is the theory of the 'new planning unit'. The other is the theory of the 'new chapter in planning history'. I will consider each theory separately.

The new planning unit f

According to this theory, when a man applies for permission to erect a new building, either where none existed before or to replace an old building, he creates a 'new planning unit'. He can use it for any purpose specified in the permission, or, if no purpose is specified, for the purpose for which it was designed to be used (see s 33(2) of the Town and Country Planning Act 1971) subject to any conditions contained in the permission. If he erects a new building without any permission at all, he starts with a nil use, and g must get permission for any use. Once he erects that new building, he cannot fall back on previous existing use rights. This theory was stated by Lord Widgery CJ in *Petticoat Lane Rentals Ltd v Secretary of State for the Environment.* In that case the new building covered the whole site. Lord Widgery CJ said ([1971] 2 All ER 793 at 796, [1971] 1 WLR 1112 at 1117):

> '... one gets in my judgment an entirely new planning unit created by the new h building. The land as such is merged in that new building and a new planning unit with no planning history is achieved. That new planning unit, the new building, starts with a nil use...'

In the later case of *Aston v Secretary of State for the Environment* Lord Widgery CJ applied it to a case where the new building covered only *part* of the site, just about half the j site. He said:

> '... where you have a new building erected, that part of the land which was absorbed in the new building and covered by the new building is merged in it; you start with a new planning unit which has no permitted planning use except those derived from the planning permission, if any, and from s 33(2) of the Town and

Country Planning Act 1971, which allows such a building in many instances to be used for the purpose for which it was designed.'

That theory was accepted by Lord Fraser in *Newbury DC v Secretary of State for the Environment* (1980) 1 All ER 731 at 744, [1981] AC 578 at 606 in the House of Lords, when he said:

'The only circumstances in which existing use rights are lost by accepting and implementing a later planning permission are . . . when a new planning unit comes into existence . . .'

This theory has been extended by some observations in the House of Lords to a case where a man applies to change the use of a building so as to make it available for occupation for several families. If he acts on the permission and makes the change (by putting in internal partitions and doors) then he creates a 'new planning unit'. He must abide by any conditions inserted in the permission. He cannot fall back on previous existing use rights: see the *Newbury DC* case [1980] 1 All ER 731 at 745, 753, [1981] AC 578 at 607, 618 by Lord Fraser and Lord Scarman.

A new chapter in planning history

According to this theory, when a man applies for permission to erect or alter a building, or to make a change in the use of land, in such circumstances as to effect a radical alteration in the nature or use of the site, then it may be interpreted as the opening of a 'new chapter in the planning history'. If he then acts on the permission, and erects or alters the building or changes the use of the land, he must abide by the conditions on which the permission was given. He cannot afterwards revert to any previous existing use rights. This theory was stated clearly by Lord Parker CJ in *Prossor v Minister of Housing and Local Government* (1968) 67 LGR 109. In that case a garage proprietor applied for planning permission to erect a new building on *part* of the site to replace an existing repair shop. He was granted permission on the condition that no retail sales were to take place in the new building. The garage proprietor afterwards claimed that he had existing use rights for selling motor cars. Lord Parker CJ said (at 113):

'. . . assuming . . . that there was at all material times prior to April 1964 an existing use right running on this land for the display and sale of motor cars, yet by adopting the permission granted in April 1964, the appellant's predecessor, as it seems to me, gave up any possible existing use rights in that regard which he may have had. The planning history of this site, as it were, seems to me to begin afresh on April 4, 1964, with the grant of this permission, a permission which was taken up and used . . .'

This theory was restated by Lord Lane in the *Newbury DC* case [1980] 1 All ER 731 at 760, [1981] AC 578 at 626:

'The holder of planning permission will not be allowed to rely on any existing use rights if the effect of the permission when acted on has been to bring one phase of the planning history of the site to an end and to start a new one.'

The difference in the two theories

In many cases the two theories give the same result. Thus in the *Newbury DC* case there was no new building at all. The two hangars remained the same throughout. So there was no 'new planning unit'. Equally the use of those hangars remained substantially the same throughout for storage purposes. So there was no 'new chapter of planning history'. Lord Lane said ([1980] 1 All ER 731 at 761, [1981] AC 578 at 626):

'The change of use from repository to wholesale warehouse could not by any stretch of the imagination be said to have started a new planning history or created a new planning unit. Indeed no one has so contended.'

But in some cases the two theories give different results. Thus, where an old building is pulled down and a new one put in its place, there is no 'new planning unit'. But the change of use may be so radical that the new use to which the building is put may open a 'new chapter in planning history'. That is what happened in *Prossor's* case. The new use was for a repair shop and stores. The existing use (on which the occupier relied) was for the display of secondhand cars for sale. The repair shop was so radical a change that it opened a 'new chapter in planning history'.

In the *Aston* case, and in our present case, the two theories give different results. In each case there was a new building on part of the site, and thus a 'new planning unit'. But in neither case did the new use open a 'new chapter in the planning history'. I think that the *Aston* case was wrongly decided, so also the decision of the Divisional Court in this case which followed it.

Result

In the light of experience, I think we should discard the theory of the 'new planning unit'. In future it should no longer be thought that a new building creates a 'new planning unit' which starts with a 'nil use'. Certainly not when it is just the replacement of an old building. The better theory is the opening of a 'new chapter in planning history'. This may take place when there is a radical change in the nature of the buildings on the site or the uses to which they are put, so radical that it can be looked on as a fresh start altogether in the character of the site. If there is such a change and the occupier applies for permission and gets it subject to conditions, and acts on that permission, he cannot afterwards revert to any previous existing use rights.

Conclusion

Before us counsel for the respondent pleaded for guidance. He told us that those in the ministry were much perplexed as to the right principle to adopt. He submitted that the right theory was the 'new chapter in the planning history'. I agree with him. Applied to this case, I think there was no change in the planning history at all. There is one whole site of half an acre with existing use rights. All that has been done is to erect a new building in place of an old one, on a little portion of the site. The occupiers are entitled to the use of those rights inside the new building. I would allow the appeal accordingly.

OLIVER LJ. The Divisional Court held that it was bound by the decision in *Aston v Secretary of State for the Environment* (9 April 1973, unreported) to find that where, either with or without permission, a building has been erected on land previously unbuilt on, that building is, from the time of its erection, a new planning unit so that the building owner is unable, where the question in issue is whether or not there has been a material change of use, to pray in aid the pre-existing user of the land on which the building stands.

It is, I think, impossible to escape from the conclusion that that is what *Aston v Secretary of State* decided. The pith of the matter is contained in the following passage from the judgment of Lord Widgery CJ:

> '... the principle which one derives from the authorities and applies to the present case is that, where you have a new building erected, that part of the land which was absorbed in the new building and covered by the new building is merged in it; you start with a new planning unit which has no permitted planning use except those derived from the planning permission, if any, and from s 33(2) of the Town and Country Planning Act 1971, which allows such a building in many instances to be used for the purpose for which it was designed.'

The principle there expressed is enunciated as a universal one, and the short question raised by the present appeal is: is it right? Inevitably this involves some review of the relevant authorities from which the universal principle is said to stem.

The first of these is *Prossor v Minister of Housing and Local Government* (1968) 67 LGR

109. There there had been for some years an established existing use as a petrol filling station and motor repair shop. A planning permission was granted for the erection of a new building and the replacement of an existing repair shop and stores. It is not clear how far the new building covered the whole of the site, but, having regard to its size and shape and the nature of the user, I infer that it covered part only. It was, however, granted subject to a condition relating to the whole site that it should not be used for retail sales other than sales of spare parts and the redevelopment took place pursuant to that permission. An enforcement notice to prevent the user of the forecourt for the sale of secondhand cars was upheld by the Divisional Court and on one analysis of the decision (subsequently suggested in *Gray v Minister of Housing and Local Government* (1969) 68 LGR 15) the basis for this was, in effect, an estoppel arising from the acceptance of the permission with the condition attached and the subsequent implementation of it. If that was indeed the ground of the decision (and the judgment of Lord Parker CJ does not make it entirely clear that it was) it is now clear from *Newbury DC v Secretary of State for the Environment* [1980] 1 All ER 731, [1981] AC 578 that it cannot be sustained as a correct decision on that ground. But the way in which it was put by Lord Parker CJ was this (67 LGR 109 at 113):

> '... by adopting the permission granted in April 1964, the appellant's predecessor, as it seems to me, gave up any possible existing use rights in that regard which he may have had. The planning history of this site, as it were, seems to me to begin afresh on April 4, 1964, with the grant of this permission, a permission which was taken up and used ...'

I draw attention to this because it is consistent with counsel for the respondent's submission on the present appeal that what the court is concerned with is not so much 'a new planning unit' (an expression which, he suggests, may be misleading) but simply with the question whether an event or a concatenation of events has taken place which can, as a matter of *fact*, be said to have opened a new chapter in the planning history. That is a question of intention and degree. The expression 'planning unit' (which nowhere appears in the legislation) is, however, one which is now hallowed by usage and is, I think, a convenient phrase for identifying, in cases where the question is whether there has been a material change of use, both the area whose planning history requires to be studied for that purpose and, in an appropriate case, the starting point of that history. The concept of the creation of a new 'planning unit' by the opening of a new planning history, not so expressed in *Prossor's* case, emerges in the judgments of the Divisional Court in *Petticoat Lane Rentals Ltd v Secretary of State for the Environment* [1971] 2 All ER 793, [1971] 1 WLR 1112. The history of the land with which that case was concerned had started with the use of the land as an open site on which a market was held. A building was then erected over the whole site pursuant to a planning permission which designated the use as an office, warehousing, supermarket, car parking and loading area (to be used for market trading on Sundays). The question was whether the existing use of the site for weekday markets prior to the erection of the building survived that event. The Divisional Court held unanimously that it did not. There was some discussion in the judgment of Widgery LJ of the ratio of *Prossor's* case, but he found it unnecessary to express any conclusion and was content to say that the principle clearly applied 'where, as here, one has a clear area of land subsequently developed by the erection of a building over the whole of that land' (see [1971] 2 All ER 793 at 796, [1971] 1 WLR 1112 at 1117). It seems, however, that when he spoke of 'the principle of *Prossor's* case' he must have had in mind the reference in the judgment of Lord Parker CJ to the fresh beginning of the planning history, for he went on to say ([1971] 2 All ER 793 at 796, [1971] 1 WLR 1112 at 1117):

> 'Where that happens ... one gets in my judgment an entirely new planning unit created by the new building. The land as such is merged in that building and a new planning unit with no planning history is achieved. The new planning unit, the new building, starts with a nil use, that is to say immediately after it was completed

it was used for nothing, and thereafter any use to which it is put is a change of use, and if that use is not authorised by the planning permission, that use is a use which can be restrained by planning control.' a

It is thus clear that what brought about the result described by Widgery LJ was not the acceptance of the planning permission, which was arguably inconsistent with the prior existing use, but the mere erection of the building, and it would follow that the same result must ensue even if there were, as in the instant case, no planning permission at all. Bridge J and Lord Parker CJ agreed, but reserved the question of what the result would be where (as here) the building was on part only of a site having a prior existing use as a whole. The concept here, therefore, is that of the creation of a new and different unit by the physical alteration of the land to an extent enabling it to be treated as if it were a new creation different and divorced from the land which was there before. Thus Bridge J referred to the 'disappearance' of the land to which the existing user was attached (see [1971] 2 All ER 793 at 797, [1971] 1 WLR 1112 at 1118). b c

A similar concept is to be found in *Leighton and Newman Car Sales Ltd v Secretary of State for the Environment* (1976) 32 P & CR 1, where there had been a pre-existing garage business on a site forming part of the relevant land, a business which included the sale of cars. The site, together with two adjoining sites, was redeveloped entirely as a petrol filling station under a permission which contained a condition restricting the use of certain car parking space to the parking of vehicles of the occupiers and users and prohibiting the sale or display for sale of vehicles on the forecourt. The Secretary of State's dismissal of the tenant's appeal against an enforcement notice was attacked, inter alia, on the ground that the inspector's report had not included a relevant matter, namely the existing use of the garage site before the redevelopment. This court upheld the dismissal by a Divisional Court of an appeal from the Secretary of State. In the judgment of the court, delivered by Browne LJ, there is this passage (at 10): d e

'Further, Nos. 271 to 275 were not merely a different "planning unit" from the old No. 271; they were a completely new and different physical unit to which we think the previous use of No. 271 was irrelevant.'

In my judgment this is the essence of the matter. Where there has been a total change in the physical nature of the premises, it is easy to infer (indeed, the inference may be irresistible) that reliance on any prior user is being abandoned and a new planning history is to begin. Such an inference may equally be drawn, and may equally be irresistible, where there is no change or a less radical change in the physical nature of the site but a change in what I may call its planning status which is inconsistent with the preservation of a prior existing use; for instance its subdivision into smaller units of occupation or its incorporation into a larger single unit. f g

Whether the alteration is of such a character as to produce this result is, I think, in every case, a question of fact and degree.

How, then, does the matter stand when, as in the instant case, what has occurred is that there has been some physical alteration to part only of an occupation site, for instance by the erection on it of a new building, the alteration of an existing building or an application for and grant of a planning permission subject to conditions inconsistent with the prior user? This may pose very difficult problems in the interpretation of the facts, particularly where, as here, there is a mixed site or where a particular use has been intensified as a result of the change. But these are problems only of fact and degree, not of principle, and they are not insoluble. h

There are, so far as the industry of counsel has been able to discover, only two reported cases (the *Aston* decision is, as I have said, unreported) which relate to the problems created in the field of change of user by the erection of a new building on part only of the site. The first is *Joyce Shopfitters Ltd v Secretary of State for the Environment* [1976] JPL 236, a decision of the Divisional Court. The report is a very sketchy one, but what seems to have occurred there was that a building on the site was used partly for the manufacture of fencing and garden furniture and partly for car repairs and car breaking. The j

remainder of the site, which included two cottages, had been used for purposes ancillary to those purposes. The site owners, without planning permission, built an extension to the main building and demolished the cottages. Two enforcement notices were served, one requiring the removal of the extension and one requiring the discontinuance of the user of the site for the purposes of a joinery and shopfitting business, a business which the Secretary of State found was not a change of use because it was merely a change from one industrial use to another within s 22(2)(*f*) of the Town and Country Planning Act 1971. He declined to grant permission for the retention of the extension to which the first enforcement notice related, but he upheld the second enforcement notice relating to change of use in respect of the site of the extension and (on the ground that there was a separate planning unit with a nil user) in respect of the site of the cottages. The Divisional Court remitted the matter for reconsideration on the basis that, so far as the site of the extension was concerned, there was an existing use which had not been extinguished by the erection of the extension, and so far as the site of the cottages was concerned the planning unit to be considered was the site as a whole.

It is not easy from the very brief report to get any very clear idea of the court's reasoning, but the case is consistent, indeed really only consistent, with the view that the court did not consider that the changes which had taken place in the site as a result of the extension and the demolition were of a sufficiently radical nature to justify the inference that in either case there was the abandonment of the existing industrial user and the commencement of a new planning history. The case is thus entirely consistent with what has been said above and inconsistent with the view that the mere erection of a building constitutes a new planning unit. The second case is that of *Hilliard v Secretary of State for the Environment* (1978) 37 P & CR 129. Here an area of farm land had existing use rights for agricultural purposes with ancillary storage and wholesale distribution of both indigenous and non-indigenous produce. The owner applied for and was granted a planning permission to erect a building, the permission having attached to it a condition that it should only be used for the storage of agricultural produce and farm implements in conjunction with the use of the farm for agricultural purposes. The building subsequently came to be used for the wholesale distribution of fruit and vegetables and the local authority, instead of serving an enforcement notice to enforce the condition, served a notice requiring the discontinuance of material change of user on the footing that there had been an intensification of user amounting to an unauthorised change of user. This court, on appeal from the Divisional Court's upholding of the Secretary of State's decision to uphold the enforcement notice, reversed the decision and remitted the matter to the Secretary of State on the footing that the evidence had been directed entirely to the intensification of the user of the building when it should have been directed to the intensification of the user of the farm as a whole. The case is not, I think, of very much assistance in the context of the present inquiry, because, ex concessis, the planning unit there was the farm as a whole and it was to the whole of that unit (as is, indeed, the case here) that the enforcement notice was directed. The case therefore turned entirely on whether the evidence could be said to have established a change of user by intensification of the farm as a whole. It has, however, this relevance, that, as counsel for the appellants points out, a building erected on part only of the land was not there treated as, ipso facto, creating a new planning unit, and indeed the decision of the court is only consistent with their view that it had not done so. Presumably it did not do so because the alteration of the unit was not such, as a matter of fact and degree, as to justify the inference that the existing user was being abandoned and a new and different planning unit created.

Speaking for myself, I have some sympathy with counsel for the respondent's suggestion that 'planning unit' has become perhaps a slightly confusing expression, combining, as it does, concepts both of geography and history. It is used in the temporal sense of a separate and distinct period of planning history with its own beginning and end relating to a given area of land, and it is used to distinguish and isolate the geographical area of land the history of which, for a given purpose, has to be studied. Nevertheless it is, I think, a convenient phrase, and there is an extremely helpful general

test contained in the judgment of Bridge J in *Burdle v Secretary of State for the Environment* [1972] 3 All ER 240 at 244–245, [1972] 1 WLR 1207 at 1212–1213. a

The historical content of the term is well brought out in the speeches of Lord Scarman and Lord Lane in *Newbury DC v Secretary of State for the Environment*. Lord Scarman said ([1980] 1 All ER 731 at 753, [1981] AC 578 at 617–618):

> 'Clearly it will be much more difficult to establish the creation of a new planning unit or the beginning of a new chapter of planning history where the unnecessary permission which has been granted subject to conditions purports to authorise only a change of use. But such cases can exist [and he gave an example]. There is in such a case a wholly new departure, a new chapter of planning history.' b

Lord Lane is to the same effect. He said ([1980] 1 All ER 731 at 760–761, [1981] AC 578 at 626):

> 'We were asked by counsel for the Secretary of State to say that the principle [i e the principle of the *Petticoat Lane* decision] can only apply where the permission granted is to build or rebuild or the like and can never apply to cases where the permission is simply to change the use. I do not consider that any such limitation would be proper. It is not the reason for the break in planning history which is important. It is the existence of the break itself, whatever the reasons may have been . . . In the present case there is no such break in the history. The change of use from repository to wholesale warehouse could not by any stretch of the imagination be said to have started a new planning history or created a new planning unit.' c d

Coming back, then, to the *Aston* case, in my judgment the principle there stated by Lord Widgery CJ is, if I may say so respectfully, too widely expressed. In my view the authorities show not that a new building, per se, has to be equated with a new planning unit but that it is one of the factors (it may in many cases be a conclusive factor) to be taken into account in considering whether there has taken place in relation to the particular land under consideration a change of so radical a nature as to constitute a 'break in the planning history' or a 'new planning unit' (the expressions are used interchangeably). As counsel for the appellants points out, the building in the *Aston* case was, as a matter of fact, pretty much on all fours with that in the *Petticoat Lane* case, for it replaced an earlier building, destroyed eight years before, which had covered rather less than half the available area, and, it itself covered 90% of the available area. There is, therefore, no ground for thinking that the case was wrongly decided on the facts. But the stated ground for the decision was, in my judgment, too widely expressed. e f

In the instant case, the local authority could perfectly well have exerted their planning control over the site by serving an enforcement notice for the removal of the building, and then, if it was the user and not the building that they objected to, granting a planning permission subject to a condition as to user. They could have done that at any time within four years from 1975, but they chose not to do so. In serving an enforcement notice to discontinue the use of the building they necessarily opened up a consideration of the question whether the circumstances, including the erection of the building without permission and any intensification of user, led to the inference of the creation of a new planning unit. It is not for this court now to decide that question, and I content myself with observing only that the buildings concerned were merely a replacement for already existing buildings on the site. I am, however, clearly of the view that, in considering himself bound by the *Petticoat Lane* decision to hold that the erection of the new buildings per se constituted a new planning unit and that he was thus constrained to depart from his inspector's recommendation, the Secretary of State misdirected himself. This, I think, would clearly have been the view of Donaldson LJ if he had not felt himself bound by the *Aston* decision, a disability from which this court is relieved. I would allow the appeal. g h j

It follows from what I have said above that in my view the difference between a new planning unit and a change in the planning history is largely a semantic one. The former

expression is, as I have said, hallowed by long usage, and I for my part think it would be a pity to discard it so long as the concepts which it embraces (which include a change in the planning history) continue to be clearly appreciated.

WATKINS LJ (read by Oliver LJ). I have had the advantage of reading the judgment of Oliver LJ, with which I entirely agree. The Secretary of State, we were told, seeks guidance on the use of the expressions 'planning unit' and 'a change in planning history'. It is my firm opinion that the use of the former should be preserved and the guidance provided by Bridge J in *Burdle v Secretary of State for the Environment* [1972] 3 All ER 240 at 244–245, [1972] 1 WLR 1207 at 1212–1213 on its application, which obviously involves a study of the history of the use of the land in question, followed.

Appeal allowed. Matter remitted to Secretary of State together with opinion of the court for hearing and determination.

Solicitors: *Malkin Cullis & Sumption,* agents for *Lamport Bassitt & Hiscock,* Southampton (for the appellants); *Treasury Solicitor.*

Diana Procter Barrister.

Marina Shipping Ltd v Laughton and another

COURT OF APPEAL, CIVIL DIVISION
LAWTON, BRIGHTMAN AND OLIVER LJJ
8, 9, 10, 11 DECEMBER 1981

Trade dispute – Acts done in contemplation or furtherance of trade dispute – In contemplation or furtherance of – Secondary action in furtherance of dispute – Validity of secondary action – Contract for supply of services between employer who is party to dispute and employer to whom secondary action relates – Vessel let on time charter by owners to charterers – Charterers engaging shipping agents to arrange harbour services with port authority – Vessel blacked while in port – Port authority's employees taking secondary action to prevent vessel leaving port – Whether contract for supply of services between owners and port authority – Whether secondary action by port authority's employees actionable in tort – Employment Act 1980, s 17(3)(6).

The plaintiffs were the registered owners of a cargo vessel sailing under a flag of convenience which was chartered to a Belgian company for a period of six months under a time charter made on 28 July 1981. On 3 November the vessel loaded a cargo at Panama for delivery in Hull and Hamburg. In the course of the voyage to Hull the charterers' agents requested a firm of shipping agents in Hull to arrange with the port authority at Hull for a berth. When the vessel was two days out of Hull the shipping agents finalised arrangements with the port authority for the reception of the vessel and also arranged for pilot services. The shipping agents were well known to the port authority who did not inquire on whose behalf they were acting. After the vessel docked on 23 November some of the crew members complained to the International Transport Workers' Federation (the ITF) about their conditions of service and pay. Two officials of the ITF investigated the complaints and demanded that the owners of the vessel pay the crew ITF rates appropriate for Europe and also pay the crew back pay from the time they signed their articles. When the owners refused those demands the ITF decided to 'black' the vessel and advised appropriate affiliated unions of the blacking including the National Union of Railwaymen (the NUR) whose members refused to operate lock gates thereby preventing the vessel from leaving port. The refusal of the NUR members to operate the

Brooks and Burton Ltd v Secretary of State for the Environment and another

COURT OF APPEAL, CIVIL DIVISION
MEGAW, LAWTON LJJ AND SIR DAVID CAIRNS
27th, 28th, 29th, 30th JUNE, 1ST, 28th JULY 1977

Town and country planning – Development – Permitted development – Development for industrial purposes – Land used for carrying out industrial process otherwise than in contravention of planning control or without planning permission – Use in contravention of planning control and without permission at its inception but no longer liable to enforcement action by reason of lapse of time – Whether land used 'otherwise than (i) in contravention of previous planning control or (ii) without planning permission' – Whether owner of land entitled to carry out development constituting permitted development for industrial purposes – Town and Country Planning General Development Order 1973 (SI 1973 No 31), art 3(1), Sch 1, class VIII.

Town and country planning – Enforcement notice – Validity – Wrong factual basis – Misconception as to use to which land had been put – Notice alleging that land had been used as light industrial building – Land in fact used as general industrial building – Notice directed against intensification of use constituting material change of use – Notice making clear to recipient that it required reversion to former use – Whether notice valid.

Town and country planning – Development – Use classes – Building – Reference to building including land occupied therewith and used for same purpose – Use as general industrial building for any purpose – Test for determining whether land used as 'industrial building' – Land occupied with building and used for same purpose – Unnecessary to show that process carried out on land dependent on building or that land ancillary to building – Sufficient to show that land used for same purpose as building – Town and Country Planning (Use Classes) Order 1972 (SI 1972 No 1385), art 2(3), Sch, class IV.

Town and Country Planning – Development – Material change of use – Intensification of use – Intensification of use capable of constituting a material change of use – Question whether it constitutes a material change of use a question of degree to be determined by Secretary of State.

Between 1929 and 1958 a plot of land covering about five acres was used for brick-making. In January 1959 the owner of the land was granted planning permission to use part of it for a class III 'light industrial use'. Later in 1959 he sold the land together with the brick-making business. Thereafter it remained unused until the end of 1963 when it was bought by a partnership. In breach of planning control, the partnership used part of the land to make concrete blocks for garden use. The blocks were made inside a shed containing block-making machinery and dried in the open air on concrete strips set in hoggin. The partnership had the machinery and manpower to produce 300,000 blocks a year but that was never achieved. In December 1972 the appellants bought the land, believing that they did not require planning permission to carry on the block-making business. Since no enforcement notice had been served on the partnership or the appellants before 1973, the appellants became immune from enforcement proceedings in respect of the block-making business. The appellants started to modernise and expand the business. They began making concrete blocks for general building use as well as for ornamental use and installed in the open air a concrete batching plant, standing some 7·62 metres off the ground, together with other smaller machines. The machines which the partnership had used in the shed were retained and used in wet weather. Production began to run at the rate of 1,200,000

blocks a year and more men had to be employed. Traffic to and from the site increased considerably. Following complaints from local inhabitants the planning authority decided that the land was not being used 'as a light industrial building' under art 3(1)[a] of, and class III of the schedule[b] to, the Town and Country Planning (Use Classes) Order 1972, in accordance with the planning permission that had been granted in 1959, and accordingly they served enforcement notices on the appellants. One notice, dated 4th April 1973, alleged breach of planning control by the erection of a concrete batching plant without the grant of permission and required the appellants to remove it. Another notice, dated 13th September 1973, alleged that there had been a breach of planning control in that the land had been developed by making a material change of use of the land and building, namely the manufacture of concrete blocks and other industrial purposes not included in class III of the Use Classes Order, without planning permission. The notice required the appellants to discontinue that use and restore the land and buildings to their condition before the development took place. The appellants appealed to the Secretary of State against the enforcement notices. They contended, inter alia, that there had been no material change of use of the land and that the enforcement notices were invalid. Following an inquiry the Secretary of State held that the enforcement notice of 13th September was valid but that it should be varied by deleting the reference to class III of the Use Classes Order and substituting words to indicate what the planning authority were complaining about, i e the use of a mobile machine, the extension of the areas used for block-making and the intensification of use, and that it should require the appellants to discontinue the use of the land for the manufacture of concrete blocks by a mobile block-making machine and to remove the machine and other plant connected therewith from the land. The Secretary of State further decided (i) that the use to which the land had been put by the partnership before the appellants bought it was a class IV use and not a class III use, (ii) that that use, although not a permitted use, had become immune from enforcement, and (iii) that there had been a material change of the use of the land, by block-making in the open, by different working procedures and by intensification of the potential capacity of the plant. The Secretary of State's reasons for deciding that there had been a material change of use were that the processes carried out on the open land were not dependent on any use of the industrial building and therefore could not be said to be a use 'as a general industrial building', within class IV of the Use Classes Order, nor were they a use 'for any other purpose of the same class' and therefore permissible under s 22(2)(*f*)[c] of the Town and Country Planning Act 1971 and art 3(1) of the Use Classes Order. The Secretary of State also considered that on the evidence the introduction of a materially different working procedure together with intensification of the potential capacity of the plant had led to a material change of use of the whole block-making site. The appellants appealed to the Divisional Court which dismissed the appeal, holding (i) that the enforcement notice of 13th September was valid and could lawfully be amended in the way the Secretary of State had done, (ii) that the land on which block-making was being carried out in the open had never acquired the capacity for use as an industrial building because it had never

a Article 3(1) provides: 'When a building or other land is used for a purpose of any class specified in the Schedule to this order, the use of such building or other land for any other purpose of the same class shall not be deemed for the purposes of the Act to involve development of the land.'

b The schedule, so far as material, provides:
'Class III.— Use as a light industrial building for any purpose.
'Class IV.— Use as a general industrial building for any purpose.'

c Section 22(2), so far as material, provides: 'The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land, that is to say ... (*f*) in the case of buildings or other land which are used for a purpose of any class specified in an order made by the Secretary of State under this section, the use thereof for any other purpose of the same class.'

been land ancillary to an industrial building and therefore could not constitute a 'building', within art 2(3)[d] of the Use Classes Order, and (iii) that accordingly, apart altogether from changes in the volume and methods of manufacture, there had been a material change in the use of the land and in consequence unlawful development. The Divisional Court did not give a ruling on the notice of 4th April. The appellants appealed, contending, inter alia, that the erection of the batching plant was permitted under art 3(1)[e] of, and class VIII, para 1[f], of Sch 1 to, the Town and Country Planning General Development Order 1973, since it constituted the installation or erection by way of addition of machinery not exceeding 15 metres in height carried out by an industrial undertaker on land used for the carrying on of an industrial process and, therefore, that the notice of 4th April was also invalid.

Held – (i) Although the use to which the partnership had put the land was immune from enforcement, it had nonetheless been a development in breach of planning permission. Accordingly the erection by the appellants of the batching plant was not a permitted development under class VIII of Sch 1 to the 1973 order since the land had not been used 'otherwise than (i) in contravention of previous planning control or (ii) without planning permission'. It followed that the enforcement notice dated 4th April 1973 requiring the appellants to remove the plant was a valid notice (see p 745 *c* to *g*, post); *LTSS Print and Supply Services Ltd v London Borough of Hackney* [1976] 1 All ER 311 applied.

(ii) The fact that the planning authority had wrongly assumed that the partnership had used the land for class III purposes did not invalidate the notice of 13th September. The planning authority had overstated their case, but that did not mean that they had no case at all. The notice was effective for its purpose, in that it made clear to the appellants that they were required to stop doing what they had been doing and use the land in the same way that the partnership had used it, and had quite properly been amended by the Secretary of State to show the correct degree of unauthorised use (see p 741 *f* to p 742 *a*, post); *Miller-Mead v Minister of Housing and Local Government* [1963] 1 All ER 459 distinguished.

(iii) The test to be applied in determining whether, for the purpose of art 2(3) of the Use Classes Order, land which was occupied with a building used as an industrial building had itself been used as an 'industrial building', was not whether the process carried out on the land was dependent on the use of the building, or whether the land was ancillary to the building, but whether the land had been used for the same purpose as the building and could therefore be regarded as one unit with it. Since, during the partnership's occupation of the land, the part of the block-making site in the open had been used for the same purpose as the shed in which the block-making machinery was installed, the drying of the blocks in the open being part of the block-making process, the whole block-making site was a 'general industrial building' within class IV of the Use Classes Order. It followed that, under s 22(2)(*f*) of the 1971

---

d Article 2(3) provides: 'References in this order to a building may, except where otherwise provided, include references to land occupied therewith and used for the same purposes.'

e Article 3(1), so far as material, provides: 'Subject to the subsequent provisions of this order, development of any class specified in Schedule 1 to this order is permitted by this order and may be undertaken upon land to which this order applies, without the permission of the local planning authority or of the Secretary of State . . .'

f Paragraph 1, so far as material, provides: 'Development of the following descriptions, carried out by an industrial undertaker on land used (otherwise than (i) in contravention of previous planning control or (ii) without planning permission granted or deemed to be granted under Part III of the Act) for the carrying out of any industrial process, and for the purposes of such process . . . (iii) the installation or erection, by way of addition or replacement, of plant or machinery, or structures or erections of the nature of plant or machinery, not exceeding 15 metres in height or the height of the plant, machinery, structure or erection so replaced, whichever is the greater . . .'

Act and art 3(1) of the Use Classes Order, the appellants were entitled to use the block-making site for any purpose that was within class IV. It was therefore immaterial that the intensification of use which had been found to have taken place amounted to a material change of use. Accordingly the appeal would be allowed and the case remitted to the Secretary of State (see p 743 *g* to *j* and p 744 *a b*, post).

Per Curiam. Intensification of use may be a material change of use. Whether it is or not depends on the degree of intensification, which is a matter to be determined by the Secretary of State (see p 744 *e*, post).

Notes

For the contents and validity of an enforcement notice, see 37 Halsbury's Laws (3rd Edn) 334, 335, para 439, and for cases on the subject, see 45 Digest (Repl) 350-354, 91-101.

For use classes, see 37 Halsbury's Laws (3rd Edn) 264-268, para 368, and for change of use, see ibid 259-263, para 366.

For the Town and Country Planning Act 1971, s 22, see 41 Halsbury's Statutes (3rd Edn) 1605.

For the Town and Country Planning (Use Classes) Order 1972, arts 2, 3 and schedule, see 21 Halsbury's Statutory Instruments (3rd Reissue) 138, 139.

For the Town and Country Planning General Development Order 1973, art 3 and Sch 1, class VIII, see ibid 151, 176.

With effect from 29th March 1977, art 3 of and Sch 1 to the 1973 order have been replaced by the Town and Country Planning General Development Order 1977 (SI 1977 No 289), art 3 and Sch 1.

Cases referred to in judgment

Brazil (Concrete) Ltd v Amersham Rural District Council (1967) 65 LGR 365, 18 P & CR 396, CA, 45 Digest (Cont Vol C) 961, *30j*.

East Barnet Urban District Council v British Transport Commission [1961] 3 All ER 878, [1962] 2 QB 484, [1962] 2 WLR 134, 126 JP 1, 60 LGR 41, 13 P & CR 127, DC, 45 Digest (Repl) 329, *17*.

Glamorgan County Council v Carter [1962] 3 All ER 866, [1963] 1 WLR 1, 127 JP 28, 61 LGR 50, 14 P & CR 88, DC, 45 Digest (Repl) 338, *46*.

Guildford Rural District Council v Penny [1959] 2 All ER 111, [1959] 2 QB 112, [1959] 2 WLR 643, 123 JP 286, 57 LGR 169, 10 P & CR 232, CA, 45 Digest (Repl) 325, *7*.

LTSS Print and Supply Services Ltd v London Borough of Hackney [1976] 1 All ER 311, [1976] QB 663, [1976] 2 WLR 253, 74 LGR 210, 31 P & CR 133, CA.

Miller-Mead v Minister of Housing and Local Government, Same v Same [1963] 1 All ER 459, [1963] 2 QB 196, [1963] 2 WLR 225, 127 JP 122, 61 LGR 152, 14 P & CR 266, [1963] RVR 181, CA, 45 Digest (Repl) 352, *100*.

Cases also cited

Bendles Motors Ltd v Bristol Corpn [1963] 1 All ER 578, [1963] 1 WLR 247, DC.

Burdle v Secretary of State for the Environment [1972] 3 All ER 240, [1972] 1 WLR 1207, DC.

Cheshire County Council v Secretary of State for the Environment (1971) 222 Estates Gazette 35, [1972] JPL 270, DC.

Hammersmith London Borough Council v Secretary of State for the Environment (1975) 73 LGR 288, 30 P & CR 19, DC.

Lewis v Secretary of State for the Environment (1971) 70 LGR 291, 23 P & CR 125, DC.

Mansi v Elstree Rural District Council (1964) 62 LGR 172, 16 P & CR 153, DC.

Metallic Protectives Ltd v Secretary of State for the Environment [1976] JPL 166, DC.

Trentham (G Percy) Ltd v Gloucestershire County Council [1966] 1 All ER 701, [1966] 1 WLR 506, CA.

Trevors Warehouses Ltd v Secretary of State for the Environment (1972) 23 P & CR 215, DC.

Vickers-Armstrong v Central Land Board (1957) 9 P & CR 33, CA

Appeal

Two enforcement notices dated 4th April 1973 and 13th September 1973 respectively were served on the appellants, Brooks & Burton Ltd, by the Wimborne and Cranborne Rural District Council, acting as agents for the second respondents, the Dorset County Council, as the planning authority, pursuant to s 87 of the Town and Country Planning Act 1971, in respect of the appellants' use of land known as Holt Brickworks, Holtwood, Wimborne, Dorset. The appellants appealed to the first respondent, the Secretary of State for the Environment, against the notices. The Secretary of State ordered an inquiry which was held by his inspector, H St J Grant Esq, from 22nd October to 9th November 1974. On 19th April 1975 the inspector made his report to the Secretary of State. By letter dated 14th October 1975 the Secretary of State pursuant to s 88 of the 1971 Act upheld with amendments the two enforcement notices. The appellants appealed against his decision under s 246 of the 1971 Act. On 22nd July 1976 the Divisional Court of the Queen's Bench Division (Lord Widgery CJ, Melford Stevenson and Caulfield JJ) dismissed the appeal. The appellants appealed to the Court of Appeal pursuant to leave of the Divisional Court and, to the extent that that leave did not cover the issue of the validity of the enforcement notice of 4th April, by leave of the Court of Appeal. The facts are set out in the judgment of the court.

Monique Viner and *William Hicks* for the appellants.
Peter Boydell QC, *Harry Woolf* and *Robert Seabrook* for the Secretary of State.
The second respondents did not appear.

Cur adv vult

28th July. **LAWTON LJ** read the following judgment of the court: In this appeal, in which the Dorset County Council have not appeared, the main questions for decision have been these. First, was an enforcement notice dated 13th September 1973 served on the appellants by the Wimborne and Cranborne Rural District Council, acting as agents of the Dorset County Council as the planning authority, null and void? Secondly, even if that enforcement order was valid, did the Secretary of State misdirect himself in law on the facts found by the inspector and as to the construction of the Town and Country Planning (Use Classes) Order 1972 ('the Use Classes Order')? Thirdly, was an enforcement notice dated 4th April 1973, and served by the same planning authority, valid having regard to the facts found by the inspector?

The land to which these enforcement notices applied was about four miles north-north-east of Wimborne Minster. We shall refer to this land as the 'appeal site'. It covers about five acres but the activities which led to the serving of the two enforcement notices were on only part of the site, the area being about 1.78 acres. We shall refer to this as the 'block-making site'. The appeal site lies behind some houses in the hamlet of Holt and is approached by an accommodation road off an unclassified road running through the hamlet. This site, together with some adjoining land, was for a long time before 1963 known as Holt Brickworks. We shall refer to all that land as the 'brickworks land'. Brick-making on a small scale was carried on there from 1929 until 1958. Clay was hauled up by machinery from clay-pits on this land. It was moulded in a shed. The moulded bricks were then dried in open-sided sheds known as hacks, and when sufficiently dry they were burnt in kilns. By 1937 there were three kilns. As brick-making was taking place on 1st July, 1948, that activity became an established use under the Town and Country Planning Act 1947: see s 12(1). Under the Town and Country Planning (Use Classes) Order 1950[1], the 'burning of building bricks' became a class VI use. In 1958 brick-making stopped. The then owner of the brickworks land applied to the planning authority for permission to use three acres

1 SI 1950 No 1131

of it for light industrial purposes, a class III use. A large part of that three acres was on the appeal site. The application was granted on 28th January 1959. Later in that year the brickworks land was sold to a Mr Stokes, together with the goodwill of the brick-making business. Mr Stokes found it impracticable to carry on the brick-making business. The land was unused from 1959 until the end of 1963; but the buildings and machinery remained.

In the summer of 1963 Mr Stokes agreed to sell the brickworks land to three partners, who were two brothers named Sturtevant and a Mr King. The conveyance was dated 14th October 1963. The partners wanted to use a small part of the brick-works land to make concrete blocks. They started to do so in November 1963. By Christmas 1963, commercial production can be said to have been established. Planning permission for this change of use had neither been asked for nor given. It was a development of the land in breach of planning control, but as it had started before the end of 1963 and no enforcement notice had been served in respect of it before 1973, the partners and their successors in title became immune from enforcement; but the use for concrete block-making was not one for which planning permission had been granted: see ss 23 and 87 of the Town and Country Planning Act 1971 and *LTSS Print and Supply Services Ltd v London Borough of Hackney*[1]. That this use was not a lawful one, even though the occupiers were immune from enforcement proceedings, is of importance in relation to the appellants' submissions as to the validity of the enforcement notice dated 4th April 1973.

By 1972 Mr King was dead. One of the Sturtevant brothers had sold out to the other. He was carrying on with the help of his son. Their operations were then on a small scale. They made concrete blocks for garden use. Two sheds were in use. One had block-making machinery in it which was driven by a diesel engine. This caused some noise which could be heard outside the boundaries of the appeal site. The other was used as a staff room and had a lavatory in it. The blocks when made were dried in the open air. This was done by placing them on concrete strips set in hoggin which had been laid down. About six men were engaged in block-making. The potential production for the machinery and manpower was about 300,000 blocks a year but this was not accomplished. The vehicular traffic to and from the block-making site was light. The office work was done in a bungalow in a corner of the block-making site. Planning permission for the erection of this bungalow had been given in 1959 but its use was limited to light industrial purposes.

In 1972 the appellants became interested in the brickworks land. They had ideas for increasing the production of concrete blocks by the use of more modern machinery. They made enquiries about the planning position. In the autumn of 1972, one of the appellants' directors, a Mr Brooks, called at the local planning office at Wimborne Minster and had an interview with a Mr Belcher, who was the local building inspector. Mr Belcher said he knew the brickworks land and that concrete blocks had been made there for ten years or more. A few days later Mr Brooks called on Mr Belcher again. On this occasion Mr Belcher said that he had looked up the records and that planning permission for industrial use had been given for three acres and that he could see no reason why Mr Brooks's company should not carry on with concrete block-making. He suggested that Mr Brooks should call on the planning officer, a Mr Belsten. This Mr Brooks did, accompanied by another director. Mr Belsten got out the plans and checked the records. He confirmed that there was a permitted use on three acres under class III. Mr Brooks told him that his company had plans to install a new mixer and to concrete the yards. Mr Belsten said that they could carry on making concrete blocks.

The appellants' two directors assumed that their company would not require planning permission for what they had in mind to do by way of block-making on the appeal site. No application was ever made for planning permission. When in

1 [1976] 1 All ER 311, [1976] QB 663

1973 the appellants learned that the planning authority were claiming that they should have obtained permission for what they were doing and served the enforcement notice dated 13th September 1973 they were indignant. In the inquiry which was held as a result of the service of this and other enforcement notices, the appellants contended that the planning authority were estopped by what Mr Belcher and Mr Belsten had said to them from alleging that there had been any development of the appeal site which required planning permission. The inspector rejected this contention. So did the Secretary of State. On the appeal from the latter's decision which the appellants made to the Divisional Court they again raised the issue of estoppel and again failed. The Divisional Court's order did not indicate that leave to appeal on that issue had been given. At the hearing counsel for the appellants asked this court for leave to appeal on that issue. After some discussion she abandoned that application. This was a wise decision as on the evidence and the inspector's findings estoppel would have been difficult, probably impossible, to establish. We say no more about this issue.

Confident that they could lawfully use the appeal site for what they wanted to do, the appellants agreed to buy it in November 1972. It was conveyed to them on 14th December. Once in possession they set about modernising and expanding the business which the Sturtevants had carried on. They planned to produce concrete blocks for general building use as well as for ornamental garden use. Blocks of the new type were to be made in the open air with modern equipment. For this purpose they obtained and installed in the open air on the block-making site some machinery called a batching plant. It was large, standing about 25 feet [7·62 metres] off the ground. It could be seen from neighbouring properties. It made some noise, as did the diesel generator which provided it with electricity. A small amount of cement dust was released when cement was fed into it. Other smaller machines were brought on to the block-making site and installed in the open. The machinery which the Sturtevants had used for making garden blocks was retained and used in one of the two sheds in wet weather. The other shed was used, as it had been in the Sturtevants' time, as a workshop with welding equipment and tools in it. Part was set aside as a staff room, adjoining which was a lavatory. The bungalow was used solely as offices. The new machinery produced many more blocks than had been produced in the Sturtevant days. Production began to run at a rate of about 1,200,000 per annum. More men had to be employed, 15 or so instead of six. The traffic to and from the site increased considerably; more materials were brought on to the site, more blocks taken away. The materials had to be stored pending use. This was done on a small piece of land, about $\frac{1}{4}$ acre in size to the south-east of the area which had been used by the Sturtevants for block-making. Lorries were also parked there from time to time.

The people living around did not like what was now going on. Complaints were made to the planning authority. They looked into the matter. What was going on was not a use of the block-making site 'as a light industrial building' under class III of the Use Classes Order which was the use for which permission had been granted in 1959. The reason for this was that the appellants' block-making activities were undoubtedly a detriment to the amenity of the neighbourhood by reason of noise and dust: see the definition of 'light industrial building' in art 2(2) of the Use Classes Order, which is as follows:

> '"light industrial building" means an industrial building (not being a special industrial building) in which the processes carried on or the machinery installed are such as could be carried on or installed in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit.'

The planning authority decided to use its enforcement powers and to refuse belated applications for planning permission which the appellants made when they appreciated that there was doubt about the planning situation. Two enforcement notices

dated 7th February 1973 were served. This appeal is not concerned with either of them. The next notice was dated 4th April 1973, and required the appellants to demolish the batching plant which they had installed. There was another notice, dated 2nd July 1973, requiring the appellants to discontinue use of the land for a temporary office. We have not been concerned with that notice. The last of the notices was dated 13th September 1973. The object of this notice was to stop the appellants making concrete blocks in the way they had been doing. As this notice is said to be null and void, it is necessary to refer to it in some detail. It was in common form with four recitals followed by a paragraph telling the owners, i e the appellants, what they were required to do. One of the recitals set out the planning authority's allegation. It was as follows:

> 'It appears to the Council that after the 31st day of December 1963 there has been a breach of planning control in that the said land [i e the appeal site] has been developed by the making of a material change in the use thereof and of the buildings situated therein to a use for the purpose of manufacture of concrete blocks, and other industrial purposes other than those indicated under class III of the Town and Country Planning (Use Classes) Order 1972 without the grant of permission required in that behalf under Part III of the Town and Country Planning Act, 1962, or Part III of the Act of 1971.'

The material parts of the requirement were as follows: the appellants were required within two months—

> 'to discontinue the use of the said land and of the buildings situate on the said land for the manufacture of concrete blocks and other industrial uses and to remove from the said land and the buildings situate thereon plant and machinery used or designed for the manufacture of concrete blocks and restore the land and buildings to their original condition before the said development took place.'

The appellants by letter dated 15th October 1973 appealed to the Secretary of State against the service of these enforcement notices. He ordered an inquiry which was held by his inspector, Mr H St J Grant, from 22nd October to 9th November 1974. He heard evidence and listened to elaborate submissions. He made a lengthy report to the Secretary of State dated 19th April 1975. It contained no less than 604 paragraphs. He recommended that the enforcement notices with which this appeal is concerned should stand, with modifications of the periods of time for compliance.

The Secretary of State gave his decision in a long and carefully worded letter dated 14th October 1975. The relevant parts of his decision can be summarised as follows. First, that although the enforcement notice dated 13th September 1973 was not null and void, it should be varied. In the recitals the reference to class III of the Use Classes Order should be deleted and there should be substituted words to indicate what the planning authority were complaining about, namely the use of a mobile machine, the extension of the area used for block-making and the intensification of use; and the requirement paragraph should be amended to read so as to call on the appellants to discontinue the use of the appeal site 'for the manufacture of concrete blocks by a mobile block-making machine and to remove from the said land the mobile block-making machine and other plant used in connection with it'. Secondly, that the use of the appeal site by the Sturtevant partnership from shortly before 1st January 1964 until the appellants took it over from them had been a class IV use, not a class III one; that this use, although not a permitted one, had become one which was immune from enforcement proceedings. Thirdly, that there had been a material change of use by the appellants. This had come about in three ways: by block-making in the open, by different working procedures 'together with intensification of the potential capacity of the plant' and by the extension of the area used for block-making to include land to the west to provide a concreted area for

the storage of blocks produced by the mobile block-making machine. It was accepted by counsel for the Secretary of State that there had been no extension to the west of the area used for block-making. The only extension had been a small one of about ¼ acre to the south-east and that was not used for actual block-making but for the storage of materials and the occasional parking of vehicles. The Secretary of State accepted the other recommendations made by the inspector.

The appellants appealed to the Divisional Court against the Secretary of State's decision. The appeal was made under s 246 of the Town and Country Planning Act 1971. It could only be made on points of law. On the hearing of this appeal Lord Widgery CJ commented critically on what he called 'the degree of technicality into which the law of town and country planning has now come'. We share his antipathy for this development, of which this case is a striking example. The Divisional Court adjudged first, that the enforcement notice dated 13th September 1973 was not null and void and could lawfully be amended in the way the Secretary of State had done secondly, that the part of the appeal site on which block-making was being carried out in the open had never acquired the capacity for use as an industrial building because it had never been land ancillary to an industrial building; and thirdly, that, because of the activities being carried on in the open, apart altogether from the changes in the volume and methods of manufacture, there had been a material change in the use of the appeal site and in consequence unlawful development. The Divisional Court did not give any ruling on the enforcement notice dated 4th April 1973; but it dealt at length with the issue of estoppel, with which we are no longer concerned. The appeal was dismissed.

Before this court, counsel for the appellants renewed and elaborated the arguments which she had put before the Divisional Court. It will be convenient to start with those directed to the alleged total invalidity of the enforcement notice dated 13th September 1973. Leave to appeal was not given by the Divisional Court on this issue. It is clear from the court's order that the Divisional Court did not think that such leave had been asked for. In the light of what appears in the transcript, there is no reason why they should have thought that leave was being asked on this issue. But, solely because we were told that there had been some misunderstanding on the part of counsel on both sides, who believed that such leave had been asked for and given, we decided that we should grant leave. Otherwise we would not have done so. Counsel for the appellants contended on this issue that this notice was founded on a misconception as to what had happened in the past. The planning authority had wrongly assumed that the Sturtevant partnership had used the appeal site for class III purposes whereas they had used it for class IV purposes. This, submitted counsel for the appellants, was a fatal defect. We do not agree. The planning authority had overstated their case; but that did not mean they had no case at all. Provided the analogy is not taken too far, an enforcement notice can be likened to an indictment. In an indictment the prosecution may charge more than they can prove, as, for example, by charging causing grievous bodily harm with intent, when they cannot, as it turns out, prove the intent; but if they can prove the causing of grievous bodily harm, a conviction can be founded on the indictment. So with this enforcement notice. The allegation was that the appellants were using the appeal site for the manufacture of concrete blocks in a different way from that in which it had been used in the past; and so it had been but not as differently as the planning authority had alleged. Counsel for the appellants' complaint about the requirement part of the enforcement notice was based on its alleged ambiguity. It left uncertain, she said, what the appellants had to do to comply with it. This uncertainty was made the greater by the reference in the recitals to an earlier alleged class III use. Again we do not agree. Had this enforcement notice been drafted by a skilled conveyancer it would, no doubt, have been made more specific; but it was not. It was probably drafted by or for a planning officer and was intended to be read by the appellants' directors. We have no doubt as to how they would have construed it. They were

to stop doing what they were doing and to run the appeal site in the same way as the Sturtevant partnership had run it. It was effective enough for its purpose but capable of improvement. This is what it got from the Secretary of State by way of amendment. In our judgment it was far from being a notice which was null and void within the principles referred to by Upjohn LJ in *Miller-Mead v Minister of Housing and Local Government*[1].

As an alternative to her submission that this enforcement notice was null and void, counsel for the appellants argued that the making of the amendment after the inquiry had been held had resulted in an injustice to the appellants because they had attended the inquiry to meet the allegations and requirements contained in the unamended notice and had had no opportunity of dealing with the case revealed by the amended notice. She said that, as the appellants' counsel, she would have conducted their case differently if the amended form of notice had been before the inspector. She told us the respects in which she would have conducted the case differently. There is nothing in this submission. As we have already said, it was clear from the start what the inquiry was about and the appellants must have known what it was about. Had the amendment been under consideration by the inspector, counsel for the appellants might have emphasised one point more than another, but it could not have made any real difference to the case which the appellants were putting forward.

The appellants challenged the Secretary of State's decision about there having been a material change in the use of the appeal site. In his decision letter he had given two reasons for saying that there had been such a change in use. The first was that the processes carried out on the open land were not dependent at all on any use of the industrial buildings. Accordingly, insofar as such processes were new ones, the use could not be regarded as falling within class IV of the Use Classes Order, since they were not 'a use as a general industrial building'. The new processes were development within s 22(1) of the 1971 Act, but as they were not dependent at all on any use of the industrial buildings they did not attract the benefit of s 22(2)(*f*), which excludes from the definition of development in s 22(1) any uses 'in the case of buildings or other land which are used for a purpose of any class specified in an order made by the Secretary of State under this section, the use for any other purpose of the same class'. New processes within class IV carried on inside the buildings would have been permissible under s 22(2)(*f*) but new ones carried on outside were not. The second reason was that on the evidence there had been a material change of the use of the whole block-making site by the introduction of a materially different working procedure together with intensification of the potential capacity of the plant.

The Divisional Court did not give any ruling on that part of the Secretary of State's decision about a material change of use coming about through the intensification of the manufacturing procedure on the appeal site. Lord Widgery CJ in his judgment, with which Melford Stevenson and Caulfield JJ agreed, said that the open land which the appellants had used for concrete block-making had never acquired the capacity for use as an industrial building because it was never land ancillary to an industrial building and that some connection of that kind was necessary before the characteristic of the use can be acquired by open land. It was on this issue that leave to appeal, so far as appears from the order of the Divisional Court, was in fact given by that court.

Both the Secretary of State and Lord Widgery CJ put a gloss on the relevant provision in the Use Classes Order which is art 2(3). It provides as follows: 'Reference in this order to a building may, except where otherwise provided, include references to land occupied therewith and used for the same purposes.' The Secretary of State said that the concrete block-making in the open was not dependent on any use of the industrial buildings. The word 'dependent' is not to be found in art 2(3); nor is the phrase 'land ancillary to an industrial building' which Lord Widgery CJ used.

1 [1963] 1 All ER 459 at 470, 471, [1963] 2 QB 196 at 226

The relevant words are 'land occupied therewith and used for the same purposes'. In the context, the words 'lands occupied therewith' must mean land other than the site of the building. The words 'and used for the same purposes' are words of limitation restricting the extent of the land which can be included with a structure so as to constitute a 'general industrial building'. The amount of land which comes within art 2(3) will usually be small, for example a loading bay or a yard used for storing fuel; but in exceptional cases it may be extensive, as in a linen-weaving factory which bleaches its woven products in the open air. Counsel for the appellants pointed out that this Use Classes Order does cover uses which are dependent on or ancillary to something else; but when it does so it uses language different from that in art 2(3). Thus art 3(3) refers to a use 'which is ordinarily incidental to and included in any use specified in the Schedule to this order'; and classes VI and VII except from their general words of definition processes which are 'ancillary to the getting, dressing or treatment of minerals'.

Counsel for the Secretary of State submitted that art 2(3) should be construed in the restricted sense used by the Secretary of State and the Divisional Court. This construction had been applied, he said, ever since use classes orders had first been made, which was nearly 30 years ago. It was one which conformed to the general policy of the Town and Country Planning Acts and the use classes orders made under them. Section 22(2)(*f*) of the 1971 Act excluded from the definition of 'development' in s 22(1) 'in the case of buildings or other land' changes of use which were within the same class of use as had been carried on previously. The policy behind this was that a change of use within the same class inside a building was unlikely to be detrimental to the amenities of the neighbourhood. The reference to 'other land' in s 22(2)(*f*) and in art 3(1) of the Use Classes Order was irrelevant to this case because the only relevant use was that 'as a general industrial building' under class IV. These words 'other land' were put in to cover industrial activities within classes VI, VII and VIII which might be carried on in the open air. If art 2(3) were not construed in a restrictive sense, a class IV change of use in a building and on the 'land occupied therewith and used for the same purposes' might result in a deleterious interference with the amenity of the neighbourhood. Counsel for the Secretary of State also submitted that a wider construction of art 2(3) could result in the kind of absurdity to which Lord Widgery CJ referred in his judgment when he said:

> 'But what I do not believe is possible is for a piece of land to acquire, as it were, industrial rights for planning purposes merely because in the corner is a tiny building used for industrial purposes.'

Nor do we; and this is so under the wider construction which we adjudge to be the correct one. The test is the use to which the land occupied with the building has been put. If it has been used for the same purpose as the building it can be regarded planning-wise as one unit with the building; but if it has not been so used it cannot be. In our judgment this is the plain meaning of the words used in art 2(3). If policy requires a more restricted meaning to be put on the article, the order will have to be amended.

When the construction which we have adjudged to be correct is applied to the inspector's findings of fact, the result must be that during the Sturtevant occupation of the appeal site the part of the block-making site in the open was used for the same purpose as the shed in which the concrete block-making machinery was installed. The blocks produced in the shed were dried in the open on concrete strips set in hoggin. This was all part of the block-making process. The whole block-making site was a 'general industrial building' for the purposes of the Use Classes Order; and, as long as the appellants confined their operations on this site to class IV uses, they were entitled to the benefit of s 22(2)(*f*) even though any new processes and intensification of use amounted to a material change of use.

Counsel for the appellants submitted that on the evidence there had not been a

material change of use anyway because all that had been proved had been a change in the degree of use, not the kind of use. She said that the Secretary of State had misdirected himself in law in deciding that a change in the degree of use could be a material change of use. Having regard to what we have adjudged to be the right construction of art 2(3), it matters not whether the intensification of use found by the inspector to have taken place did amount to a material change of use, provided the new use was a class IV one; and it clearly was. Nevertheless counsel for the appellants' submission on intensification of use calls for examination because she told us that there is no reported case in which a change in the degree of an existing use, often referred to as intensification of use, has been adjudged to be a material change in use. As her researches have clearly been thorough, this may be so as a matter of the strict application of the law relating to precedent. In *Guildford Rural District Council v Penny*[1], Lord Evershed MR, without deciding the point, expressed the opinion that 'Mere intensity of user may ... affect a definable character of the land and of its use'. In *Glamorgan County Council v Carter*[2], Salmon J expressed the opinion on the facts before him that 'Once it is established that the site is as a site a caravan site, it does not seem to me that the use is materially changed by bringing a larger number of caravans on it'. On numerous occasions since 1959 the Secretary of State, probably relying on the opinion of Lord Evershed MR, has decided that an intensification of use may be a material change of use. Particulars of some of these decisions are to be found in the Encyclopedia of Planning Law and Practice[3]. What is clear is that, when hearing appeals from the Secretary of State in cases where there has been a question whether there has been a material change of use, the courts have consistently held that the question is one of fact and have declined to substitute any decision of their own for that of the Secretary of State: see *East Barnet Urban District Council v British Transport Commission*[4] and the cases referred to in the Encyclopedia of Planning Law and Practice[5]. We have no doubt that intensification of use can be a material change of use. Whether it is or not depends on the degree of intensification. Matters of degree are for the Secretary of State to decide. He did so in this case. There was ample evidence to support his decision on this point. It cannot be upset in this court.

Counsel for the Secretary of State sought to uphold the Secretary of State's decision about change of use on another ground. He submitted that when the appellants started to make concrete blocks for general building use in the open air on the appeal site they began a new operation which was an unauthorised development within s 22(1) of the 1971 Act. They were not, he argued, merely intensifying an existing use. We do not agree. The primary purpose for which the Sturtevants had used the site and the appellants were using it was for concrete block-making. It is this primary purpose which determined the character of the use: see *Brazil (Concrete) Ltd v Amersham Rural District Council*[6].

There remains one detail to be dealt with in relation to change of use, namely the use to which the appellants put the small area of ¼ acre to the south-east of the appeal site. The Secretary of State admittedly was mistaken about the situation of, and the use to which the appellants put, the additional land to which he referred in his decision letter. This, in our judgment, is of no materiality in relation to the enforcement notice dated 13th September 1973.

We turn now to the appellants' contention that the enforcement notice dated 4th April 1973 was invalid. The appellants did not get leave from the Divisional Court to appeal against this notice but on the hearing of the appeal, in order that this

1 [1959] 2 All ER 111 at 113, [1959] 2 QB 112 at 125
2 [1962] 3 All ER 866 at 867, [1963] 1 WLR 1 at 5
3 Vol 4, pp 6077-6079
4 [1961] 3 All ER 878, [1962] 2 QB 484
5 Vol 4, p 6079
6 (1967) 65 LGR 365

further issue might be considered in the light of our decision, differing from the Divisional Court in one respect, as to the enforcement notice of 13th September 1973, we granted leave.

The allegation in the April enforcement notice was that in breach of planning control the appeal site had been developed by the erection of a concrete batching plant. The requirement was that the appellants should demolish this plant and remove all materials arising from such demolition and restore the land to the condition it was in before the unauthorised development had taken place. In the early part of 1973 the appellants erected the batching plant on the block-making site and began to use it in May 1973. It stood on the concrete yard. Counsel for the appellants made an elaborate submission to justify the erection of this machinery. It was to the effect that the Sturtevants' use of the appeal site had not been in contravention of planning control. This was based on the history of the appeal site and of the adjoining land when the brickworks were operating, and on the contention that burning bricks and making concrete blocks were substantially the same operation, since the burning of bricks and the drying of blocks were mere finishing processes after moulding had been done. The Secretary of State rejected this argument and decided that the concrete block-making started by the Sturtevants had been a material change in the use of the site. That use was a class IV use and not a class III use for which planning permission had been granted in 1959. It followed that the Sturtevant use was not a use for which planning permission had been granted although with the passing of time it became a use which was immune from enforcement: see s 87 of the 1971 Act and *LTSS Print and Supply Services Ltd v London Borough of Hackney*[1]. Counsel for the appellants accepted that the *LTSS* case[1], being a decision of this court, was binding on us. It follows, in our judgment, that the appellants, as successors to the Sturtevants, could not take advantage of the provisions of art 3(1) of the Town and Country Planning General Development Order 1973, which permits development of any class specified in Sch 1 to the order. Paragraph 1 of class VIII in Sch 1 permits the installation or erection by way of addition or replacement of machines not exceeding 15 metres in height. The batching plant was under this height. But advantage of this permission can only be taken by an industrial undertaker on land used 'otherwise than (i) in contravention of previous planning control or (ii) without planning permission granted or deemed to be granted under this Act'. This qualification renders counsel for the appellants' argument of no avail to the appellants. She wished to reserve the right to argue elsewhere that the *LTSS* case[1] had been wrongly decided. In our judgment no valid criticism of the enforcement notice dated 4th April 1973 can be made.

The appeal will be allowed and the case will be remitted to the Secretary of State in accordance with RSC Ord 94, r 12(5), for him to reconsider and determine it in the light of our opinion as to the right construction of art 2(3) of the Use Classes Order.

Appeal allowed. Case remitted to Secretary of State. Leave to appeal to House of Lords refused.

Solicitors: *Riders*, agents for *Derek T Wilkinson & Co*, Bournemouth (for the appellants); *Treasury Solicitor.*

Mary Rose Plummer Barrister.

1 [1976] 1 All ER 311, [1976] QB 663

The Trustees of the Castell-y-Mynach Estate v The Secretary of State for Wales and another [1984] Lexis Citation 186

[1985] JPL 40

QUEEN'S BENCH DIVISION (CROWN OFFICE LIST)

NOLAN J

8 JUNE 1984

8 June 1984

P Roderick for the Applicants; S Brown for the First Respondent; The Second Respondent did not appear and was not represented

LC Williams & Prichard, Cardiff; Treasury Solicitor

NOLAN J

By this motion, the Applicants seek the reversal of the decision of the First Respondent under Sections 53 and 36 and the Ninth Schedule of the Town and Country Planning Act 1971, dated the 23rd November, 1983, dismissing the Applicants' Appeal to the First Respondent against the determination of the Second Respondent, the Taff-Ely Borough Council, that the repairs and restoration of the property known as Brystafach, Pentyrch in the County of Mid Glamorgan to its former condition for residential use required planning permission. The substantial issue which had to be considered by the First Respondent was whether those repairs and restorations involved a material change of use. The Second Respondent is not represented in the proceedings before me.

The decision of the First Respondent is contained in a letter dated the 23rd November and is addressed to the solicitors acting for the Applicants. In the course of that letter, the First Respondent quoted paragraph 22 in the report of the Inspector appointed by him. That passage reads: "During the period from 1965 when the building was last occupied as a dwelling until 1967 there remained some likelihood that land surrounding and including the appeal site might be developed for residential purposes. Since 1967 however the development plan position has been that no proposals for redevelopment affecting the site remained. Although the estate owners retained Brystafach they had made no attempts to maintain the building in a condition suitable for it to be used as a dwellinghouse. Indeed no effort had been made to secure the building in any way. The implication of their lack of action over a period of some 18 years and the deterioration of the building ot a near derelict and totally uninhabitatable state is that a reasonable person might assume that the residential use of Brystafach had been abandoned."

The First Respondent, in his decision, said: "As to the issues to be decided he notes the evidence on the structural condition of the building and agrees with the Inspector's views expressed in paragraph 22 of the report that no attempt had been made to maintain the building in a condition suitable for it to be used as a dwelling house even though since 1967 no proposals for redevelopment affecting the site remained, and that the condition of the building

has deteriorated to such an extent that a reasonable person might assume that the residential use has to all intents and purposes been abandoned."

In the first part of the submissions deployed by Mr Roderick before me, he argued that a wrong approach is to be detected in this passage from the decision letter of the First Respondent with regard to the relevant considerations. In particular, he submits, there is an undue reliance upon the objective appraisal of the condition of the building when what should have been taken into account were four factors, of which the actual physical state of the building is only one. I shall return to that point later.

Before doing that, it will be convenient to give a little more information about the site and the contentions of the parties as they appear in the Inspector's report. In paragraph 5 of his report, the Inspector said: "The appeal building itself was used as a dwelling until 1965 and clearly retains the general appearance of having been a dwelling which has now fallen into considerable disrepair. The building is constructed of stone and brick under a pitched slate roof. The western and eastern stone gable walls appear fairly sound but a large part of the nortern flank wall has collapsed leaving a section of severely damaged roof hanging unsupported. The northern and southern flanking walls are mostly constructed of stone to the ground floor with a cavity brick wall to the first floor. Both flank walls, particularly the northern wall, appear unsound. Many slates have been lost from the roof and evidence of substantial rot and structural damage to the roof timbers can be seen. No doors or window frames remain to the building. Internally all fittings have been removed. No ground floor construction can be seen and all internal timber including floor joists, staircase and some ceiling joists to the roof have been removed. The general internal appearance is one of almost total disrepair and dereliction. Some signs of entry by cattle could be seen amongst the rubble on the floor."

I pause at this point to observe that one argument that had been canvassed against the Applicant was that the original residential use of the property had been replaced by agricultural use involving the occupation of the premises by cattle as a shelter.That, as we shall see, was not an argument which commended itself to the Inspector.

The report of the Inspector goes on in the ordinary way to set out first the case for the Applicants. In the course of setting it out, the Inspector observes that at no time did the owners of the estate have any intention of abandoning the rights of the existing use. He repeats this part of their submission at the end of paragraph 12 of his report. He says: "On the fourth factor the specific exclusion of the property from the agricultural tenancy of the surrounding land indicated a specific intention on the part of the owners to retain the property."

In that same paragraph, it is clear the Applicants had begun by making these submissions: "In considering cases of this nature it was agreed that four factors should be considered (a) physical condition of the building; (b) period of non-use; (c) whether there had been any other use; and (d) evidence regarding the owner's intentions." It is common ground before me, as appears from the authorities, that these are the four principal factors to be taken into account in a case of this sort.

In setting out the case for the Council, the Inspector notes the submission that the Appellants themselves -- the Applicants before me -- had made a conscious decision not to re-let the property after the licensee had died in 1965. The Inspector went on to make a number of findings of fact after completing the summary of the case for the Council. The general nature of those findings may be anticipated from what I have said. As far as the building itself is concerned, he described it in his findings as having "fallen into considerable disrepair. No internal fittings, ceilings, first floor, staircase, windows or doors remained at the time of my inspection. It was agreed by the parties that the structure retained the general appearance of a house."

In paragraph 21 of his conclusions, the Inspector rejects the submissions of intermediate use for agricultural purposes. In doing so, he uses these words: "Judging from the precarious state of parts of the structure I would

consider it unlikely that a farmer concerned about the welfare of his stock would regard the building as a safe or useful shelter for his cattle."

In substance, the issue was whether the building was abandoned or not. It was on that basis that the Secretary of State made his decision. In developing his argument before me, Mr Roderick dwelt on the four factors. He submitted that inadequate attention was paid to the owners' express intentions, supported as they were by corroborative evidence. I think that there is force in Mr Brown's remarks that in a contest of this sort, the owner's declarations of his own intentions cannot avoid being self-serving. Unless he claimed such an intention, he would be abandoning the contest. It is therefore not surprising that the courts should have approached all four factors, taking them together, in order to establish whether abandonment had occurred.

The position is, to my mind, helpfully summarised by Mr Justice Bridge, as he then was, in Ratcliffe v Secretary of State for the Environment and another 235 EG 901, which was quoted by Mr Justice McNeill in Nicholls v Secretary of State for the Environment and another [1981] JPL 890. Mr Justice McNeill, quoting Mr Justice Bridge, said: "'There" -- referring to Hartley -- "one found the clearest explanation of the principles to be applied to resolve any question of whether a use of land had been abandoned for planning purposes. It was clear from that case that once a use has been abandoned, it could not be resumed without planning permission. Cessation of use followed by non-use might be merely temporary or might amount to abandonment. Abandonment depended on the circumstances. If land remained unused in such circumstances that a reasonable man might conclude that the previous use had been abandoned, then a tribunal should conclude that it had been abandoned.'"'

However, Mr Roderick submitted that one should look at the evidence before the Inspector and the Secretary of State relating to the four factors. There was no intermediate use in this case, the suggestion of occupation by the cows having been discounted. Although the period of non-use was 16 or 17 years, that is not an exceptionally long period for a dwelling house to remain unused. Mr Roderick referred me to other instances in which dwelling houses, although in similar states of disrepair to the house in the present case, were not treated as demonstrating abandonment. The physical condition, submitted Mr Roderick, was such as to leave this building still resembling a house and on that ground, the Secretary of State misdirected himself in going by the view of a reasonable man rather than apprising his mind of the crucial issue, which was the true intention of the owners. But where as here you have an extreme case of dereliction, a building considered by the Inspector as unlikely to be fit for us as a cattle shelter, it seems to me that the objective view of a reasonable man was a highly relevant matter for the Inspector and the First Respondent to take into account.

Mr Roderick also relied on the fact that the site had not been included in an agricultural tenancy as corroboration of the intention of the owners. Secondly, he submitted that there had been no positive act of abandonment. In the sense that there had been no formal abandonment that too is true, although it is perhaps fair to say that the acknowledged and conscious decision not to re-let the property after the licensee had died in 1965, coupled with the fact that the property was allowed to fall into an uninhabitable state must come close to positive abandonment.

Finally, as corroborative evidence, Mr Roderick relied on the approach made by the owners to the Council in 1981 when they suggested giving up the house as residents and abandoning their claim for residential use in return for permission to build a house elsewhere. Mr Roderick submitted that that supports the genuineness of their view that it was still a residential property.

To my mind, what is decisive is that the argument before the Inspector, reviewed by the First Respondent, was conducted on the agreed basis that all four factors relevant to this matter were taken into account. The weight that any particular factor bears must depend on the particular case. It is true that in this case the extreme state of disrepair seems to have affected the mind of the First Respondent, as it did the Inspector, more than anything else. However, to my mind, that was not at all inconsistent with the view formed, whichever one of the four factors one looks at. The only strong evidence the other way was the expressed intention of the owners, which was repeated at the hearing. However, genuinely expressed and put forward, it appears to have yielded to the weight of the other

factors in the mind of the Inspector. Therefore, I can see no error of law on the grounds advanced by Mr Roderick in his first submission.

His second submission is to the effect that the Inspector ignored an important and crucial argument put foward by the Applicants, namely, he ignored their argument that applications in respect of three other properties in the locality had been allowed in the sense that it was agreed that no planning permission was required for them to be used again as residences. It was said that all these properties were in a similar state of disrepair and had been vacated for a similar period of time to that of the building in this case. The one distinction drawn between those properties and the property in the present case by the Second Respondent was the use by cattle, which the Inspector discounted. That argument was put before the Inspector and recorded in paragraph 12 of his report. The Council's counter-argument is set out in paragraph 17 of the report. Paragraph 17 states: "It was accepted that the evidence of an agricultural use was a significant difference between this case and the three other cases referred to by the appellants. However the degree of dereliction and the absence of any action by the owners to maintain or secure the building was sufficient evidence of an intention to abandon any residential use of the building. That was a view supported by the county planning officer to the Mid-Glamorgan County Council in a letter of consultation dated 13 January 1983. He considered that the period of non-use and the condition of the building to be evidence of an intention to abandon it as a residence."

Here one finds, in relation to those other three properties, a decision made partly -- although not entirely -- on the basis of there being no question of agricultural use in their cases. The decision was made by the Council. The Inspector had information about the applications in respect of those properties. He acknowledged what had happened, but they were not before him. It was for him to make his own recommendations in relation to the property in question and he did so. He could not be bound by decisions made by another body in relation to other properties. Although the circumstances were similar, they were not accepted as being identical. It follows that I can see no error of law in the approach adopted by the Inspector or by the First Respondent in relation to the matter which the Inspector had to decide. Therefore, the application must fail.

Application dismissed with costs.

All England Law Reports/1972/Volume 3 /Burdle and another v Secretary of State for the Environment and another - [1972] 3 All ER 240

Burdle and another v Secretary of State for the Environment and another

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, WILLIS AND BRIDGE JJ

20, 22 JUNE 1972

Town and country planning - Development - Material change of use - Planning unit - Determination of what constitutes appropriate unit - Factors to be considered - Planning unit to be taken as whole unit of occupation unless smaller unit recognisable as site of activities amounting to a separate use physically and functionally.

A occupied a site on which there stood a dwelling-house to which was attached a lean-to annexe and certain other buildings. On that site, within the open curtilage, A had carried on, since a time prior to 1963, the business of a scrap yard and car breakers' yard. As an incident to that business from time to time he sold on the site car parts arising from the break-up of cars and occasionally sold car parts acquired from elsewhere. In 1965 the appellants purchased the site and substantially reconstructed the lean-to annexe, in particular by providing it with external display windows. They started using that building for the sale, on a substantial scale, of vehicle spare parts acquired new from manufacturers and for the sale of other goods. In February 1971 the local planning authority served an enforcement notice which stated that it appeared that 'a breach of planning control has taken place namely the use of premises ... as a shop for the purpose of sale of inter alia motor car accessories ... without the grant of planning permission ... ' The appellants appealed to the Secretary of State and both parties presented the case to the inspector on the footing that the whole site was the planning unit with which the inquiry was concerned, the appellants contending that, looking at the site as a whole, the intensification of retail sales had not been such as to amount to a material change of use. The inspector concluded that whether or not the notice was 'properly directed to the whole property or to the annexe' the appeal should fail. In his decision letter however the Secretary of State stated that the appellants' argument that 'the whole site was used for sales and should be regarded as a long established shop' could not be accepted having regard to the definition of 'shop' in the Town and Country Planning Acts and the enforcement notice as worded could relate only to the lean-to annexe. He therefore considered and dismissed the appeal on that limited basis. On appeal,

Held - (i) The reasons given by the Secretary of State for concluding that the lean-to annexe, rather than the site as a whole, was the appropriate planning unit for consideration could not be supported. Although the word 'shop' was inappropriate to describe the whole site it did not follow that the accident of language used by the authority in framing the enforcement notice could determine conclusively what was the planning unit to which attention was to be directed (see p 243 *j* to p 244 *a*, post).

(ii) In determining what was the appropriate planning unit a useful working rule was to assume that it was the whole unit of occupation, unless and until some smaller unit could be recognised as the site of activities which amounted in substance to a separate use both physically and functionally. Since it was impossible to conclude, on the factual and evidential material available, that the Secretary of State would have come to the conclusion that the lean-to annexe was the appropriate planning unit if he had approached the matter on that basis, the appeal would be allowed and the case sent back to him for reconsideration (see p 244 *b d e h* and

j to p 245 *c*, post); dictum of Diplock LJ in *G Percy Trentham Ltd v Gloucestershire County Council* [1966] 1 All ER at 704 applied.

Notes

For a material change of use constituting development, see 37 *Halsbury's Laws* (3rd Edn) 259-263, para 366, and for cases on the subject, see 45 *Digest* (Repl) 328-334, *14-30*.

Case referred to in judgments

Trentham (G Percy) Ltd v Gloucestershire County Council [1966] 1 All ER 701, [1966] 1 WLR 506, 130 JP 179, 64 LGR 134, *Digest* (Cont Vol B) 689, *30d*.

Cases also cited

Bendles Motors Ltd v Bristol Corporation [1963] 1 All ER 578, [1963] 1 WLR 247.

Wipperman and Buckingham v London Borough of Barking (1965) 130 JP 103.

Appeal

By an originating notice of motion dated 4 February the appellants, Derek Stanley Burdle and Dennis Williams, sought an order that the matter of two enforcement notices pursuant to s 47 of the Town and Country Planning Act 1962 and s 15 of the Town and Country Planning Act 1968 dated 3 February 1971 and made by the second respondents, New Forest Rural District Council ('the authority'), and a decision of the first respondent, the Secretary of State for the Environment, pursuant to s 16 of the 1968 Act notified by letter dated 7 January 1972 might be remitted to the Secretary of State for the Environment for rehearing and determination together with the opinion or direction of the court on the matters set out in the grounds of appeal. The facts are set out in the judgment of Bridge J.

R J Roddis for the appellants.

Gordon Slynn for the Secretary of State.

Alan Fletcher for the authority.

22 June 1972. The following judgments were delivered.

BRIDGE J

delivered the first judgment at the invitation of Lord Widgery CJ. This is an appeal under s 180 of the Town and Country Planning Act 1962 from a decision of the Secretary of State for the Environment given in a letter dated 7 January 1972 upholding, subject to variation, an enforcement notice which had been served by the New Forest Rural District Council as delegate of the local planning authority on the present appellants. The appellants occupy a site at Ringwood Road, Netley Marsh, in the New Forest area, which has a frontage of 75 feet and a depth of 190 feet, and on which there stand a dwelling-house to which is attached a lean-to annexe and a number of other buildings which it is not necessary to describe.

The relevant history of the matter is that before the end of 1963, which of course in relation to changes of use is the critical date under the Town and Country Planning Act 1968, the appellants' predecessor in title, a Mr Andrews, carried on, on the site, within the open curtilage, the business of a scrap yard and a car breakers' yard. As an incident of that business he effected from time to time on the site retail sales of car parts arising from the cars broken up on the site. There was some evidence at the inquiry at which this history emerged of a very limited scale of retail sales of car parts arising from sources other than the break-up of vehicles in the course of the breakers' yard business.

The lean-to annexe adjoining the dwelling-house was used by Mr Andrews as an office in connection with the scrap yard business. In 1965 the present appellants purchased the property; whereas Mr Andrews had carried on business under the modest title of 'New Forest Scrap Metals', the present appellants promptly changed the title to the more grandiose 'New Forest Autos'. They found the lean-to annexe in a somewhat decrepit state, and effected a substantial reconstruction and alteration of it which clearly materially altered its appearance. Inter alia they provided it with two external display windows. They started to use that building for retail sales on a

substantial scale for vehicle spare parts not arising from the break-up of vehicles as part of the scrap yard business, but new spares of which the appellants had themselves been appointed stockists by the manufacturers. They also embarked on retail sale of camping equipment and the goods to be sold by retail from the annexe lean-to were displayed both in the new shop windows if one could so call them, and on shelves within the buildings. Finally it is to be observed that as well as advertising themselves as stockists of spare parts for all makes of motor cars, they included in the advertising material the phrase 'New accessories and spares shop now open'.

Those activities prompted the local planning authority to serve on 3 February 1971 the enforcement notice which is the subject of the appeal to this court. That notice recites:

> '... that it appears to the Council: That a breach of planning control has taken place namely the use of premises at New Forest Scrap Metals, Ringwood Road, Netley Marsh, as a shop for the purpose of the sale inter alia of motor-car accessories and spare parts without the grant of planning permission required in that behalf in accordance with Part III of the Town and Country Planning Act, 1962.

The steps required to be taken by the notice are the discontinuance of the use of the premises as a shop and the restoration of the premises to their condition before the development took place. Concurrently with that notice with which the court is concerned, it is to be observed merely as a matter of history that there was also served an enforcement notice directed at the building alterations which had been effected to the lean-to annexe, but as the Secretary of State allowed an appeal against that enforcement notice, it is unnecessary for us to consider it.

The enforcement notice alleging a change of use, be it observed, uses the perhaps ambiguous expression 'premises' to indicate the unit of land to which it was intended to apply. We were told in the course of argument by counsel for the authority that the authority's intention was to direct this notice at the whole of the appellants' site; it alleged a material change of use of the whole site. It seems to have been so understood by the appellants, and when the matter came before an inspector of the Department of the Environment following the appeal to the Secretary of State by the appellants against the notice, both parties presented their cases on the footing that the whole site was the planning unit with which the inquiry was concerned.

The authority's case was that the change in the character and degree of retail sales from the site, as a matter of fact and degree, effected a material change of use of the whole site which had taken place since the beginning of 1964. Indeed, in these proceedings, counsel for the authority has submitted before us that that is

still the proper approach which the Secretary of State should adopt if the matter goes back to him. On that view, so counsel said, the notice as applied to the whole site should be upheld subject to any necessary reservation to preserve to the appellants their right to effect retail sales in the manner and to the extent that such sales were effected by their predecessor before the beginning of 1964.

The appellants' case at the inquiry was in essence that, as a matter of fact and degree, looking at the site as a whole, the intensification of retail sales had not been sufficient to amount to a material change of use.

The inspector, after indicating his findings of primary fact, expressed his conclusions thus:

> 'The legal implications of the above facts are matters for the consideration of the Secretary of State and his legal advisers but it appears to me, from the almost complete absence of reference to wholesale deliveries, that the original business was based on the scrapyard, grew out of the then proprietor's specialisation in the Austin "Seven", an obsolete vehicle, and would not have survived as a mainly retail business. In contrast, while sales of salvaged spares survive, the combination of advertising with improved facilities for display, and the emphasis on new

> items in that display, all now support the appellants' claim that the annexe is a shop. But in becoming a shop a material change has taken place, without planning permission and later than 1 January 1964. Whether or not notice A [which is the use notice] is properly directed to the whole property or to the annexe, the appeal should therefore fail on ground (d).'

I read that conclusion as indicating first that the inspector was aware, although it does not appear from the report that it was raised by the parties, that there was an issue for consideration as to what was the appropriate planning unit to be considered, either the whole site on the one hand, or on the other hand the lean-to annexe, but he took the view that whichever unit one considered, there had been a material change of use, and accordingly he thought the notice could be upheld on that footing. Speaking for myself, if the Secretary of State had adopted and endorsed that view, I do not see that such a conclusion could have been faulted in this court as being erroneous in point of law.

But the Secretary of State did not simply endorse his inspector's conclusion; what he said in the decision letter was this:

> 'Both enforcement notices allege development associated with a shop. It is clear that enforcement notice B [that is the notice relating to the building operations] relates to the building called variously the annexe or lean-to. Enforcement notice A refers to the use of premises as a shop and at the inquiry it was argued for your clients that the whole site was used for sales and should be regarded as a long established shop. This is not an argument that can be accepted in the light of the clearly established definition of a shop for the purposes of the Town and Country Planning Acts as a building used for the carrying on of any retail trade etc The view is taken that enforcement notice A as worded can relate only to the lean-to or annexe. It is proposed to amend the notice to make this clear. The appeal against enforcement notice A has been considered on that limited basis.'

The Secretary of State then went on to ask himself the question: has there been a material change of use of the lean-to annexe? and on the facts, as it seems to me inevitably, he answered that question in the affirmative. Given that the lean-to annexe was the appropriate planning unit for consideration, the decision of the Secretary of State that there had been a material change of use of it was, as I think, clearly right, and, in spite of the argument of counsel for the appellants, I cannot accept that the Minister in any way exceeded his jurisdiction in ordering that the scope of the notice be cut down if it was originally intended to apply to the whole site, so as to limit the ambit of its operation to the lean-to annexe. As such, that was a variation of the notice in favour of the appellants.

But the real complaint and grievance of the appellants is that the Secretary of State has for insufficient or incorrect reasons directed his mind to the wrong planning unit and thereby deprived them of a consideration and decision by the Secretary of State, as opposed to the inspector, of the real question which the appellants

say should have been considered, namely: has the change of activities on the whole site effected a change of use of the whole site which is the appropriate planning unit to be considered?

For my part I am unable to accept that the reasons as expressed by the Secretary of State in his decision letter were good reasons for concluding that the lean-to annexe was the appropriate planning unit for consideration. I accept at once that whether one uses the definition of 'shop' in the Town and Country Planning (Use Classes) Order 1963[a] or the ordinary dictionary meaning of the word 'shop', it is really an absurdity to describe the whole of this site as a shop, but what I cannot

[a] SI 1963 No 708

accept is that the accident of language which the planning authority choose to use in framing their enforcement notice can determine conclusively what is the appropriate planning unit to which attention should be directed.

What, then, are the appropriate criteria to determine the planning unit which should be considered in deciding whether there has been a material change of use? Without presuming to propound exhaustive tests apt to cover every situation, it may be helpful to sketch out some broad categories of distinction.

First, whenever it is possible to recognise a single main purpose of the occupier's use of his land to which secondary activities are incidental or ancillary, the whole unit of occupation should be considered. That proposition emerges clearly from the case of *G Percy Trentham Ltd v Gloucestershire County Council* ([1966] 1 All ER 701 at 704, [1966] 1 WLR 506 at 513), where Diplock LJ said:

> 'What is the unit which the local authority are entitled to look at and deal with in an enforcement notice for the purpose of determining whether or not there has been a "material change in the use of any buildings or other land"? As I suggested in the course of the argument, I think that for that purpose what the local authority are entitled to look at is the whole of the area which was used for a particular purpose including any part of that area whose use was incidental to or ancillary to the achievement of that purpose.'

But, secondly, it may equally be apt to consider the entire unit of occupation even though the occupier carries on a variety of activities and it is not possible to say that one is incidental or ancillary to another. This is well settled in the case of a composite use where the component activities fluctuate in their intensity from time to time, but the different activities are not confined within separte and physically distinct areas of land.

Thirdly, however, it may frequently occur that within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes. In such a case each area used for a different main purpose (together with its indicental and ancillary activities) ought to be considered as a separate planning unit.

To decide which of these three categories apply to the circumstances of any particular case at any given time may be difficult. Like the question of material change of use, it must be a question of fact and degree. There may indeed be an almost imperceptible change from one category to another. Thus, for example, activities initially incidental to the main use of an area of land may grow in scale to a point where they convert the single use to a composite use and produce a material change of use of the whole. Again, activities once properly regarded as incidental to another use or as part of a composite use may be so intensified in scale

and physically concentrated in a recognisably separate area that they produce a new planning unit the use of which is materially changed. It may be a useful working rule to assume that the unit of occupation is the appropriate planning unit, unless and until some smaller unit can be recognised as the site of activities which amount in substance to a separate use both physically and functionally.

It may well be that if the Secretary of State had applied those criteria to the question: what was the proper planning unit which fell for consideration in the instant case? he would have concluded on the material before him that the use of the lean-to annexe for purposes appropriate to a shop had become so predominant and the connection between that use and the scrap yard business carried on from the open parts of the curtilage had become so tenuous that the lean-to annexe ought to be regarded as a separate planning unit.

But for myself I do not think it is possible on the factual and evidential material which is before this court for us to say that that was by any means an inevitable

conclusion at which the Secretary of State was bound to arrive, and that being so I do not think it would be appropriate for us to usurp his function of deciding the question: what is the appropriate planning unit here? to be considered as a matter of fact and degree. Accordingly I reach the conclusion that this appeal should be allowed and that we should send the case back to the Secretary of State with a direction to reconsider his decision in the light of the judgment of this court.

WILLIS J.

I agree.

LORD WIDGERY CJ.

I entirely agree for the reasons so fully and clearly given by Bridge J.

Appeal allowed.

Solicitors: Heppenstall, Rustom & Rowbotham, Lymington (for the appellants); The Solicitor, Department of the Environment; Sharpe, Pritchard & Co (for the council).

Jacqueline Charles Barrister.

*186 Panton & Farmer v Secretary of State for the Environment, Transport & the Regions and Vale of White Horse District Council

Positive/Neutral Judicial Consideration

Court
Queen's Bench Division

Judgment Date
16 December 1998

Report Citation
(1999) 78 P. & C.R. 186

Queen's Bench Division

(Mr Christopher Lockhart-Mummery, Q.C. sitting as a Deputy High Court Judge):

December 16, 1998

Town and country planning—Application for Certificate of Lawful Use—Different parts of premises in different uses—Whether duty to modify description of lawful use if necessary—Whether duty to identify uses immune from enforcement under legislation prior to Planning and Compensation Act 1991 —Methods by which accrued planning rights can be lost through operation of law—Correct approach of decision-maker in lawful use applications—Meaning of existing use

The first applicant owned, and the second applicant occupied a listed three-storey mill, to which had been added a two-storey extension on the eastern side, known as the flat. The first applicant wished to store wine at the property as part of his wine business and applied for a Certificate of Lawful Use under section 191(1)(a) of the Town and Country Planning Act 1990 . The uses asserted to be lawful at the date of the application included dwellinghouse use (class C3), storage (Class B8) and the sale of food and drink (Class A3). The second respondents failed to determine the application and the applicants appealed to the first respondent. It was contended in respect of each use that the use had commenced before the end of 1963; alternatively, after January 1, 1964 and continued for a period of 10 years before July 27, 1992; alternatively, for a period of 10 years prior to April 11, 1997 (the date of the application) and subsisted on that date. The appointed Inspector granted a certificate of lawful use relating only to the residential use of the flat. The applicants challenged her decision in the High Court on the basis that, *inter alia* , she had failed to consider whether there had been material changes of use to non-residential uses prior to the end of 1963 which would now be classed as lawful uses and she had also misunderstood the term “existing user”.

Held, allowing the applications, there is a duty on a local planning authority, passing to the Secretary of State for the Environment, Transport and the Regions on appeal, to issue a Certificate of Lawful Use in respect of the premises applied for where a lawful use is demonstrated, and, if the facts so require, to modify the description of that use from that described in the application. Secondly, immunity from enforcement action for material changes of use occurring before July 1, 1948, or December 31, 1963, is not lost by the provisions relating to certificates of lawful use introduced by the Planning and Compensation Act 1991 . Such an accrued planning use right can only be lost in one of three ways by operation of law. First, by abandonment, secondly by the formation of a new planning unit and thirdly, by way of a material change of use (whether by way of implementation of a further planning permission or otherwise). (Discontinuance orders can also be made.) A decision-maker should determine when the breach of planning control occurred (*e.g.* before July 1, 1948, by December 31, 1963 or at a date 10 years prior to the application for the certificate of lawful use). Then, if the material change of use took place prior to one of those dates, he should consider whether that use has been lost by operation of law in one of the four possible ways. A use which is dormant, in the sense of being inactive at the date of the application, can be capable of being an “existing user” within the terms of section 191(1) of the 1990 Act if it has not been lost by operation of law in one of those ways.

*187

Cases referred to:

(1) *Nicholson v. Secretary of State for the Environment (1998) 76 P. & C.R. 191* .
(2) *Pioneer Aggregates (U.K.) Ltd v. Secretary of State for the Environment [1985] A.C. 132; 48 P. & C.R 95* .
(3) *William Boyer (Transport) Ltd v. Secretary of State for the Environment [1996] 1 P.L.R 103* .

Legislation referred to:

Town and Country Planning Act 1990, section 191 .

Applications under section 288 of the Town and Country Planning Act 1990 by Bernard John Panton and Allan Wentworth Farmer to quash a decision by the Secretary of State for the Environment, Transport and the Regions, whereby his Inspector issued a limited Certificate of Lawful Use in relation to part of Dandridges Mill, Mill Orchard, East Hanney in the area of the Vale of White Horse District Council, the second respondents. The facts are set out in the judgment of Mr Christopher Lockhart-Mummery Q.C. below.

Representation

The first applicant appeared in person.
Nicholas Burton appeared for the second applicant.
Ian Albutt appeared for the first respondent.
The second respondents did not appear and were not represented.

Mr Christopher Lockhart-Mummery Q.C.:

This judgment is given following the hearing of two applications under section 288 of the Town and Country Planning Act 1990 to quash the grant, by an Inspector on behalf of the first respondent, of a certificate of lawful use or development (LDC) in relation to Dandridges Mill, Mill Orchard, East Hanney, in the area of the Vale of White Horse District Council, the second respondent.

The premises consist of a Grade II listed three-storey mill constructed in about 1820. An extension was added some time in this century on the eastern side of the building, above the ground floor sluice room and millrace, comprising two storeys, and known alternatively as the flat or maisonette. The mill was bought by Mr Farmer, one of the Applicants, in November 1960, and owned by him until June 1987. It was then sold to Mr Panton, the other Applicant, who granted Mr Farmer the right to remain in occupation for life. Mr Panton lives, and has done since about 1982, in the nearby dwelling, Old Mill House.

The events which have led to the present proceedings were provoked by Mr Panton's wish to store wine in the mill as part of his wine business. This proposal was challenged by the local planning authority, the second respondent, and accordingly Mr Panton applied, on April 11, 1997, for a LDC under section 191(1)(a) of the 1990 Act. The existing uses for which a certificate was sought were dwellinghouse (Class C3) on the eastern side of first and second floor (*i.e.* the flat) industrial process as restricted by Class B1, storage (Class B8), display of goods for sale (Class A1), and sale of food and drink (Class A3). The second respondent having failed to make a decision on this application, Mr Panton appealed to the first respondent under section 195 of the Act.

It is fair to say that Mr Panton promoted his appeal pursuant to every possible avenue open to him. In relation to each use, he contended that the use had commenced before the end of 1963, alternatively after January 1, 1964 and continuing for 10

years before July 27, 1992, alternatively for a period of 10 years prior to April 11, 1997, and subsisting on that date. The ***188** significance of such dates are that, respectively, the first was the date by which a use had to be commenced in relation to a claim for an established use certificate under the former statutory provisions replaced, by way of amendment to the 1990 Act, by the Planning and Compensation Act 1991 ; secondly, July 27, 1992 was the date when the new provisions in relation to enforcement and LDC's introduced by the 1991 Act came fully into effect; thirdly, the period of 10 years prior to the application is the "rolling" period of 10 years necessary for achieving immunity, alternatively a LDC, under the current statutory provisions.

The relevant statutory provisions are as follows. Section 191 of the 1990 Act provides, so far as relevant:

> "(1) If any person wishes to ascertain whether:
>
> (a) any existing use of buildings or other land is lawful … he may make an application for the purpose to the local planning authority specifying the land and describing the use …
>
> (2) For the purposes of this Act uses and operations are lawful at any time if:
>
> (a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and
>
> (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.
>
> …
>
> (4) If, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operations or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case they shall refuse the application.
>
> …
>
> (6) The lawfulness of any use, operations or other matter for which a certificate is in force under this section shall be conclusively presumed."

Section 192 provides, so far as relevant:

> "(1) If any person wishes to ascertain whether:

> (a) any proposed use of buildings or other land … would be lawful, he may make an application for the purpose to the local planning authority specifying the land and describing the use or operations in question."

Section 195(2) provides, so far as relevant.

> "(2) On any such appeal, if and so far as the Secretary of State is satisfied—
>
> (b) in the case of an appeal under sub-section (1)(b), that if the authority had refused the application their refusal would not have been well-founded,
>
> he shall grant the Appellant a certificate under section 191 or, as the case may be, 192 accordingly or, in the case of a refusal in part, modify the certificate granted by the authority on the application".

***189**

The lawful development certificate provisions are included in Part VII of the 1990 Act, which deals with planning enforcement. Other relevant provisions in that Part include section 171A , which provides so far as relevant:

> "(1) For the purposes of this Act—
>
> (a) carrying out development without the required planning permission …
>
> constitutes a breach of planning control."

Section 171B introduces the new time limits effected by the Planning and Compensation Act 1991 . In relation to the matters which principally arise in this case—that is to say, material changes of use for commercial purposes—the relevant provision is subsection (3) :

> "(3) In the case of any other breach of planning control, no enforcement action may be taken after the end of the period of 10 years beginning with the date of the breach."

In response to Mr Panton's compendious claims on his appeal, the Inspector recorded as follows:

> "6. As explained in paras 2 and 3 of former Circular 17/92 to which you referred, now cancelled and superseded by Circular 10/97 , section 10 of the Planning and Compensation Act 1991 introduced the new system for establishing the lawfulness, for planning purposes, of proposed or existing operations, uses or activities in, on, over or under land, by applying to the local planning authority for an LDC. As stated in the former Circular, the procedure for applying for an LDC replaces the now obsolete concept of 'established use', and the procedures for 'established use certificate' (EUC) applications, and appeals to the Secretary of State in sections 191 to 196 of the 1990 Act. All the new and revised time-limits for taking planning enforcement action, including the new 10-year rule in section 171B(3) of the 1990 Act, as amended by the 1991 Act, applied with effect from 27 July 1992. Annex 8 of Circular 10/97 , referred to at the Inquiry, explains the provisions and procedures for applying for an LDC under the provisions of section 191 of the 1990 Act, as amended, and defines what is lawful for planning purposes. Para. 8.23 of the Circular makes it clear that the statement in an LDC of what is lawful relates only to the state of affairs on the land at the date of the certificate application".

She continued in paragraph 7:

> "7. I therefore consider that the main issue to be determined in this case is whether the uses applied for in the application for an LDC are lawful by reason of having commenced 10 or more years before the application was made on 11 April 1997 (4 years in the case of the Class C3 single dwellinghouse use) and were existing on that date".

It is apparent already that the Inspector is seemingly falling into errors. First, she appears to be ignoring the claims, undoubtedly based on evidence (see below) that there had been material changes of use to non-residential uses prior to December 31, 1963. Second, and as appears further below, she ***190*** appears to be misunderstanding the significance of the concept of "existing use" at the time of the application.

Her decision letter contains a clear and substantial record of the evidence which had been placed before her. I refer, in this judgment, only to brief extracts so far as necessary. In paragraph 8, in response to the claims in relation to Class B1 and A1 uses, she recorded:

> "Mr A.W. Farmer gave evidence in his sworn affidavit, that he purchased the appeal site on November 1, 1960. There were two buildings on the land—the Old Mill House and the Mill. Soon after he bought the Mill in 1960 he began to modify it so that he could use it as the workshop and studio for his business constructing models and sculpting. To the best of his recollection he first used the Mill for his business during 1962. Prior to his move from London the bulk of his work was commissioned by buyers. However, due to an unpredicted adverse effect of the move on his business, he changed its emphasis to producing designs of his choice for display and sale from the Mill's studio".

In paragraph 9 she referred to various pieces of documentary evidence, consistent with Class B1 use at various periods of the history. She gives a detailed description of the inspection undertaken by the Second Respondent's planning officer at the premises in May 1997. She gives a full description of what she observed on her visit to the premises following the inquiry, on February 18, 1998. She continued in paragraph 11:

> "11. From my consideration of all the evidence, including Mr Farmer's sworn affidavit dated April 10, 1997 and various letters submitted concerning commissions/orders dating from the 1950s and 1960s, I conclude on the balance of probability that Mr Farmer's work of artistic construction/ sculpting has declined significantly since the 1960s to its present position of being de minimis and barely more than a hobby. In reaching this conclusion I attach considerable weight to Mr Farmer's statement in his sworn affidavit, borne out by his evidence to the inquiry, that his work had progressively become more for his own pleasure and directed to exhibitions rather than commercial purposes. You also acknowledged in your application that the death of Mr Farmer's wife and his own age (now 87) have meant that there is no significant commercial purpose to Mr Farmer's activities in the Mill. No evidence was submitted of any sales or commissions during the period 1987 to 1997 and Mr Farmer said in evidence that there were no commissions at present. Taking into account the case law … I conclude that because his activity is the artistic work of construction/sculpting and not the making or manufacturing of an article in the course of a trade or business it does not fall within Class Bl(c) use for any industrial process, of the Town and Country Planning (Use Classes) Order 1987 , but is a sui generis use".

In relation to the claim in respect of Class A3, she records in paragraph 13:

> "13. Mr A.W. Farmer's evidence in his sworn affidavit is that when he bought the Mill in 1960, his wife moved her catering business … from London to the Mill. Part of the Mill was converted to a kitchen and its ancillary storage for the catering business. The ***191** catering business involved the sale of hot food for consumption off the premises."

She then records the decline of that business, related, in the main, to the declining health and subsequent death of Mrs Farmer. She concluded on this aspect in paragraph 14:

> "14. I therefore conclude from the evidence on the balance of probability, that a catering business operated from the Mill in the 1960s, 1970s and early 1980s but that the operation ceased in 1987 when Mr Farmer's wife became ill. As there is no evidence that a catering business operated from the Mill between 1987 and 1997, your application for a certificate of lawfulness in respect of an existing use for the sale of Class A3 food and drink of the Town and Country Planning (Use Classes) Order 1987 fails to satisfy the statutory requirements of the 1990 Act as explained in Annex 8 of Circular 10/97 ".

She then proceeds to record the evidence relating to the claim for a use under Class B8. Paragraph 16 records:

> "16. I saw on my visit that apart from the crockery and other items stored on the ground floor of the Mill in connection with the former catering business, and miscellaneous items including some car seats and garden furniture, the bulk of the items stored were domestic household items including furniture. I conclude from all the evidence, taking into account the small area of ground floor used for the purpose, that the storage of the various items referred to, belonging to Mr Farmer, friends and neighbours, between 1987 and 1997 amounted to no more than a use ancillary to the primary use of the Mill which I conclude below is for residential purposes. It does not therefore constitute a primary storage use within Class B8 of the Town and Country Planning (Use Classes) Order 1987 ".

In relation to the claim in respect of Class C3 (use as a dwellinghouse) she records in paragraph 18:

> "18. The Council do not dispute that there has been a residential use in the Mill for more than 10 years before April 11, 1997. I conclude from all the evidence, on the balance of probability, that there has been a residential use in the Mill continuously for more than 10 years before the date of the LDC application. As the use as a single dwellinghouse commenced more than four years ago it is lawful for planning purposes".

Her overall conclusions are found in paragraph 19:

> "19. Having regard to my findings above on the various uses applied for, I conclude from all the evidence and on the balance of probability, that Mr Farmer has occupied the Mill as his home since 1968, and since at least 1987 has used all the floors in the building to a greater or lesser extent for domestic purposes and ancillary uses for artistic construction/sculpting and storage. I therefore conclude that the primary use of the Mill is as a dwellinghouse within Class C3 of the Town and Country Planning (Use Classes) Order 1987 with ancillary uses for the purposes of artistic construction/sculpting ***192*** and storage, and that these uses have existed continuously for more than 10 years prior to the date of the LDC application".

Paragraph 20 records that she proposed to issue a certificate in respect of the use of the first and second floor of the eastern side of the Mill as a dwellinghouse within Class C3 and ancillary uses for the purposes of artistic construction/sculpting and storage. The certificate attached to her decision letter certified that on 11 April 1997 the use described in the first schedule, in respect of the land specified in the second schedule, was lawful within the statutory provisions. The second schedule refers to land at Dandridges Mill. The first schedule provides:

> "Use of the eastern side of first and second floor as a dwellinghouse within Class C3 of the Town and Country Planning (Use Classes) Order 1987 and ancillary uses for the purposes of artistic construction/sculpting and storage".

Against that background, six main submissions were made. First, that even on the basis of the Inspector's findings as to the primarily residential use (with ancillary uses) the certificate granted by her wrongly confined such a use to the flat only. Second, that she had failed to understand, and to give effect to, the significance of the evidence as to material changes of use having occurred before December 31, 1963. Third, that she had failed to understand the true legal significance of the term "existing use" for the purposes of section 191 . Fourth, that she had overwhelmingly directed her attention to the state of affairs in 1997 and 1998, without proper regard to the full history of the various uses. Fifth, that she should have found that Mr Farmer's use was a B1 use, not *sui generis* . Sixth—a point taken by Mr Panton only—that the inquiry had been conducted in a manner which was procedurally unfair to him. (I should record that Mr Panton—appearing in person, and, if I may say so, with considerable skill—raised a large number of grounds, which I believe are properly encapsulated in the above six points. Further, for reasons which will become apparent, matters arising under the fourth submission will need little separate treatment.)

The first submission can be shortly dealt with. The Inspector has found that the lawful use of the Mill is for residential purposes, with certain ancillary uses. She has, however, failed to certify that any part of the nineteenth century mill premises has any lawful use. (It was accepted by the first respondent that this was the construction and effect of the certificate.) It was accepted by Mr Albutt, on behalf of the first respondent, that it would have been open to the Inspector, under section 191(4) , to certify residential use in respect of the whole of the premises, and that the failure to do so was an error. It was submitted, however, that this should not lead to the quashing of the certificate. No prejudice had been suffered, since Mr Panton could re-apply for a certificate in respect of the main part of the Mill.

It is clear from section 191(4) that there is a duty on the authority (passing to the first respondent on appeal) to issue a certificate in respect of the premises applied for, where a lawful use is demonstrated, and if the facts and circumstances so require, to modify the description of the use from that described in the application. This Inspector has failed to carry out this duty in relation to the premises the subject of the application. The presence or absence of prejudice is, in my judgment, irrelevant. Having said that, Mr Panton was entitled to a LDC for the uses demonstrated in evidence, and the ***193** prejudice suffered by him and Mr Farmer is, surely, self-evident. They should be entitled to occupy the mill, at least for residential and ancillary purposes, without any fear of an enforcement notice, and without the need to apply for a further LDC (for which an additional application fee would now be payable). This certificate has not been issued in accordance with the statutory provisions, and on this ground alone should be quashed.

I turn to the second issue. Under section 45(2)(a) of the Town and Country Planning Act 1962 , an enforcement notice had to be served, in relation to any development, within four years from the carrying out of that development. Section 15(3) of the Town and Country Planning Act 1968 contained a similar limitation period, but such period did not apply to a change of use apart from a change of use to a single dwellinghouse. However, that immunity was preserved by sub-section (1) , whereby enforcement of planning control could only take place in relation to breaches occurring after the end of 1963. The Acts of 1971 and 1990 were consolidations, and could not be interpreted as removing the acquired immunity. The question, therefore, is whether the Planning and Compensation Act 1991, introducing an entirely new basis for immunity from development control, on the basis of a "rolling" 10 year period of use, removed such already accrued immunities. There is nothing in the Act so to suggest, and indeed the craftsman seems to have been astute to avoid removing accrued immunities: see section 4 of the 1991 Act, and the Planning and Compensation Act 1991 (Commencement No. 5 and Transitional Provisions) Order

1991 . Indeed, if it were necessary, section 16 of the Interpretation Act 1978 would seem to protect the immunity acquired under the previous legislation.

It is clear, therefore, that an immunity accrued under the previous statutory provisions was not prejudiced by the 1991 provisions. The Court of Appeal expressly proceeded on this basis in *William Boyer (Transport) Limited v. Secretary of State for the Environment [1996] 1 P.L.R. 103* at 107, and that position was accepted by Mr Albutt. (The same principles would apply in relation to a material change of use taking place before July 1, 1948.) Further, in accordance with long established principles, such an accrued planning use right could only be lost in one of three ways, by operation of law. First by abandonment, second by the formation of a new planning unit, and third, by way of a material change of use (whether by way of implementation of a further planning permission, or otherwise): *Pioneer Aggregates Limited v. Secretary of State [1985] A.C. 132* . (Further, of course, a discontinuance order can be made under section 102 of the 1990 Act.)

Before turning to examine how this decision dealt with the above matters, I must deal with the issues arising under the third submission. Mr Albutt's skeleton argument appeared to suggest that an "existing" use for the purposes of section 191(1) described one which was active at the time of the application. During the hearing I suggested the term "dormant use", as representing a use which had arisen by way of a material change of use, but was now inactive, possibly for a long period of time. Such decline, even cessation, of physical activity could, of course, occur in countless different circumstances. The dormant use would still exist in planning terms, in the sense that the use right had not been lost by operation of law by one of the three events referred to above.

It is clear that a dormant use, in this sense, can be an "existing" use for the purposes of section 191(1) , and this position was in terms accepted by the ***194*** First Respondent. This becomes clear when one appreciates that the LDC provisions have to be construed in the context of the enforcement provisions as a whole. Section 191(1) enables the grant of a certificate where a use is lawful, one example of lawfulness being immunity from enforcement through the passage of time. By section 171B(3) the relevant period of time (in relation to a use other than as a single dwellinghouse) is the passage of 10 years *from the date of the breach* . The subsection is silent on any requirement for continuation of the use. Indeed, this approach is consistent with the fundamental principles of statutory development control in relation to material changes of use. The provisions are concerned with the carrying out of development, that is to say not use, but material change of use.

Further, this approach to the term "existing", shared by the first respondent in this case, is consistent with the approach taken by the Secretary of State in relation to the former provisions. Under the previous provisions relating to established use certificates, the use had to have "continued since the end of 1963", and be "subsisting at the time of the application". In a number of appeal decisions, the Secretary of State accepted that these provisions could apply to an inactive, or dormant, use, provided that it had not been abandoned.

Finally, there is nothing inconsistent, in my view, between this approach and the judgment of Mr Robin Purchas Q.C. (sitting as a deputy High Court judge) in *Nicholson v. Secretary of State for the Environment 76 P. & C.R. 191* . That decision concerned the time limits for enforcement in relation to breaches of condition. Mr Purchas held that a LDC could only be granted where the non-compliance with the planning condition was current at the date of the application. As Mr Purchas pointed out, if there were a period, following non-compliance, of compliance with the condition, the breach would be at an end, and a later breach would constitute a fresh breach, in relation to which time would begin to run again under section 171B(3) . As he pointed out:

> "In this context a failure to comply with a condition is not to be confused with the continuation or abandonment of a planning use".

The learned deputy judge continued in the following terms at page 199:

> "That construction seems to me consistent with the linked provisions in section 191 for lawful development certificates in respect of uses and operations … it is plain, accordingly, that in respect of uses the use must exist at the time of the application … That seems to me to presuppose that there is something in existence at the time of the application which would be capable of contravention if there was in fact a relevant enforcement notice then in force … to my mind, the natural reading of section 191 in respect of uses and operations is that the section requires that the uses and operations should exist at the time of the application in the sense that I have indicated. That would be consistent with the approach that I have taken to non-compliance".

There is nothing inconsistent, in my view, between those remarks and the approach that I take in the present case, an approach accepted by the first respondent. The burden of Mr Purchas's reasoning is that there must be, at the date of the application, a use or operation at the land upon which an enforcement notice could "bite". An enforcement notice is no less properly ***195** served in relation to a dormant use than in relation to one which is being carried on in an active or physical sense.

Against that background, accordingly, the approach by the decision-maker in a case such as the present ought, in my view, logically to be as follows. First, to ask and answer the question: when did the breach of planning control, *i.e.* the material change of use to the use specified in the application, occur? (To qualify, this would be before July 1, 1948, by December 31, 1963, or at a date 10 years prior to the current application.) Second, if the material change of use took place prior to one of those dates, has that use been lost by operation of law, in one of the three possible ways? Third, if it is satisfied that the description of the use specified in the LDC application does not properly describe the nature of the use which resulted from the material change of use, then the decision-maker must modify/substitute such description so as properly to describe the nature of the material change of use which occurred.

Against that background, it is entirely clear, in my judgment, that such was not the approach taken by the Inspector in the present case. As Mr Burton, appearing for Mr Farmer, rightly observed, she started on April 11, 1997 and looked backwards, when she should have started at the inception of the material change of use (or uses) and looked forward. The overwhelming focus of her examination and assessment of the factual evidence was on the state of affairs at the date of the application and at her site visit. This could be highly relevant if she was considering whether the uses resulting from the earlier material changes of use had been abandoned. However, she nowhere makes such finding, and it was expressly conceded by the first respondent that no such finding had been made. The point becomes especially clear by reference to the claim for B1 use, and the passage from paragraph 8 of the decision letter which I cited earlier. Mr Albutt accepted that this passage appeared to be, or was, a finding that in 1960/1962 there had been a material change of use to use for B1 purposes. However there is, as I have said, no finding that such use has been abandoned.

The point is especially clear in relation to the B1 use, but is applicable to the other uses claimed. In relation to the claim for the A3 use, unhappily there is no clear finding as to whether or when there had been a material change of use to A3, although paragraph 13 of the letter is consistent with the finding that there may have been a material change of use to A3 prior to 1964. The position in relation to the claim for the B8 use is even less clear. The evidence may, on proper examination,

show a material change of use of part of the premises to storage (otherwise than ancillary to residential use), having taken place prior to April 11, 1987. Whether it does show such a conclusion will have to be the subject of reassessment on re-determination of this matter.

Accordingly, Mr Albutt's defence of this decision letter rested on one single proposition. This was that the findings in the letter, especially paragraph 19, were tantamount to a finding that, whatever material changes of use may have taken place in the past to commercial uses, there had subsequently been a material change of use to residential use in respect of the whole premises, a primary use to which the uses for artistic construction/sculpting and storage were merely ancillary.

It is entirely clear, in my judgment, that the Inspector has not approached the matter in this way. If this had been the issue in her mind, I would expect it to have been defined clearly as such in paragraph 7. I would expect a clear ***196** finding not simply of use, but of material change of use. The whole tenor of the decision letter relates to the decline of the former commercial uses to levels found much reduced in their active intensity in 1997/1998. The Inspector supplied—in relation to another issue—Man affidavit to the court the terms of which were wholly inconsistent with the first respondent's submissions on her behalf. The affidavit includes the following passages:

> "I gave most weight to the evidence that related to the items stated to be in the building at the date of the application … I merely emphasised that the relevant date for the purposes of determining the Class B8 use was the date of the application, as opposed to any earlier date proposed by the applicant".

These remarks are wholly at odds with the suggested approach, namely, that she was considering whether previous uses had been lost by the undertaking of a material change of use to residential purposes. I am not saying that the facts might not be *capable* of founding a conclusion that, as a matter of fact and degree, there had been a material change of use to residential of the whole premises, but I am satisfied that the decision letter cannot properly, for the reasons indicated, be construed as amounting to such a finding.

Since I reject the submission that the decision letter can be construed as a valid finding that the previous uses had been replaced by a material change of use to residential use, the appeal will have to be re-determined, and the matters arising under the fifth submission accordingly fall away for the purposes of this hearing. The re-determination will have to assess the nature of the material change of use which may have been undertaken by Mr Farmer in the early 1960s, and whether such use was later supplanted by a material change of use to another use, whether residential or *sui generis* . I say nothing further as to the proper definition of the uses arising from the evidence, which will be a matter for the first respondent to determine.

In relation to the sixth submission, Mr Panton raised several points to the effect that he had been unfairly disadvantaged by the procedure at the Inquiry. I indicated at the hearing that I was not satisfied that there had been any unfairness in the manner in which the Inspector conducted the Inquiry. Further, these points are now academic, since the matter will in any event be the subject of re-determination.

For these reasons, these applications succeed.

Representation

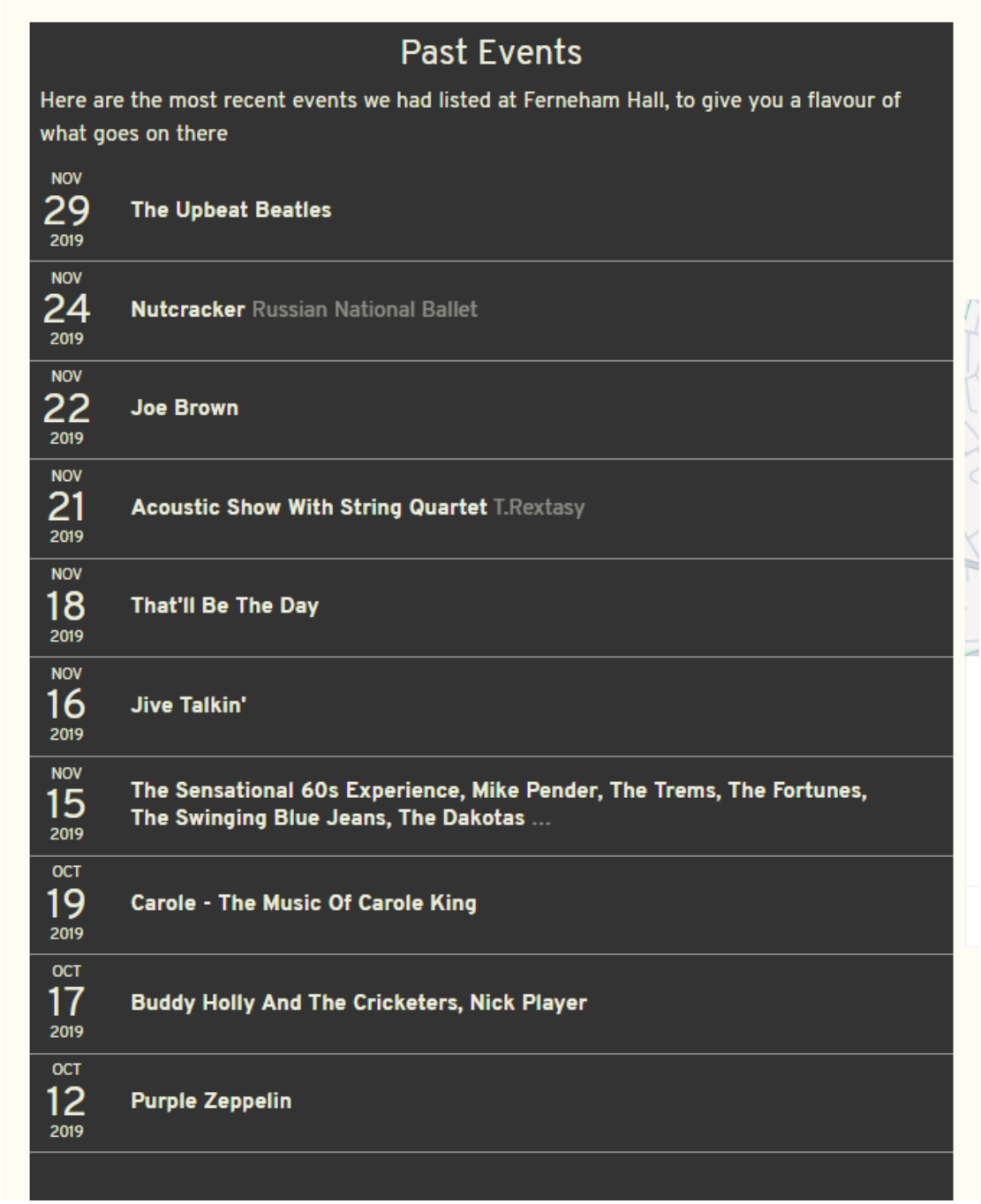
Solicitors— Morgan Cole , Oxford; Treasury Solicitor .

Order

Reporter —Megan Thomas.

Applications allowed with costs. ***197**

Most recent events at Fernehem Hall



Theatres fit for the **future**

Theatres Trust

Theatres Trust – Statement for Appeal Reference: APP/A1720/C/23/3336046

Site:	**Titchfield Festival Theatre, 71-73 St. Margarets Lane, FAREHAM, PO14 4BG**
Proposal:	**The Material Change Of Use Of The Land To Theatre Use (Sui Generis) And An Engineering Operation To Excavate And Create An Underground Area Beneath The Land (Enforcement Notice Appeal)**
Appellant:	**Titchfield Festival Theatre Limited**
Planning Authority:	**Fareham Borough Council**
Application:	**P/24/0007/DA**

CONTENTS

1. Introduction

1.1 Theatres Trust is making this statement as an interested party in this enforcement appeal.

1.2 The interest of Theatres Trust is twofold:

i. The application site contains existing land on which there is a theatre.
ii. Irrespective of whether a material change of use of the specific appeal site has occurred, and irrespective of the status of the theatre on that site and whether it would constitute a new unit in planning terms or an extension of the existing theatre, theatre use is otherwise (retrospectively) proposed.

1.2 Theatres Trust is clear in its position that it does not endorse or support the carrying out of development (including minor works, alterations or changes of use) without the requisite consents being in place, unless those works were demonstrably necessary in the interests of health and public safety and/or for the preservation of a building.

1.3 In scenarios where works without consent are necessary we expect the relevant authority to be notified without delay and for retrospective consent(s) to be applied for. Where we become aware of works which have been undertaken without the appropriate consents, we make recommendation to seek regularisation retrospectively.

1.4 The undertaking of unauthorised development does not prejudice the position of Theatres Trust in relation to the principle of that development. Our recommendations, having paid due regard to plans, policies and other evidence and submissions, will be the same whether or not development has already occurred.

1.5 Theatres Trust is the national advisory public body for theatres. We were established through the Theatres Trust Act 1976 'to promote the better protection of theatres' and provide statutory planning advice on theatre buildings and theatre use in England through The Town and Country Planning (Development Management Procedure) (England) Order 2015, requiring Theatres Trust to be consulted by local authorities on planning applications which include 'development involving any land on which there is a theatre'.

1.6 There is no statutory duty to notify Theatres Trust of enforcement action. Nonetheless, this site already consists of land on which there is a theatre. Theatres Trust would therefore be a statutory consultee for the purposes of planning applications on this site, but we otherwise also have a legitimate role in our capacity as the national advisory public body with regards to providing specialist advice on the merits or otherwise of theatre developments. We consider that our advice and specialist knowledge would be beneficial in the determination of this appeal.

2. The appeal site

2.1 Titchfield Festival Theatre Limited ("the Appellant") has been in receipt of an Enforcement Notice from Fareham Borough Council (FBC) alleging:

"Without the benefit of planning permission, the material change of use of the Land to theatre use (sui generis); and an engineering operation to excavate and create an underground area beneath the land"

2.2 The notice referred to above requires the theatre to:

i. cease the use of the land as a theatre;
ii. backfill the excavated underground area beneath the land with a suitable inert material (such as compacted aggregate, soil, or similar) to ground level;
iii. dismantle the stage
iv. remove the seating
v. dismantle the lighting rig and PA or other sound equipment; and
vi. remove the resultant materials from carrying out steps (iii), (iv) and (v) from the land except to the extent that those materials are solely being stored on the land.

2.3 The appellant has submitted an appeal against the served enforcement notice on a number of grounds.

2.4 The application site as represented on both the the Appeals Casework Portal and the FBC application portal is, "Titchfield Festival Theatre, 71-73 St. Margarets Lane, FAREHAM, PO14 4BG".

2.5 The appeal site consists of one single building with car parking and service access to its front (south-west elevation) and along one side (the south-east elevation). This building has been within three separate uses and with different ownerships. The appellant refers to those sections as Units A, B and C. FBC refer to them within their Enforcement Report as Areas A, B and C.

2.6 Area A is in lawful use as a theatre (Sui Generis).

2.7 Area B has historically been within industrial/storage use (assumed B8) but we understand from the appellant this has been utilised for theatre purposes for a number of years, exceeding ten, and therefore theatre use (Sui Generis) could be lawfully established through Lawful Development Certificate application and submission of appropriate information.

2.8 Area C has also been within industrial uses (assumed B2 and/or B8) and passed into the theatre's ownership more recently.

2.9 A planning application seeking conversion of Area B to a theatre was registered by FBC on 10th May 2019. That application was refused. Theatres Trust was not consulted or notified by the Council of that application. We subsequently wrote to the Council reminding them of their obligations.

2.10 Theatres Trust became aware of the development subject to this appeal through press reports. A site visit was made on 19th February 2024 so that the site, the development and the surrounding context could be better understood.

2.11 It is noted there are grounds for appeal concerning the validity and serving of the enforcement notice by FDC. Theatres Trust makes no comment or representation on this matter.

2.12 It is also noted, as highlighted in paragraph 2.6, that the appellant is claiming that Area B can benefit from an established use for theatre purposes obtained through continuous use over a period exceeding ten years. The onus is on the appellant to properly demonstrate and evidence this, and therefore this is also not something on which Theatres Trust can directly engage with. However, it can be advised that the activities purported to have been undertaken within this section are compatible with ancillary functions routinely undertaken at many other theatre buildings within a formal theatre (Sui Generis) use class.

2.13 The concern of Theatres Trust in relation to this case is the principle of

additional (or new) theatre use, and what our advice would have been had this come forward as an application for full planning permission (or, with formal theatre use having been established, what our advice would have been had the applicant approached Theatres Trust for design, operational and architectural advice within our wider organisational function).

2.14 With the presence of an existing theatre at this site and the scale and offer of Titchfield Festival Theatre differing from other venues within the district of Fareham and its wider catchment, and having considered wider factors and evidence, the position of Theatres Trust is to **support** the development of Titchfield Festival Theatre and the provision of new or additional theatre at this location.

2.15 Our reasons for this support will be further substantiated subsequently within this statement.

3. About Theatres Trust

3.1 Theatres Trust is the national advisory public body for theatres, set up by the Government through an Act of Parliament in 1976 to work to promote the better protection of theatres for the benefit of the nation. We are a statutory consultee within the planning systems in England, Scotland and Wales and have an administrative agreement to be consulted on planning applications concerning theatres in Northern Ireland.

3.2 Theatres Trust operates as a charity. We do not receive regular public funding aside from a small grant from Historic England to support advice in relation to heritage. In order to maintain our activity and to offer grant funding to theatres, we raise funds through our trading activity and through fundraising from a wide range of industry supporters, including our Patron, Corporate Supporter and Friend schemes. Between 1986 and 1989, the Theatres Trust acquired the freeholds of the Lyric, Garrick and Lyceum theatres from the London Residuary Board, the distributors of the dissolved assets of the Greater London Council. Theatres Trust leases these theatres to commercial operators and the income from these theatres continues to support the core work of the Trust.

3.3 Our decision making process is entirely independent of our fundraising and is governed by our overall mission to ensure current and future generations have

access to good quality theatres where they can be inspired by, and enjoy, live performance. This work includes advising to ensure theatre buildings meet the current needs and demands of the theatre industry and the audiences they serve.

3.4 Our Vision states:

"We believe that current and future generations should have access to good quality theatres where they can be inspired by, and enjoy, live performance."

3.5 Our Mission states:

"We champion the future of live performance, by protecting and supporting excellent theatre buildings which meet the needs of their communities.
We do this by providing advice on the design, planning, development and sustainability of theatres, campaigning on behalf of theatres old and new and offering financial assistance through grants.

We promote the quality and design of existing and new theatres and protect important historic theatres so that they can be used as theatres in the future. The Trust also advises to ensure theatre buildings meet the current needs and demands of the theatre industry and the audiences they serve."

3.6 Theatres Trust is accountable to the Secretary of State for the Department for Digital, Culture, Media and Sport. In association with our role as a statutory consultee within the UK's respective planning systems we also report annually to the Chief Planners of England and Wales.

3.7 Theatres Trust is a source of free advice for all types of theatres whether new, old or proposed as well as for theatre buildings in alternative use or which are vacant. We also work with all operators or interested parties, from large commercial and West End theatres to small community theatres and voluntary groups. We work with commercial developers and local authorities, as well as the UK and devolved Governments to promote the interests of theatres and cultural provision more broadly within legislation, policy, plans and strategies. Our advice generally covers matters such as:

- capital projects
- planning applications
- campaigning to save or revive a theatre

- placemaking, cultural and local plans
- fundraising
- architecture/design
- heritage and listings
- maintenance and repairs
- accessibility
- environmental sustainability
- business development

3.8 Within the planning system Theatres Trust seeks to objectively respond to planning applications (as well as Listed Building Consents, Advertisement Consents and other types of application) concerning theatres, theatre buildings and proposed theatre use to provide specialised advice to local authorities and ensure the interests of theatres are upheld in decision making. This includes supporting alternative uses where scope for future theatre use is retained, and on occasion complete loss or un-reversible alteration where we are satisfied a facility is genuinely surplus to requirements with robust evidence having been provided. As well as theatre sites we are also frequently engaged on applications concerning neighbouring sites which may impact on theatre use. We contribute to policy consultations, for example ensuring development plans have strong policies for the protection of community and cultural facilities and that where appropriate site allocations either support or protect theatre and cultural use.

3.9 One of the main reasons Theatres Trust is cautious in offering support for proposals which result in change of use from theatres or the alteration or loss of theatre buildings, and why we urge strong policies protecting such uses, is because once a theatre building has been lost it is very difficult to subsequently replace them. This is due to the space required to deliver theatres; not just quantum of floorspace but also volume. On the same basis it is challenging to acquire new land to provide new theatre developments, especially for larger capacities, not just because of lack of availability of sufficient land but because they struggle against promoters of more valuable developments in financial terms.

3.10 Theatres Trust employs one full time National Planning Adviser to manage and respond to all types of planning casework. Theatres Trust's Board of Trustees also includes a professional planner and a solicitor with experience in planning, who are able to provide additional support and guidance. We also

employ a Heritage Consultant to provide specialist conservation and heritage advice, a full time Architectural Adviser and a full time Theatres Adviser with expertise in theatre management and operations, as well as having access to external specialist advice as required.

3.11 As a statutory consultee and expert in planning matters with regards to theatres and theatre buildings we expect significant weight to be afforded to our advice. The important weight of statutory consultees and their expertise and the legal requirements upon decision makers should they depart from such expert views has been emphasised by the High Court in Visao Ltd v The Secretary of State for Housing, Communities and Local Government [2019]. Furthermore Shadwell Estates Ltd. v Breckland DC [2013] EWHC 12 (Admin) stated "a decision-maker should give the views of statutory consultees…“great" or "considerable" weight. A departure from those views requires “cogent and compelling reasons”.

3.12 This statement will clearly support and substantiate our position outlined in paragraph 2.12, paying particular regard to the National Planning Policy Framework and the Council’s Local Plan as well as supplementary evidence.

4. The development site

4.1 There is an existing theatre at this site. It has a main auditorium with a capacity of around 200 seats and a second studio space which can accommodate an audience of around 100. The main auditorium has a large bank of raked seating looking down onto a stage below. This is fairly typical in style and character of smaller community or amateur theatres. The secondary studio theatre has a flexible layout and again is quite typical of ‘black box’ spaces which can be found at many other theatres.

4.2 This part of the theatre has been further developed since it first opened, with an upward extension and new frontage.

4.3 The unit behind, Area B, has as we understand it been utilised for a number of ancillary theatre functions. This includes rehearsals, storage and a workshop for theatre activities, as well as use by a local ‘Men’s Shed’ group. If the activities described to us had taken place within a formal theatre building with theatre (Sui Generis) landuse this would not be considered unusual or uncommon; a number have integrated workshops, networks of back of house spaces including laundry facilities and large wardrobes and historically a

number had painting rooms where backdrops would be hung and painted.

4.4 The appellant considers that Area B benefits from formal theatre use obtained through continual usage for a period in excess of ten years, although this has not been formalised.

4.5 A new auditorium with a stage has been developed within Area B. This has a capacity of around 450 seats. It has its own entrance and foyer (which requires further work and expansion, and we understand a planning application has been submitted on that basis), but is also accessible through Area A. It is served by a bar. If formal theatre use (Sui Generis) can be established within this space, in principle its conversion into an auditorium would be permissible without the need for planning permission.

4.6 In addition to the auditorium described in paragraph 4.5, the stage extends into Area C. Area C also contains a number of back of house functions displaced from Area B. Furthermore, an orchestra pit with sub-stage area including further storage and the facilitation of additional stage functionality has been excavated within the rear of Area B and into Area C. There are sixteen dressing rooms. Altogether this area provides a new theatre space. There is additionally a further studio within Area B capable of being utilised for public performances, with a capacity of around 64.

4.7 Due to the nature of the works undertaken – both the amalgamation between Areas B and C and the operational development to create the sub-stage area – full planning permission for these works would be required.

4.8 We note there is potentially dispute between the appellant and FDC as to whether the new theatre space constitutes a new theatre, or an extension to the existing theatre.

4.9 Theatres Trust has considered what in our view the status of the additional theatre would be, irrespective of the formal landuse of Area B. Having paid regard to the floorplans provided to us and the evidence of our site visit, and considering the status, design and function of other theatres around the UK, we have come to the opinion that the new theatre and its supporting facilities constitutes an extension to the existing theatre.

5. Evidence and rationale for the position of Theatres Trust

5.1 The reason for the position of Theatres Trust, with regards to this

development constituting an extension to an existing theatre, is that the respective elements of the building are interconnected.

5.2 FDC in paragraph 7.4 of their enforcement report state:

"It should be noted that the Arden theatre which has been created in Areas B & C is capable of being used independently to the existing facility in Area A. For this reason, the unauthorised development at Areas B & C is not considered to be an extension to the existing theatre use at Area A but the introduction of a new self-contained theatre use on the site."

5.3 We do not consider the Council's position and understanding to be correct. Areas A and B/C are interlinked, or have become interlinked. Whilst there are separate public entrances and foyers serving the respective auditoriums and studios within Areas A and B, it would be possible for members of the public to enter through the existing Area A foyer to access the auditorium within Area B and vice versa. Similarly the main bar serves both Area A and Area B. This is not an unusual arrangement where theatres have multiple spaces within their buildings. There are a great number of theatres which have spaces that can be used independently of each other with only part of the building opened including with separate and distinct entrances and foyers.

5.4 This development is demonstrably consistent with the principles of design and function outlined within paragraph 4.3. This development should therefore be considered as an extension rather than as a new self-contained theatre.

5.5 Theatres Trust considers that an expanded/extended theatre can be appropriate at this location.

5.6 The location of this theatre is designated by the Fareham Local Plan 2037 (2023) as being within the countryside ('outside of the urban areas') and within the district's Strategic Gap. Therefore FDC applies Policy DS1.

5.7 In the context of the appeal site's designation within a rural location, paragraph 89 of the NPPF becomes a relevant consideration. This recognises that sites to meet community needs may have to be found adjacent to or beyond existing settlements, and in areas not well served by public transport. The use of previously developed land is encouraged.

5.8 Part a. of Policy DS1 states that proposals in such locations can be supported. Parts b. – i. outline the criteria by which proposals are assessed.

5.9 Part b. supports development which is associated with previously developed land and appropriate for the proposed use. The appeal site is previously developed land. In principle theatre use can be appropriate at this location, demonstrated through there being established theatre use within the same site.

5.10 Part c. provides an alternative criteria, where the development is for uses including community and leisure facilities. Theatres more generally, and this theatre in particular given its role supporting amateur and community groups, can be considered to fall within this category (such uses are covered for example within the same paragraph of the National Planning Policy Framework). The caveat for this category is that demonstration is needed to show there is a local need for the facility that cannot be met by existing facilities elsewhere.

5.11 The fact that Titchfield Festival Theatre has sought to expand through self-funding, at a time where it is well documented that a number of theatres and other arts and cultural facilities are facing financial challenges, demonstrates that they view an expansion of their offer to be viable. Their current offer is capped by the capacity of their existing main auditorium. We contend that there is a realistic gap in provision within the local area for a capacity of the scale offered at the appeal site, and that it fills a particular role within the local cultural ecosystem. Within Appendix A are details of theatres within the district of Fareham as well as nearby authorities, constituting a realistic wider catchment.

5.12 The information within Appendix A shows the capacities of nearby venues and provides an overview of the nature of their offers. This data shows that the new theatre space is of a capacity and form not available within the district of Fareham. In fact, the only venue of equal capacity is the MAST Mayflower Studio in Southampton, approximately 25-30 minutes away by car. The programme of MAST Mayflower Studio's main auditorium is very different to that of Titchfield Festival Theatre, consisting of established comedians, speakers, live music and some professional touring theatre.

5.13 On that basis, we consider that it is demonstrable that the extension to Titchfield Festival Theatre would provide an offer which cannot be met by existing facilities elsewhere.

5.14 Parts d. to g. of Policy DS1 are not relevant for development of this nature.

Part h. supports development which provides infrastructure meeting an overriding public need. Paragraph 20 of the NPPF makes reference to cultural infrastructure. Given the lack of theatre provision of the scale offered at the appeal site within the district and wider catchment, it is considered that expansion of Titchfield Festival Theatre can be supported through this policy.

5.15 Part i. supports development which can demonstrate a requirement for a location outside of the urban area.

5.16 Theatres Trust is keen to ensure that development is sustainable, and well located to meet the needs of communities and to support the vitality of town centres and the wider economy. Whilst the optimal location for theatres would be within designated centres and locations with high accessibility by sustainable modes of transport, we recognise that in some cases local circumstances, constraints and the needs of theatres and their audiences are best met elsewhere. As noted within paragraph 3.9 above, it is challenging to viably and sustainably secure sufficient land for theatre developments of larger scale within designated centres. Therefore, for various reasons, there are a number of theatres around the country located outside of designated centres including within rural settings. A number of such venues are popular and highly successful.

5.17 The appellant already operates an established and successful theatre at the appeal site, which clearly attracts sufficient audiences to the extent that it sees it as viable to substantially expand its maximum capacity. That site has its own more immediate catchment which is quite distinct from that of the town of Fareham and the eastern parts of the borough. Therefore there is a requirement for a location outside of the urban area, because a location within the urban area and within a designated centre specifically is not realistic.

5.18 Policy DS1 does not require accordance with the full set of criteria. Nonetheless on all criteria which could be applicable to the principle of theatre use at the appeal site it is demonstrable that extension or expansion of the theatre use can be supported. The site reflects the principles of rural development articulated through NPPF paragraph 89.

5.19 We would also note that supporting paragraph 3.40 for Policy DS1 states the policy, “seeks to support proposals for new community, leisure, education facilities that meet an identified need which cannot be met by existing facilities. Such facilities could combine several functions and provide useful social and recreational activities.” That description reflects the role of Titchfield Festival Theatre, which has a wider social, cultural and community offer

beyond pure theatre provision.

5.20 Therefore, we disagree with and dispute the position of FDC expressed within paragraphs 7.6 to 7.8 of the Enforcement Report.

5.21 Paragraph 7.11 of the Enforcement Report refers to main town centre uses outside of the town centre, with a focus on Local Plan Policy R2.

5.22 As already stated above, there is unlikely to be available land within one of the district's designated centres to accommodate the offer of Titchfield Festival Theatre. With regards to impact on the town centre, Titchfield Festival Theatre has a very different offer to that likely to be provided by Fareham Live and so in our view the two would complement each other rather than compete (based on the assumed programme of Fareham Live which is likely to be consistent with other venues run by its operator). We have also noted that Titchfield Festival Theatre would have a unique position in the wider market and catchment. Therefore we consider it improbable that it would divert footfall away from the designated Fareham town centre, although it is likely to have a positive impact on other out-of-centre businesses including pubs as well as local centres within its vicinity.

5.23 Whilst we acknowledge that the site has poor accessibility by public transport, a desktop exercise shows that the district's primary theatre and performance venue located within the designated town centre of Fareham (Fareham Live) is also poorly served by public transport for the purposes of their likely performance programme. This is particularly the case for communities in closest proximity to Titchfield Festival Theatre, where the final bus services leave Fareham at around 18:30.

5.24 We also acknowledge that Titchfield Festival Theatre currently has insufficient car parking to meet local indicative standards. However, the theatre has made efforts to increase provision and we understand a planning application on that basis is shortly forthcoming.

5.25 Out-of-centre and rural theatres are not uncommon. Appendix B provides examples of other venues. For example, one of the most notable theatres in Wales – Theatr Clywd – is a complex of four different auditoriums with a maximum capacity of 570, a cinema screen and other community and studio spaces in a rural location outside of Mold (this theatre's catchment also extends into north-west England). The Minack Theatre is a famed venue with

a capacity of 750, accessible by relatively narrow Cornish country lanes. The Nevill Holt Opera House and 1,200 capacity Glyndebourne are within open countryside. Although a rural location in technical policy terms, functionally Titchfield Festival Theatre is only 200 metres from the A27 and a short distance from settlement boundaries (along with there being existing theatre use at the site).

5.26 We note the comments of FDC with regards to highways impacts and impacts on neighbouring properties. We have already cited above the efforts of the appellant to improve and regularise enhanced parking provision. We would suggest that there is a role for the respective local authorities (FDC and the highway authority) to proactively seek to address and mitigate potential impacts and risks along St Margarets Lane, and that any reluctance to take reasonable actions should not be used as a reason to unnecessarily refuse development.

5.27 With regards to impacts on neighbouring properties, the onus is on the appellant to undertake the requisite surveys and reports and facilitate mitigations in line with paragraph 193 of the NPPF.

5.28 Beyond the planning considerations referenced within the report of FDC, we consider that the wider social, cultural and community benefits of Titchfield Festival Theatre are relevant within a planning context.

5.29 Paragraph 8 of the NPPF includes a social objective to support strong, vibrant and healthy communities met by accessible services which support communities' health, social and cultural well-being.

5.30 Paragraph 97 of the NPPF seeks to provide the social, recreational and cultural facilities and services the community needs. Planning decisions should therefore plan positively for such uses.

5.31 Strategic Policy R4 of the Fareham Local Plan 2037 supports development of new or extended community and leisure facilities. As noted previously, we consider the criteria of this policy is largely met. The introductory text for this policy outlines the key role of facilities such as theatres in the health, well-being and education of residents, and the positive benefits of social interaction.

5.32 Titchfield Festival Theatre provides a facility for local youth, amateur and

community theatre groups, as well as other community groups. It produces its own work, supporting actors, producers, writers and supporting personnel to develop and learn new skills. It relies on volunteers, enabling people to come together and be active. In turn this reduces loneliness and isolation, improving social and cultural well-being. Its programme provides access to plays and other theatrical events for local people. Its ongoing function and development is to be supported.

5.33 The new theatre space within the appeal site is unusually well equipped for an amateur/community theatre. The operational development which has occurred has provided a large orchestra pit and facilitated a revolve and trap within the stage. These are rare for venues of this nature. As such, the development and educational role of the theatre has been substantially enhanced. We would want this aspect to be regularised, along with the wider expansion of the theatre, and consider there are compelling grounds for the sub-stage area to be retained. The facilities within Area C are also very good, for example the number of dressing rooms is high even in comparison with some large professional theatres.

5.34 On the basis that continual use of Area B can be established and that theatre use is lawful within that element, the new theatre space could continue to function if it were ordered to remain within Area B with its sub-stage area infilled and link through to Area C closed. However, this would result in the loss of facilities and functionality which have wider cultural and social benefits. The impacts of development of Area C and excavation of a sub-stage area have little or no impact on the theatre's wider setting, including the highway network or the amenity of nearby properties. Therefore, there we consider there is compelling benefit in Area C (or a combined Area B and C) also benefitting from retrospective formal theatre use.

6. Concluding comments

6.1 Our position is that expansion of the theatre at this location is acceptable and can be justified and supported through policy and other evidence as we have set out. It is enhancing the local cultural, social and community offer and meets a gap within the local market.

6.2 Should expansion of the theatre be deemed acceptable in principle we would also be keen for the sub-stage area to be retained and there would be demonstrable public benefit in doing so.

6.3 We are keen to be work positively with the appellant and FDC going forward to ensure Titchfield Festival Theatre is supported, but also to ensure that the theatre understands its obligations and correctly engages with the planning system in future.

6.4 Theatres Trust in its capacity as the national advisory body for theatres is also available to provide advice and expert evidence to the Planning Inspectorate in the determination of this appeal.

Appendix A – Theatres within the district of Fareham and neighbouring areas

Theatre	District	Address	Postcode	Programme	Capacity (Main)	Capacity (Second)
Titchfield Festival Theatre (existing)	Fareham	Titchfield, Fareham	PO14 4BG	Amateur	200	100
Titchfield Festival Theatre (extension)	Fareham	Titchfield, Fareham	PO14 4BG	Amateur/In-house productions	450	64
Titchfield Great Barn	Fareham	Titchfield, Fareham	PO15 5RB	Amateur	175	
Ashcroft Arts Centre	Fareham	Fareham	PO16 7DR	Receiving	150	
Fareham Live (under construction)	Fareham	Fareham	PO16 7DB	Receiving	1000	150
Spring Arts Centre	Havant	Havant	PO9 1BS	Receiving	145	
Station Theatre	Havant	Hayling Island	PO11 0EH	Amateur	144	
Groundlings Theatre	Portsmouth	Portsmouth	PO1 3BS	Producing	180	30
New Theatre Royal	Portsmouth	Portsmouth	PO1 2DD	Receiving	667	
King's Theatre	Portsmouth	Southsea	PO5 2QJ	Receiving	1600	
MAST Studios	Southampton	Southampton	SO14 7DU	Producing/Commercial receiving	450	133
NST Campus (Closed)	Southampton	Southampton	SO17 1TR	Receiving	510	30
Mayflower Theatre	Southampton	Southampton	SO15 1GE	Commercial Receiving	2300	

Appendix B – Examples of theatres within rural and out-of-centre locations

Theatre	District	Nature of location	Programme	Capacity
Glyndebourne	Lewes	Rural location, accessible by country lanes	Professional opera	1,200
Kilworth House Theatre	Harborough	Rural location, accessible from A4304	Mixed	540
Minack Theatre	Cornwall	Rural seaside location, accessible by country lanes	Professional, seasonal	750
Nevill Holt Opera House	Harborough	Rural location, accessible by country lanes	Professional opera	400
Pitlochry Festival Theatre	Perth & Kinross (Scotland)	Outside of settlement boundary, accessed from A9	Professional receiving, producing	544 (also secondary studio)
Sterts Arts Centre	Cornwall	Rural location, accessible by country lanes	Mixed	400
Theatr Clywd	Flintshire (Wales)	Outside of settlement boundary, accessed from A5119	Professional producing	570, 300, 250, 120
Thorington Theatre	East Suffolk	Rural location, accessible by track from country lane	Amateur	350
Watermill Theatre	West Berkshire	Rural location, accessible from country lane	Producing/small scale receiving	220

Section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
("the 1990 Act")

Statement in support of a Ground D appeal in relation to the enforcement notice served in by Fareham Borough Council

In relations to 71 and 73 St Margaret's Lane

Date: 2nd April 2024

Introduction

1. The basis of this ground D appeal that, at the date on which the notice was issued, no enforcement action could be taken in respect of any breach of planning control that may be constituted by those matters.

2. The National Planning Practice Guidance ['the Guidance'] advises that the Applicant is responsible for providing sufficient information to support an application for a Certificate of Lawful Use which is the equivalent of ground (d) in an enforcement appeal.

3. It states: "*In the case of applications for existing use, if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability*"

4. This applies equally to an Inspector at appeal stage. Under this ground of appeal, the onus of proof falls on the Appellant to show that: "…at the time the enforcement notice was issued, it was too late to take enforcement action against the matters stated in the notice" [as per section E(d) of the appeal form]. The relevant date for this purpose is 10-years before the date of issue of the enforcement notice, 22 November 2023 hereinafter referred to as 'the material date'. In order to succeed under this ground of appeal the Appellant needs to

show, on the balance of probability, that the use alleged in the notice (theatre use) commenced prior to the material date and continued.

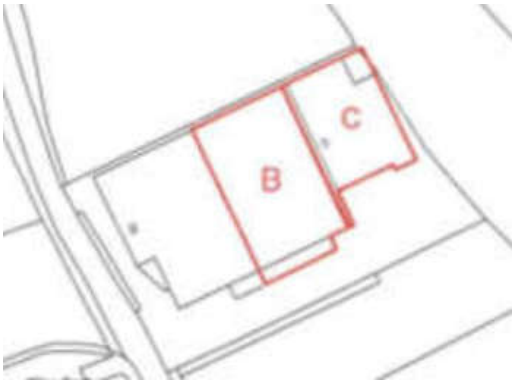
The property

5. Details of the location of the theatre is covered in the appeal statement previously submitted.

The enforcement notice

6. The Enforcement Notice in question relates to the land identified within the red edging in the plan below.

7. The area identified has in previous correspondence between both parties, been referred to as separate areas known as unit B and C, and references in this statement to those corresponding with the below. The area of the building not edged with red is known as unit A. Units A and B together form 73 St Margaret's Lane, and unit C number 71.



History of the property up until the service of the enforcement notice

8. Area A (also known, along with Area B, as 73 St Margaret's Lane) has planning permission for conversion to theatre use (Sui Generis), this was granted in 2012. A condition controlling the temporary use of the site for Theatre use was subsequently appealed and the appeal upheld permitting the permanent theatre use (P/12/0050/CU). (APP/A1720/A/12/2186833).

9. Area B has planning permission for storage use falling within Use Classes B1 or B8. This use was permitted at the same time as that for Area A in 2012 (P/12/0050/CU). Since 2010 this area has been used for a mix of theatre use, storage and community uses.

10. Area C (also known as 71 St Margaret's Lane formally owned by 'Welbro Limited') has permission for the erection of a building to provide workshop and storage accommodation, which was permitted in 1963 (FBC.3312/1). Area C was most recently used as a warehouse by Welbro. Up until recently this unit was separated from number 73 with a 1.5 metre gap.

11. TFT purchased the Welbro site in 2021 and in 2022 planning permission was granted to connect Area B to Area C (P/22/0255/FP) together with alterations to the roof.

The current situation is as follows: -

12. Planning application P/22/0255/FP has been implemented and units B and C have been connected externally. Internally the western external wall of Area B and the eastern external wall of Area C have been removed and Area B has been extended to connect with Area C. This has created one large building on the site (Units A, B and C). The warehouse use previously carried out in Area C has ceased and 'Welbro' have vacated the site.

13. The site of Areas A, B & C now comprise one building. There are the two pre-existing theatres, the Oak Theatre and the Acorn Theatre. This is as permitted

under the 2012 appeal. Area B has since 2010 been used continuously use for scenery storage for plays in the Acorn and Oak theatre, performance rehearsals and for performances in the Oberon (a large studio space with seating).

14. The limited extension of Area B into Area C has facilitated the creation of a third theatre "the Arden Theatre". The Arden theatre opened in August 2023 and has been in use since that date.

15. The remainder of Unit C is used for ancillary purposes related to the theatre purposes including rehearsal space and changing rooms.

16. A sworn statement (**appendix 1** to this statement) from Kevin Fraser provides a timeline for the use of units A and B from 2010 up until the creation of the Arden Theatre in 2023. This includes a history from the date of purchase and includes plans showing how the layout of unit B changed over the period the relationship with use of unit A. The proof of evidence demonstrates that over the past 12 years, Both Areas A and B 73 St Margaret's Lane has been continuously in a use for community uses as storage for third parties, as well as rehearsal space, scenery storage and the Oberon performance and rehearsal area.

Key points from history

17. The following key points are relevant to the use of the 71-73 St Margarets Lane Theatre up until the formation of the Arden Theatre: -

- That unit B was never used for either B1 or B8 purposes.
- That unit B was used in association with unit A from when the theatre first commenced operations in 2010.
- That unit B was principally used for Theatre related uses: mainly rehearsals scenery storage and performance in the Oberon. There was an area of external storage and community use (as shown on the exhibits in the sworn statement by Kevin Fraser) however in terms of the overall combined size of

units A and B the areas for external storage and community use are small. In addition, the 'Mens Shed', although a community use, have also always made stage props and scenery for the Theatre company for use across all theatres and performance spaces at the site.

- There was always has been internal access between units A and B used for example by moving props and scenery.
- The creation of the Arden involved the removal of an internal wall. However approximately 90% of the Arden is within unit A/B. The uses previously operating in the unit A/B namely rehearsals, storage and community uses have moved into unit C.
- Consequently, up until the creation of the Arden theatre units A and B were operating as one planning unit i.e. A/B. Using the judgment in Burdle **(Burdle v Secretary of State for the Environment [1972] 3 All E.R. 240**),the use of unit A/B falls within the following categories: either **Ancillary Use** (if the storage and community uses are considered ancillary) or a **Composite Use** (if the storage and community use are not considered ancillary but they are not physically and functionally separate within the building).
- It is argued that the storage areas and community uses within B due to their small size and linked use could be classed as **ancillary**.
- Unit C was, until the link to unit A/B, in use for storage purposes (B8). Unit A/B and C now operate as one unit. This would still fit within the above definition within Burdle (ancillary).
- Under the changes to the GPDO (updated on 1 September 2020), the whole of the site (unit A/B and C) is used for Theatre purposes (sui generis)

<u>The appellant's argument in relation to the lawful use</u>

18. The linking together of unit A/B with C has not resulted in the loss of the lawful use or existing use rights. The circumstances in which existing use rights are capable of being lost, is based on the position as summarised by Christopher Lockhart Mummery QC sitting as a Deputy High Court Judge in **Panton &**

Farmer v SoSE (1999) 78 P. & C.R. 86 at 193 that: "*Further, in accordance with long established principles, such an accrued planning use right could only be lost in one of three ways, by operation of law. First by abandonment, second by the formation of a new planning unit, and third, by way of a material change of use (whether by way of implementation of a further planning permission, or otherwise): Pioneer Aggregates Limited v. Secretary of State [1985] A.C. 132*". Each of those three ways is applied to the property and explained below.

Abandonment

19. The possibility of abandonment of an established use right arises under case law. In **The Trustees of Castell-y-Mynach Estate v Taff-Ely (1985) JPL 40**, the High Court established four criteria for assessing whether a use had been abandoned. These are:

- The physical condition of the property.
- The period of non-use.
- Whether or not there has been any other use.
- The intention of the parties.

20. In the case of the site at 73 St Margarets Lane there has been no change to unit A/B it is still in Theatre Use.

Formation of a new planning unit

21. The phrase "formation of a new planning unit" can only be understood by reference to the line of authorities that Mr Lockhart Mummery QC was summarising in *Panton*. Those authorities make it clear that that the threshold at which existing use rights are lost is not a mere change to the planning unit, but requires change in the character of the land so fundamental as to open a new chapter in the planning history.

22. **In Jennings Motors Limited (see Jennings Motors v SSE [1982] JPL 181)** Oliver L.J said at 557

"In my view the authorities show not that a new building, per se, has to be equated with a new planning unit but that it is one of the factors—it may in many cases be a conclusive factor—to be taken into account in considering whether there has taken place in relation to the particular land under consideration a change of so radical a nature as to constitute a "break in the planning history" or a "new planning unit" (the expressions are used interchangeably)."

23. The creation of the Arden theatre, the majority of which is within unit A/B, has not resulted in any radical change to the buildings on the site, nor to the uses to which they are put. As such there has not been a "break in the planning history" or a "new planning history" created.

Material change of use

24. In accordance with *Burdle* the use of unit B is ancillary in relation to the Theatre Use in A.

25. Due to the length of time unit A/B had been in theatre use (in excess of 10 years) then an additional theatre (in this case the Arden Theatre) could have been created within unit A/B without the need for a further planning permission.

26. The creation of the Arden Theatre has not resulted in an intensification of the use. The basic principle on 'intensification' is that there may come a point when an increase in a use results in a marked change in the character of that use, giving rise to such materially different planning consequences that, as a matter of fact and degree, it constitutes a material change of use requiring planning permission.

27. The judgement in Brooks and Burton (**Brooks and Burton Ltd v Secretary of State for the Environment [1978] 35 P&CR 27**) is relevant here. In that, Simon Brown J stated: *"what the Inspector was not only entitled but was obliged to do was to contrast, not what might have been done under the previous use, but what was actually done in the way of the previous use with what was done following the introduction" of the new activity."*

He went on to say: *"…the issue whether or not there had been a material change in use fell to be considered by reference to the character of the use of the land. It was equally well recognised that intensification was capable of being of such a nature and degree as itself to affect the definable character of the land and its use and thus give rise to a material change of use. Mere intensification, if it fell short of changing the character of the use, would not constitute material change of use."*

28. Unit A/B was in use for theatre purposes prior to the Arden Theatre therefore the addition of the Arden Theatre has not resulted in a '*marked change in the character of the use*'.

Legal authorities referred to in this statement

- Burdle v Secretary of State for the Environment [1972] 3 All E.R. 240
- Panton & Farmer v SoSE (1999) 78 P. & C.R. 86 at 193
- The Trustees of Castell-y-Mynach Estate v Taff-Ely (1985) JPL 40
- Jennings Motors Limited (See Jennings Motors v SSE [1982] JPL 181)
- Brooks and Burton Ltd v Secretary of State for the Environment [1978] 35 P&CR 27

Jennings Motors Ltd v Secretary of State for the Environment and another

COURT OF APPEAL, CIVIL DIVISION
LORD DENNING MR, OLIVER AND WATKINS LJJ
30 OCTOBER, 2, 27 NOVEMBER 1981

Town and country planning – Development – Material change of use – Planning unit – Determination of what constitutes appropriate unit – New chapter in planning history – Extinction of existing use rights – Industrial site having existing use rights for repair and maintenance of vehicles – Old workshop on site replaced by new workshop without planning permission – Workshop covering only small portion of site – Whether new workshop a new planning unit starting with nil use – Whether new chapter in planning history commencing – Whether new workshop falling within existing use right attaching to whole site.

Since 1962 the occupiers had used a half-acre site for the repair and maintenance of vehicles and the sale and hire of cars. In 1975 they demolished an existing garage workshop on part of the site and without obtaining planning permission erected a new building in its place. The new building occupied about 6% of the site and was used for substantially the same purposes as the demolished building. The local planning authority did not take enforcement proceedings for the removal of the building but instead served an enforcement notice on the occupiers requiring them to discontinue use of the new building, on the grounds that the use of the new building without the grant of permission amounted to a material change of use and was a breach of planning control. The occupiers appealed to the Secretary of State for the Environment, who upheld the enforcement notice on the grounds that, when the new building was erected, it was to be considered as a new planning unit which had no actual, established or permitted use, so that a new planning history commenced starting with a nil use and the use to which it was put thereafter necessarily involved a material change of use from nil use which, if it was done without planning permission, amounted to a breach of planning control, despite the fact that the new building was used for the same purposes as the building it replaced. The occupiers appealed to the Divisional Court, which upheld the Secretary of State's decision. The occupiers appealed to the Court of Appeal, contending that the Secretary of State had been wrong to consider the use of the building alone and that the correct test was whether the use of the new building effected a material change in the use of the site as a whole. The occupiers submitted that the site as a whole had an established use right for the purposes for which the new building was being used and that therefore there had been no material change of use.

Held – The appeal would be allowed for the following reasons—

(1) (Per Lord Denning MR) A new building which replaced an old building did not create a new planning unit which started with a nil use. The new building could open a new chapter in the planning history, thus bringing to an end previous existing use rights, but only if there was such a radical change in the nature of the buildings on the site or the uses to which they were put that the change amounted to a fresh start in the character of the site. Where, however, that was not the case the existing use rights continued. Having regard to the size of the building in relation to the site as a whole, there had not been any change in the planning history and therefore the existing use rights attaching to the site as a whole extended to the new building (see p 476 *a* to *c* and *e f*, post).

(2) (Per Oliver and Watkins LJJ) The replacement of an old building by a new building on materially the same part of the site did not necessarily create a new planning unit starting with a nil use or commence a new planning history in relation to it, since whether there was a change in the planning status of the site caused by the new building which had the effect of extinguishing existing use rights and creating a new planning

unit was a question of fact and degree in every case. Since the Secretary of State had held that the new building was in itself sufficient to create a new planning unit, he had misdirected himself (see p 478 *f* to *j*, p 480 *e f j* and p 481 *b*, post).

Per Lord Denning MR. The theory that a new building creates a new planning unit starting with a nil use should be discarded. The better view is that, if a radical change occurs in the nature of the buildings on the site or the uses to which they are put, a new chapter in the planning history is opened in respect of it (see p 476 *c d*, post).

Per Oliver and Watkins LJJ. The difference between the expressions 'new planning unit' and 'change in the planning history' is largely semantic. Because the expression 'new planning unit' is hallowed by long usage it should be retained and used to include the concept of a change in the planning history (see p 477 *f* and p 479 *j* to p 480 *a* and *j* to p 481 *b*, post); dictum of Bridge J in *Burdle v Secretary of State for the Environment* [1972] 3 All ER at 244–245 approved.

Notes

For development by a material change of use, see 37 Halsbury's Laws (3rd edn) 259, para 366, and for cases on the subject, see 45 Digest (Repl) 328–334, *14–30*.

Cases referred to in judgments

Aston v Secretary of State for the Environment (9 April 1973, unreported), DC.

Burdle v Secretary of State for the Environment [1972] 3 All ER 240, [1972] 1 WLR 1207, DC, Digest (Cont Vol D) 918, *30x*.

Gray v Minister of Housing and Local Government (1969) 68 LGR 15, CA, Digest (Cont Vol C) 963, *30r*.

Hilliard v Secretary of State for the Environment (1978) 37 P & CR 129, CA, Digest (Cont Vol E) 592, *30a(iii)*.

Joyce Shopfitters Ltd v Secretary of State for the Environment [1976] JPL 236.

Leighton and Newman Car Sales v Secretary of State for the Environment (1976) 32 P & CR 1, CA.

Newbury DC v Secretary of State for the Environment [1980] 1 All ER 731, [1981] AC 578, [1980] 2 WLR 379, HL.

Petticoat Lane Rentals Ltd v Secretary of State for the Environment [1971] 2 All ER 793, [1971] 1 WLR 1112, DC, Digest (Cont Vol D) 932, *119a*.

Prossor v Minister of Housing and Local Government (1968) 67 LGR 109, DC, Digest (Cont Vol C) 971, *61b*.

Appeal

Jennings Motors Ltd (the occupiers) appealed against the decision of the Divisional Court of the Queen's Bench Division (Donaldson LJ and Bristow J) on 22 April 1980 dismissing an appeal by way of motion for an order that a decision of the Secretary of State for the Environment made on 6 July 1978 be quashed and the case remitted to the Secretary of State for rehearing. By his decision the Secretary of State refused to follow the recommendation of a planning inspector and upheld an enforcement notice dated 12 August 1976 served on the occupiers by the New Forest District Council requiring the occupiers to discontinue the use of a building on a site at Whinfield Road, Dibden Purlieu for the purpose of workshops for the repair, servicing and maintenance of motor vehicles. The occupiers appealed against the notice and, following an inquiry, the inspector in his report found, inter alia: (1) the appeal premises were in a predominantly residential area and were surrounded with dwellings; (2) the premises were used for the repair and maintenance of vehicles, the sale of cars and the hire of self-drive cars and comprised a building used as a commercial vehicle repair workshop, a range of buildings comprising a car showroom, offices and store and a vehicle repair workshop (which was the building the subject of the enforcement notice) and open areas where vehicles were displayed for sale, parked and stored; (3) in 1966 it was decided on appeal that the premises had an established use for the servicing and repair of motor vehicles; (4) the building subject to the enforcement notice was a new building which was erected without planning permission in 1975; (5) much of the new building was on land where

there were previously buildings used by the end of 1963 for parking, garaging and storage of vehicles and to a minimal extent for vehicle repairing and servicing and by 1975 to a greater extent for vehicle repairing and servicing; and (6) the council would be likely to permit the retention of the new building for use as a lock-up garage. The inspector recommended: 'The planning unit is the whole of the appeal premises and as they have an established use for the servicing and repair of motor vehicles that use can lawfully be carried on anywhere within the premises. This includes land within the buildings formerly on the land on which now stands the new building. Therefore although the use enforced against is carried on within a new building which has been erected without planning permission, as that land has an established use for that purpose and the notice is directed against the use, the appeal succeeds . . .' The occupiers' grounds of appeal against the decision of the Divisional Court were, inter alia, that (1) the Divisional Court was wrong in law in holding that when the new building was erected on part of the appeal site a new planning history commenced in respect of the new building, and the building on completion had no established use and could not form part of the planning unit unless and until planning permission was granted for its retention and use for a particular purpose and (2) the Divisional Court was wrong in law in not holding that the Secretary of State should have considered whether there had been a material change in the use of the appeal site as a whole by reason of the use of the new building on part of the appeal site for the repair, servicing and maintenance of motor vehicles, as alleged in the enforcement notice. The facts are set out in the judgment of Lord Denning MR.

Michael J Burrell for the appellants.
Simon D Brown for the respondent.
The council was not represented.

Cur adv vult

27 November. The following judgments were read.

LORD DENNING MR. The village has an attractive name, Dibden Purlieu. It goes back to the times of the Norman French. It is a mile or so inland from Southampton Water on the west side, near the New Forest. Some part of it has been developed in recent years for residential purposes. It is designated in the Hythe town map, Hampshire, for residential use. But in the midst of this residential area there is an industrial site. It only takes up about half an acre all told. It has been used for the last 20 years for commercial purposes in connection with motor vehicles. It is a mixed use in connection with the repair, servicing and maintenance of vehicles. There is a garage workshop in one corner. It takes up one-twelfth of the site. There is a showroom and office in another. It takes up one-thirteenth of the site. No question arises about those. But then there is a new building. It only occupies about one-seventeenth of the site of half an acre. It is about 55 feet long, 23 feet wide and 10 feet high. The rest of the site is for access and parking motor vehicles.

It is that new building which is in question. Previously there was a garage workshop there. The occupiers had applied in 1975 for permission to pull it down and put up the new building. It was refused. They never got permission for it. But, in spite of the refusal of permission, the occupiers completed the building. The local authority did not take enforcement proceedings in respect of the building because 'it was considered that the new building was more satisfactory in appearance than those it had replaced'. Nevertheless, the local authority resolved that enforcement proceedings should be taken to secure the discontinuance of the use.

Now the point of law that arises is this. The whole of the half-acre site is being used for a 'mixed' use for which it has been used for the last 20 years, since 1962. The new building is being used for one of those mixed uses, namely the repair and servicing of motor vehicles. It is not suggested that there has been a change in the 'mix' of use on the site as a whole. Nor is any charge made in the enforcement notice that there has been a

change owing to the 'intensification' of use. The enforcement notice related only to the new building (coloured pink on a plan). It was dated 12 August 1976, and was in these terms: a

> '... It appears to the Council that after the 31st day of December, 1963, there has been a breach of planning control in that the said land has been developed by the making of a material change in the use of the buildings coloured pink on the attached plan situate thereon to a use for the purpose of workshops for the repair, servicing and maintenance of motor vehicles without the grant of permission ... b Now therefore ... the Council hereby require you within two months ... to discontinue the use of the buildings coloured pink on the attached plan for the purpose of workshops for the repair, servicing and maintenance of motor vehicles.'

The minister upheld the enforcement notice. In his decision letter of 6 June 1978 he said: c

> '... in the light of the judgment in the case of Petticoat Lane Rentals Ltd v Secretary of State ([1971] 2 All ER 793, [1971] 1 WLR 1112) it is considered that when the new building referred to in the appeal was erected, a new planning history commenced in respect of it and the building on completion had no actual, established or permitted use ... the issue before the Secretary of State is the continued use of the building for the repair, servicing and maintenance of motor d vehicles and it is considered that this must involve a material change of use from no use, and that there has therefore been a breach of planning control as alleged in the notice....'

The Divisional Court upheld the minister. They did so reluctantly as they thought they were bound by *Aston v Secretary of State for the Environment* (9 April 1973, e unreported). The occupiers appeal to this court.

We have been referred to all the cases. They disclose two theories. The one is the theory of the 'new planning unit'. The other is the theory of the 'new chapter in planning history'. I will consider each theory separately.

The new planning unit f

According to this theory, when a man applies for permission to erect a new building, either where none existed before or to replace an old building, he creates a 'new planning unit'. He can use it for any purpose specified in the permission, or, if no purpose is specified, for the purpose for which it was designed to be used (see s 33(2) of the Town and Country Planning Act 1971) subject to any conditions contained in the permission. If he erects a new building without any permission at all, he starts with a nil use, and g must get permission for any use. Once he erects that new building, he cannot fall back on previous existing use rights. This theory was stated by Lord Widgery CJ in *Petticoat Lane Rentals Ltd v Secretary of State for the Environment.* In that case the new building covered the whole site. Lord Widgery CJ said ([1971] 2 All ER 793 at 796, [1971] 1 WLR 1112 at 1117):

> '... one gets in my judgment an entirely new planning unit created by the new h building. The land as such is merged in that new building and a new planning unit with no planning history is achieved. That new planning unit, the new building, starts with a nil use...'

In the later case of *Aston v Secretary of State for the Environment* Lord Widgery CJ applied it to a case where the new building covered only *part* of the site, just about half the j site. He said:

> '... where you have a new building erected, that part of the land which was absorbed in the new building and covered by the new building is merged in it; you start with a new planning unit which has no permitted planning use except those derived from the planning permission, if any, and from s 33(2) of the Town and

Country Planning Act 1971, which allows such a building in many instances to be used for the purpose for which it was designed.'

That theory was accepted by Lord Fraser in *Newbury DC v Secretary of State for the Environment* (1980) 1 All ER 731 at 744, [1981] AC 578 at 606 in the House of Lords, when he said:

'The only circumstances in which existing use rights are lost by accepting and implementing a later planning permission are . . . when a new planning unit comes into existence . . .'

This theory has been extended by some observations in the House of Lords to a case where a man applies to change the use of a building so as to make it available for occupation for several families. If he acts on the permission and makes the change (by putting in internal partitions and doors) then he creates a 'new planning unit'. He must abide by any conditions inserted in the permission. He cannot fall back on previous existing use rights: see the *Newbury DC* case [1980] 1 All ER 731 at 745, 753, [1981] AC 578 at 607, 618 by Lord Fraser and Lord Scarman.

A new chapter in planning history

According to this theory, when a man applies for permission to erect or alter a building, or to make a change in the use of land, in such circumstances as to effect a radical alteration in the nature or use of the site, then it may be interpreted as the opening of a 'new chapter in the planning history'. If he then acts on the permission, and erects or alters the building or changes the use of the land, he must abide by the conditions on which the permission was given. He cannot afterwards revert to any previous existing use rights. This theory was stated clearly by Lord Parker CJ in *Prossor v Minister of Housing and Local Government* (1968) 67 LGR 109. In that case a garage proprietor applied for planning permission to erect a new building on *part* of the site to replace an existing repair shop. He was granted permission on the condition that no retail sales were to take place in the new building. The garage proprietor afterwards claimed that he had existing use rights for selling motor cars. Lord Parker CJ said (at 113):

'. . . assuming . . . that there was at all material times prior to April 1964 an existing use right running on this land for the display and sale of motor cars, yet by adopting the permission granted in April 1964, the appellant's predecessor, as it seems to me, gave up any possible existing use rights in that regard which he may have had. The planning history of this site, as it were, seems to me to begin afresh on April 4, 1964, with the grant of this permission, a permission which was taken up and used . . .'

This theory was restated by Lord Lane in the *Newbury DC* case [1980] 1 All ER 731 at 760, [1981] AC 578 at 626:

'The holder of planning permission will not be allowed to rely on any existing use rights if the effect of the permission when acted on has been to bring one phase of the planning history of the site to an end and to start a new one.'

The difference in the two theories

In many cases the two theories give the same result. Thus in the *Newbury DC* case there was no new building at all. The two hangars remained the same throughout. So there was no 'new planning unit'. Equally the use of those hangars remained substantially the same throughout for storage purposes. So there was no 'new chapter of planning history'. Lord Lane said ([1980] 1 All ER 731 at 761, [1981] AC 578 at 626):

'The change of use from repository to wholesale warehouse could not by any stretch of the imagination be said to have started a new planning history or created a new planning unit. Indeed no one has so contended.'

But in some cases the two theories give different results. Thus, where an old building is pulled down and a new one put in its place, there is no 'new planning unit'. But the change of use may be so radical that the new use to which the building is put may open a 'new chapter in planning history'. That is what happened in *Prossor's* case. The new use was for a repair shop and stores. The existing use (on which the occupier relied) was for the display of secondhand cars for sale. The repair shop was so radical a change that it opened a 'new chapter in planning history'.

In the *Aston* case, and in our present case, the two theories give different results. In each case there was a new building on part of the site, and thus a 'new planning unit'. But in neither case did the new use open a 'new chapter in the planning history'. I think that the *Aston* case was wrongly decided, so also the decision of the Divisional Court in this case which followed it.

Result

In the light of experience, I think we should discard the theory of the 'new planning unit'. In future it should no longer be thought that a new building creates a 'new planning unit' which starts with a 'nil use'. Certainly not when it is just the replacement of an old building. The better theory is the opening of a 'new chapter in planning history'. This may take place when there is a radical change in the nature of the buildings on the site or the uses to which they are put, so radical that it can be looked on as a fresh start altogether in the character of the site. If there is such a change and the occupier applies for permission and gets it subject to conditions, and acts on that permission, he cannot afterwards revert to any previous existing use rights.

Conclusion

Before us counsel for the respondent pleaded for guidance. He told us that those in the ministry were much perplexed as to the right principle to adopt. He submitted that the right theory was the 'new chapter in the planning history'. I agree with him. Applied to this case, I think there was no change in the planning history at all. There is one whole site of half an acre with existing use rights. All that has been done is to erect a new building in place of an old one, on a little portion of the site. The occupiers are entitled to the use of those rights inside the new building. I would allow the appeal accordingly.

OLIVER LJ. The Divisional Court held that it was bound by the decision in *Aston v Secretary of State for the Environment* (9 April 1973, unreported) to find that where, either with or without permission, a building has been erected on land previously unbuilt on, that building is, from the time of its erection, a new planning unit so that the building owner is unable, where the question in issue is whether or not there has been a material change of use, to pray in aid the pre-existing user of the land on which the building stands.

It is, I think, impossible to escape from the conclusion that that is what *Aston v Secretary of State* decided. The pith of the matter is contained in the following passage from the judgment of Lord Widgery CJ:

> '... the principle which one derives from the authorities and applies to the present case is that, where you have a new building erected, that part of the land which was absorbed in the new building and covered by the new building is merged in it; you start with a new planning unit which has no permitted planning use except those derived from the planning permission, if any, and from s 33(2) of the Town and Country Planning Act 1971, which allows such a building in many instances to be used for the purpose for which it was designed.'

The principle there expressed is enunciated as a universal one, and the short question raised by the present appeal is: is it right? Inevitably this involves some review of the relevant authorities from which the universal principle is said to stem.

The first of these is *Prossor v Minister of Housing and Local Government* (1968) 67 LGR

109. There there had been for some years an established existing use as a petrol filling station and motor repair shop. A planning permission was granted for the erection of a new building and the replacement of an existing repair shop and stores. It is not clear how far the new building covered the whole of the site, but, having regard to its size and shape and the nature of the user, I infer that it covered part only. It was, however, granted subject to a condition relating to the whole site that it should not be used for retail sales other than sales of spare parts and the redevelopment took place pursuant to that permission. An enforcement notice to prevent the user of the forecourt for the sale of secondhand cars was upheld by the Divisional Court and on one analysis of the decision (subsequently suggested in *Gray v Minister of Housing and Local Government* (1969) 68 LGR 15) the basis for this was, in effect, an estoppel arising from the acceptance of the permission with the condition attached and the subsequent implementation of it. If that was indeed the ground of the decision (and the judgment of Lord Parker CJ does not make it entirely clear that it was) it is now clear from *Newbury DC v Secretary of State for the Environment* [1980] 1 All ER 731, [1981] AC 578 that it cannot be sustained as a correct decision on that ground. But the way in which it was put by Lord Parker CJ was this (67 LGR 109 at 113):

> '... by adopting the permission granted in April 1964, the appellant's predecessor, as it seems to me, gave up any possible existing use rights in that regard which he may have had. The planning history of this site, as it were, seems to me to begin afresh on April 4, 1964, with the grant of this permission, a permission which was taken up and used ...'

I draw attention to this because it is consistent with counsel for the respondent's submission on the present appeal that what the court is concerned with is not so much 'a new planning unit' (an expression which, he suggests, may be misleading) but simply with the question whether an event or a concatenation of events has taken place which can, as a matter of *fact*, be said to have opened a new chapter in the planning history. That is a question of intention and degree. The expression 'planning unit' (which nowhere appears in the legislation) is, however, one which is now hallowed by usage and is, I think, a convenient phrase for identifying, in cases where the question is whether there has been a material change of use, both the area whose planning history requires to be studied for that purpose and, in an appropriate case, the starting point of that history. The concept of the creation of a new 'planning unit' by the opening of a new planning history, not so expressed in *Prossor's* case, emerges in the judgments of the Divisional Court in *Petticoat Lane Rentals Ltd v Secretary of State for the Environment* [1971] 2 All ER 793, [1971] 1 WLR 1112. The history of the land with which that case was concerned had started with the use of the land as an open site on which a market was held. A building was then erected over the whole site pursuant to a planning permission which designated the use as an office, warehousing, supermarket, car parking and loading area (to be used for market trading on Sundays). The question was whether the existing use of the site for weekday markets prior to the erection of the building survived that event. The Divisional Court held unanimously that it did not. There was some discussion in the judgment of Widgery LJ of the ratio of *Prossor's* case, but he found it unnecessary to express any conclusion and was content to say that the principle clearly applied 'where, as here, one has a clear area of land subsequently developed by the erection of a building over the whole of that land' (see [1971] 2 All ER 793 at 796, [1971] 1 WLR 1112 at 1117). It seems, however, that when he spoke of 'the principle of *Prossor's* case' he must have had in mind the reference in the judgment of Lord Parker CJ to the fresh beginning of the planning history, for he went on to say ([1971] 2 All ER 793 at 796, [1971] 1 WLR 1112 at 1117):

> 'Where that happens ... one gets in my judgment an entirely new planning unit created by the new building. The land as such is merged in that building and a new planning unit with no planning history is achieved. The new planning unit, the new building, starts with a nil use, that is to say immediately after it was completed

it was used for nothing, and thereafter any use to which it is put is a change of use, and if that use is not authorised by the planning permission, that use is a use which can be restrained by planning control.' a

It is thus clear that what brought about the result described by Widgery LJ was not the acceptance of the planning permission, which was arguably inconsistent with the prior existing use, but the mere erection of the building, and it would follow that the same result must ensue even if there were, as in the instant case, no planning permission at all. Bridge J and Lord Parker CJ agreed, but reserved the question of what the result would be where (as here) the building was on part only of a site having a prior existing use as a whole. The concept here, therefore, is that of the creation of a new and different unit by the physical alteration of the land to an extent enabling it to be treated as if it were a new creation different and divorced from the land which was there before. Thus Bridge J referred to the 'disappearance' of the land to which the existing user was attached (see [1971] 2 All ER 793 at 797, [1971] 1 WLR 1112 at 1118). b c

A similar concept is to be found in *Leighton and Newman Car Sales Ltd v Secretary of State for the Environment* (1976) 32 P & CR 1, where there had been a pre-existing garage business on a site forming part of the relevant land, a business which included the sale of cars. The site, together with two adjoining sites, was redeveloped entirely as a petrol filling station under a permission which contained a condition restricting the use of certain car parking space to the parking of vehicles of the occupiers and users and prohibiting the sale or display for sale of vehicles on the forecourt. The Secretary of State's dismissal of the tenant's appeal against an enforcement notice was attacked, inter alia, on the ground that the inspector's report had not included a relevant matter, namely the existing use of the garage site before the redevelopment. This court upheld the dismissal by a Divisional Court of an appeal from the Secretary of State. In the judgment of the court, delivered by Browne LJ, there is this passage (at 10): d e

'Further, Nos. 271 to 275 were not merely a different "planning unit" from the old No. 271; they were a completely new and different physical unit to which we think the previous use of No. 271 was irrelevant.'

In my judgment this is the essence of the matter. Where there has been a total change in the physical nature of the premises, it is easy to infer (indeed, the inference may be irresistible) that reliance on any prior user is being abandoned and a new planning history is to begin. Such an inference may equally be drawn, and may equally be irresistible, where there is no change or a less radical change in the physical nature of the site but a change in what I may call its planning status which is inconsistent with the preservation of a prior existing use; for instance its subdivision into smaller units of occupation or its incorporation into a larger single unit. f g

Whether the alteration is of such a character as to produce this result is, I think, in every case, a question of fact and degree.

How, then, does the matter stand when, as in the instant case, what has occurred is that there has been some physical alteration to part only of an occupation site, for instance by the erection on it of a new building, the alteration of an existing building or an application for and grant of a planning permission subject to conditions inconsistent with the prior user? This may pose very difficult problems in the interpretation of the facts, particularly where, as here, there is a mixed site or where a particular use has been intensified as a result of the change. But these are problems only of fact and degree, not of principle, and they are not insoluble. h

There are, so far as the industry of counsel has been able to discover, only two reported cases (the *Aston* decision is, as I have said, unreported) which relate to the problems created in the field of change of user by the erection of a new building on part only of the site. The first is *Joyce Shopfitters Ltd v Secretary of State for the Environment* [1976] JPL 236, a decision of the Divisional Court. The report is a very sketchy one, but what seems to have occurred there was that a building on the site was used partly for the manufacture of fencing and garden furniture and partly for car repairs and car breaking. The j

remainder of the site, which included two cottages, had been used for purposes ancillary to those purposes. The site owners, without planning permission, built an extension to the main building and demolished the cottages. Two enforcement notices were served, one requiring the removal of the extension and one requiring the discontinuance of the user of the site for the purposes of a joinery and shopfitting business, a business which the Secretary of State found was not a change of use because it was merely a change from one industrial use to another within s 22(2)(*f*) of the Town and Country Planning Act 1971. He declined to grant permission for the retention of the extension to which the first enforcement notice related, but he upheld the second enforcement notice relating to change of use in respect of the site of the extension and (on the ground that there was a separate planning unit with a nil user) in respect of the site of the cottages. The Divisional Court remitted the matter for reconsideration on the basis that, so far as the site of the extension was concerned, there was an existing use which had not been extinguished by the erection of the extension, and so far as the site of the cottages was concerned the planning unit to be considered was the site as a whole.

It is not easy from the very brief report to get any very clear idea of the court's reasoning, but the case is consistent, indeed really only consistent, with the view that the court did not consider that the changes which had taken place in the site as a result of the extension and the demolition were of a sufficiently radical nature to justify the inference that in either case there was the abandonment of the existing industrial user and the commencement of a new planning history. The case is thus entirely consistent with what has been said above and inconsistent with the view that the mere erection of a building constitutes a new planning unit. The second case is that of *Hilliard v Secretary of State for the Environment* (1978) 37 P & CR 129. Here an area of farm land had existing use rights for agricultural purposes with ancillary storage and wholesale distribution of both indigenous and non-indigenous produce. The owner applied for and was granted a planning permission to erect a building, the permission having attached to it a condition that it should only be used for the storage of agricultural produce and farm implements in conjunction with the use of the farm for agricultural purposes. The building subsequently came to be used for the wholesale distribution of fruit and vegetables and the local authority, instead of serving an enforcement notice to enforce the condition, served a notice requiring the discontinuance of material change of user on the footing that there had been an intensification of user amounting to an unauthorised change of user. This court, on appeal from the Divisional Court's upholding of the Secretary of State's decision to uphold the enforcement notice, reversed the decision and remitted the matter to the Secretary of State on the footing that the evidence had been directed entirely to the intensification of the user of the building when it should have been directed to the intensification of the user of the farm as a whole. The case is not, I think, of very much assistance in the context of the present inquiry, because, ex concessis, the planning unit there was the farm as a whole and it was to the whole of that unit (as is, indeed, the case here) that the enforcement notice was directed. The case therefore turned entirely on whether the evidence could be said to have established a change of user by intensification of the farm as a whole. It has, however, this relevance, that, as counsel for the appellants points out, a building erected on part only of the land was not there treated as, ipso facto, creating a new planning unit, and indeed the decision of the court is only consistent with their view that it had not done so. Presumably it did not do so because the alteration of the unit was not such, as a matter of fact and degree, as to justify the inference that the existing user was being abandoned and a new and different planning unit created.

Speaking for myself, I have some sympathy with counsel for the respondent's suggestion that 'planning unit' has become perhaps a slightly confusing expression, combining, as it does, concepts both of geography and history. It is used in the temporal sense of a separate and distinct period of planning history with its own beginning and end relating to a given area of land, and it is used to distinguish and isolate the geographical area of land the history of which, for a given purpose, has to be studied. Nevertheless it is, I think, a convenient phrase, and there is an extremely helpful general

test contained in the judgment of Bridge J in *Burdle v Secretary of State for the Environment* [1972] 3 All ER 240 at 244–245, [1972] 1 WLR 1207 at 1212–1213. a

The historical content of the term is well brought out in the speeches of Lord Scarman and Lord Lane in *Newbury DC v Secretary of State for the Environment*. Lord Scarman said ([1980] 1 All ER 731 at 753, [1981] AC 578 at 617–618):

> 'Clearly it will be much more difficult to establish the creation of a new planning unit or the beginning of a new chapter of planning history where the unnecessary permission which has been granted subject to conditions purports to authorise only a change of use. But such cases can exist [and he gave an example]. There is in such a case a wholly new departure, a new chapter of planning history.' b

Lord Lane is to the same effect. He said ([1980] 1 All ER 731 at 760–761, [1981] AC 578 at 626):

> 'We were asked by counsel for the Secretary of State to say that the principle [i e the principle of the *Petticoat Lane* decision] can only apply where the permission granted is to build or rebuild or the like and can never apply to cases where the permission is simply to change the use. I do not consider that any such limitation would be proper. It is not the reason for the break in planning history which is important. It is the existence of the break itself, whatever the reasons may have been . . . In the present case there is no such break in the history. The change of use from repository to wholesale warehouse could not by any stretch of the imagination be said to have started a new planning history or created a new planning unit.' c d

Coming back, then, to the *Aston* case, in my judgment the principle there stated by Lord Widgery CJ is, if I may say so respectfully, too widely expressed. In my view the authorities show not that a new building, per se, has to be equated with a new planning unit but that it is one of the factors (it may in many cases be a conclusive factor) to be taken into account in considering whether there has taken place in relation to the particular land under consideration a change of so radical a nature as to constitute a 'break in the planning history' or a 'new planning unit' (the expressions are used interchangeably). As counsel for the appellants points out, the building in the *Aston* case was, as a matter of fact, pretty much on all fours with that in the *Petticoat Lane* case, for it replaced an earlier building, destroyed eight years before, which had covered rather less than half the available area, and, it itself covered 90% of the available area. There is, therefore, no ground for thinking that the case was wrongly decided on the facts. But the stated ground for the decision was, in my judgment, too widely expressed. e f

In the instant case, the local authority could perfectly well have exerted their planning control over the site by serving an enforcement notice for the removal of the building, and then, if it was the user and not the building that they objected to, granting a planning permission subject to a condition as to user. They could have done that at any time within four years from 1975, but they chose not to do so. In serving an enforcement notice to discontinue the use of the building they necessarily opened up a consideration of the question whether the circumstances, including the erection of the building without permission and any intensification of user, led to the inference of the creation of a new planning unit. It is not for this court now to decide that question, and I content myself with observing only that the buildings concerned were merely a replacement for already existing buildings on the site. I am, however, clearly of the view that, in considering himself bound by the *Petticoat Lane* decision to hold that the erection of the new buildings per se constituted a new planning unit and that he was thus constrained to depart from his inspector's recommendation, the Secretary of State misdirected himself. This, I think, would clearly have been the view of Donaldson LJ if he had not felt himself bound by the *Aston* decision, a disability from which this court is relieved. I would allow the appeal. g h j

It follows from what I have said above that in my view the difference between a new planning unit and a change in the planning history is largely a semantic one. The former

expression is, as I have said, hallowed by long usage, and I for my part think it would be a pity to discard it so long as the concepts which it embraces (which include a change in the planning history) continue to be clearly appreciated.

WATKINS LJ (read by Oliver LJ). I have had the advantage of reading the judgment of Oliver LJ, with which I entirely agree. The Secretary of State, we were told, seeks guidance on the use of the expressions 'planning unit' and 'a change in planning history'. It is my firm opinion that the use of the former should be preserved and the guidance provided by Bridge J in *Burdle v Secretary of State for the Environment* [1972] 3 All ER 240 at 244–245, [1972] 1 WLR 1207 at 1212–1213 on its application, which obviously involves a study of the history of the use of the land in question, followed.

Appeal allowed. Matter remitted to Secretary of State together with opinion of the court for hearing and determination.

Solicitors: *Malkin Cullis & Sumption,* agents for *Lamport Bassitt & Hiscock,* Southampton (for the appellants); *Treasury Solicitor.*

Diana Procter Barrister.

Marina Shipping Ltd v Laughton and another

COURT OF APPEAL, CIVIL DIVISION
LAWTON, BRIGHTMAN AND OLIVER LJJ
8, 9, 10, 11 DECEMBER 1981

Trade dispute – Acts done in contemplation or furtherance of trade dispute – In contemplation or furtherance of – Secondary action in furtherance of dispute – Validity of secondary action – Contract for supply of services between employer who is party to dispute and employer to whom secondary action relates – Vessel let on time charter by owners to charterers – Charterers engaging shipping agents to arrange harbour services with port authority – Vessel blacked while in port – Port authority's employees taking secondary action to prevent vessel leaving port – Whether contract for supply of services between owners and port authority – Whether secondary action by port authority's employees actionable in tort – Employment Act 1980, s 17(3)(6).

The plaintiffs were the registered owners of a cargo vessel sailing under a flag of convenience which was chartered to a Belgian company for a period of six months under a time charter made on 28 July 1981. On 3 November the vessel loaded a cargo at Panama for delivery in Hull and Hamburg. In the course of the voyage to Hull the charterers' agents requested a firm of shipping agents in Hull to arrange with the port authority at Hull for a berth. When the vessel was two days out of Hull the shipping agents finalised arrangements with the port authority for the reception of the vessel and also arranged for pilot services. The shipping agents were well known to the port authority who did not inquire on whose behalf they were acting. After the vessel docked on 23 November some of the crew members complained to the International Transport Workers' Federation (the ITF) about their conditions of service and pay. Two officials of the ITF investigated the complaints and demanded that the owners of the vessel pay the crew ITF rates appropriate for Europe and also pay the crew back pay from the time they signed their articles. When the owners refused those demands the ITF decided to 'black' the vessel and advised appropriate affiliated unions of the blacking including the National Union of Railwaymen (the NUR) whose members refused to operate lock gates thereby preventing the vessel from leaving port. The refusal of the NUR members to operate the

Brooks and Burton Ltd v Secretary of State for the Environment and another

COURT OF APPEAL, CIVIL DIVISION
MEGAW, LAWTON LJJ AND SIR DAVID CAIRNS
27th, 28th, 29th, 30th JUNE, 1ST, 28th JULY 1977

Town and country planning – Development – Permitted development – Development for industrial purposes – Land used for carrying out industrial process otherwise than in contravention of planning control or without planning permission – Use in contravention of planning control and without permission at its inception but no longer liable to enforcement action by reason of lapse of time – Whether land used 'otherwise than (i) in contravention of previous planning control or (ii) without planning permission' – Whether owner of land entitled to carry out development constituting permitted development for industrial purposes – Town and Country Planning General Development Order 1973 (SI 1973 No 31), art 3(1), Sch 1, class VIII.

Town and country planning – Enforcement notice – Validity – Wrong factual basis – Misconception as to use to which land had been put – Notice alleging that land had been used as light industrial building – Land in fact used as general industrial building – Notice directed against intensification of use constituting material change of use – Notice making clear to recipient that it required reversion to former use – Whether notice valid.

Town and country planning – Development – Use classes – Building – Reference to building including land occupied therewith and used for same purpose – Use as general industrial building for any purpose – Test for determining whether land used as 'industrial building' – Land occupied with building and used for same purpose – Unnecessary to show that process carried out on land dependent on building or that land ancillary to building – Sufficient to show that land used for same purpose as building – Town and Country Planning (Use Classes) Order 1972 (SI 1972 No 1385), art 2(3), Sch, class IV.

Town and Country Planning – Development – Material change of use – Intensification of use – Intensification of use capable of constituting a material change of use – Question whether it constitutes a material change of use a question of degree to be determined by Secretary of State.

Between 1929 and 1958 a plot of land covering about five acres was used for brick-making. In January 1959 the owner of the land was granted planning permission to use part of it for a class III 'light industrial use'. Later in 1959 he sold the land together with the brick-making business. Thereafter it remained unused until the end of 1963 when it was bought by a partnership. In breach of planning control, the partnership used part of the land to make concrete blocks for garden use. The blocks were made inside a shed containing block-making machinery and dried in the open air on concrete strips set in hoggin. The partnership had the machinery and manpower to produce 300,000 blocks a year but that was never achieved. In December 1972 the appellants bought the land, believing that they did not require planning permission to carry on the block-making business. Since no enforcement notice had been served on the partnership or the appellants before 1973, the appellants became immune from enforcement proceedings in respect of the block-making business. The appellants started to modernise and expand the business. They began making concrete blocks for general building use as well as for ornamental use and installed in the open air a concrete batching plant, standing some 7·62 metres off the ground, together with other smaller machines. The machines which the partnership had used in the shed were retained and used in wet weather. Production began to run at the rate of 1,200,000

blocks a year and more men had to be employed. Traffic to and from the site increased considerably. Following complaints from local inhabitants the planning authority decided that the land was not being used 'as a light industrial building' under art 3(1)[a] of, and class III of the schedule[b] to, the Town and Country Planning (Use Classes) Order 1972, in accordance with the planning permission that had been granted in 1959, and accordingly they served enforcement notices on the appellants. One notice, dated 4th April 1973, alleged breach of planning control by the erection of a concrete batching plant without the grant of permission and required the appellants to remove it. Another notice, dated 13th September 1973, alleged that there had been a breach of planning control in that the land had been developed by making a material change of use of the land and building, namely the manufacture of concrete blocks and other industrial purposes not included in class III of the Use Classes Order, without planning permission. The notice required the appellants to discontinue that use and restore the land and buildings to their condition before the development took place. The appellants appealed to the Secretary of State against the enforcement notices. They contended, inter alia, that there had been no material change of use of the land and that the enforcement notices were invalid. Following an inquiry the Secretary of State held that the enforcement notice of 13th September was valid but that it should be varied by deleting the reference to class III of the Use Classes Order and substituting words to indicate what the planning authority were complaining about, i e the use of a mobile machine, the extension of the areas used for block-making and the intensification of use, and that it should require the appellants to discontinue the use of the land for the manufacture of concrete blocks by a mobile block-making machine and to remove the machine and other plant connected therewith from the land. The Secretary of State further decided (i) that the use to which the land had been put by the partnership before the appellants bought it was a class IV use and not a class III use, (ii) that that use, although not a permitted use, had become immune from enforcement, and (iii) that there had been a material change of the use of the land, by block-making in the open, by different working procedures and by intensification of the potential capacity of the plant. The Secretary of State's reasons for deciding that there had been a material change of use were that the processes carried out on the open land were not dependent on any use of the industrial building and therefore could not be said to be a use 'as a general industrial building', within class IV of the Use Classes Order, nor were they a use 'for any other purpose of the same class' and therefore permissible under s 22(2)(*f*)[c] of the Town and Country Planning Act 1971 and art 3(1) of the Use Classes Order. The Secretary of State also considered that on the evidence the introduction of a materially different working procedure together with intensification of the potential capacity of the plant had led to a material change of use of the whole block-making site. The appellants appealed to the Divisional Court which dismissed the appeal, holding (i) that the enforcement notice of 13th September was valid and could lawfully be amended in the way the Secretary of State had done, (ii) that the land on which block-making was being carried out in the open had never acquired the capacity for use as an industrial building because it had never

a Article 3(1) provides: 'When a building or other land is used for a purpose of any class specified in the Schedule to this order, the use of such building or other land for any other purpose of the same class shall not be deemed for the purposes of the Act to involve development of the land.'

b The schedule, so far as material, provides:
'Class III.— Use as a light industrial building for any purpose.
'Class IV.— Use as a general industrial building for any purpose.'

c Section 22(2), so far as material, provides: 'The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land, that is to say ... (*f*) in the case of buildings or other land which are used for a purpose of any class specified in an order made by the Secretary of State under this section, the use thereof for any other purpose of the same class.'

been land ancillary to an industrial building and therefore could not constitute a 'building', within art 2(3)[d] of the Use Classes Order, and (iii) that accordingly, apart altogether from changes in the volume and methods of manufacture, there had been a material change in the use of the land and in consequence unlawful development. The Divisional Court did not give a ruling on the notice of 4th April. The appellants appealed, contending, inter alia, that the erection of the batching plant was permitted under art 3(1)[e] of, and class VIII, para 1[f], of Sch 1 to, the Town and Country Planning General Development Order 1973, since it constituted the installation or erection by way of addition of machinery not exceeding 15 metres in height carried out by an industrial undertaker on land used for the carrying on of an industrial process and, therefore, that the notice of 4th April was also invalid.

Held – (i) Although the use to which the partnership had put the land was immune from enforcement, it had nonetheless been a development in breach of planning permission. Accordingly the erection by the appellants of the batching plant was not a permitted development under class VIII of Sch 1 to the 1973 order since the land had not been used 'otherwise than (i) in contravention of previous planning control or (ii) without planning permission'. It followed that the enforcement notice dated 4th April 1973 requiring the appellants to remove the plant was a valid notice (see p 745 *c* to *g*, post); *LTSS Print and Supply Services Ltd v London Borough of Hackney* [1976] 1 All ER 311 applied.

(ii) The fact that the planning authority had wrongly assumed that the partnership had used the land for class III purposes did not invalidate the notice of 13th September. The planning authority had overstated their case, but that did not mean that they had no case at all. The notice was effective for its purpose, in that it made clear to the appellants that they were required to stop doing what they had been doing and use the land in the same way that the partnership had used it, and had quite properly been amended by the Secretary of State to show the correct degree of unauthorised use (see p 741 *f* to p 742 *a*, post); *Miller-Mead v Minister of Housing and Local Government* [1963] 1 All ER 459 distinguished.

(iii) The test to be applied in determining whether, for the purpose of art 2(3) of the Use Classes Order, land which was occupied with a building used as an industrial building had itself been used as an 'industrial building', was not whether the process carried out on the land was dependent on the use of the building, or whether the land was ancillary to the building, but whether the land had been used for the same purpose as the building and could therefore be regarded as one unit with it. Since, during the partnership's occupation of the land, the part of the block-making site in the open had been used for the same purpose as the shed in which the block-making machinery was installed, the drying of the blocks in the open being part of the block-making process, the whole block-making site was a 'general industrial building' within class IV of the Use Classes Order. It followed that, under s 22(2)(*f*) of the 1971

---

d Article 2(3) provides: 'References in this order to a building may, except where otherwise provided, include references to land occupied therewith and used for the same purposes.'

e Article 3(1), so far as material, provides: 'Subject to the subsequent provisions of this order, development of any class specified in Schedule 1 to this order is permitted by this order and may be undertaken upon land to which this order applies, without the permission of the local planning authority or of the Secretary of State . . .'

f Paragraph 1, so far as material, provides: 'Development of the following descriptions, carried out by an industrial undertaker on land used (otherwise than (i) in contravention of previous planning control or (ii) without planning permission granted or deemed to be granted under Part III of the Act) for the carrying out of any industrial process, and for the purposes of such process . . . (iii) the installation or erection, by way of addition or replacement, of plant or machinery, or structures or erections of the nature of plant or machinery, not exceeding 15 metres in height or the height of the plant, machinery, structure or erection so replaced, whichever is the greater . . .'

Act and art 3(1) of the Use Classes Order, the appellants were entitled to use the block-making site for any purpose that was within class IV. It was therefore immaterial that the intensification of use which had been found to have taken place amounted to a material change of use. Accordingly the appeal would be allowed and the case remitted to the Secretary of State (see p 743 *g* to *j* and p 744 *a b*, post).

Per Curiam. Intensification of use may be a material change of use. Whether it is or not depends on the degree of intensification, which is a matter to be determined by the Secretary of State (see p 744 *e*, post).

Notes

For the contents and validity of an enforcement notice, see 37 Halsbury's Laws (3rd Edn) 334, 335, para 439, and for cases on the subject, see 45 Digest (Repl) 350-354, 91-101.

For use classes, see 37 Halsbury's Laws (3rd Edn) 264-268, para 368, and for change of use, see ibid 259-263, para 366.

For the Town and Country Planning Act 1971, s 22, see 41 Halsbury's Statutes (3rd Edn) 1605.

For the Town and Country Planning (Use Classes) Order 1972, arts 2, 3 and schedule, see 21 Halsbury's Statutory Instruments (3rd Reissue) 138, 139.

For the Town and Country Planning General Development Order 1973, art 3 and Sch 1, class VIII, see ibid 151, 176.

With effect from 29th March 1977, art 3 of and Sch 1 to the 1973 order have been replaced by the Town and Country Planning General Development Order 1977 (SI 1977 No 289), art 3 and Sch 1.

Cases referred to in judgment

Brazil (Concrete) Ltd v Amersham Rural District Council (1967) 65 LGR 365, 18 P & CR 396, CA, 45 Digest (Cont Vol C) 961, *30j*.

East Barnet Urban District Council v British Transport Commission [1961] 3 All ER 878, [1962] 2 QB 484, [1962] 2 WLR 134, 126 JP 1, 60 LGR 41, 13 P & CR 127, DC, 45 Digest (Repl) 329, *17*.

Glamorgan County Council v Carter [1962] 3 All ER 866, [1963] 1 WLR 1, 127 JP 28, 61 LGR 50, 14 P & CR 88, DC, 45 Digest (Repl) 338, *46*.

Guildford Rural District Council v Penny [1959] 2 All ER 111, [1959] 2 QB 112, [1959] 2 WLR 643, 123 JP 286, 57 LGR 169, 10 P & CR 232, CA, 45 Digest (Repl) 325, *7*.

LTSS Print and Supply Services Ltd v London Borough of Hackney [1976] 1 All ER 311, [1976] QB 663, [1976] 2 WLR 253, 74 LGR 210, 31 P & CR 133, CA.

Miller-Mead v Minister of Housing and Local Government, Same v Same [1963] 1 All ER 459, [1963] 2 QB 196, [1963] 2 WLR 225, 127 JP 122, 61 LGR 152, 14 P & CR 266, [1963] RVR 181, CA, 45 Digest (Repl) 352, *100*.

Cases also cited

Bendles Motors Ltd v Bristol Corpn [1963] 1 All ER 578, [1963] 1 WLR 247, DC.

Burdle v Secretary of State for the Environment [1972] 3 All ER 240, [1972] 1 WLR 1207, DC.

Cheshire County Council v Secretary of State for the Environment (1971) 222 Estates Gazette 35, [1972] JPL 270, DC.

Hammersmith London Borough Council v Secretary of State for the Environment (1975) 73 LGR 288, 30 P & CR 19, DC.

Lewis v Secretary of State for the Environment (1971) 70 LGR 291, 23 P & CR 125, DC.

Mansi v Elstree Rural District Council (1964) 62 LGR 172, 16 P & CR 153, DC.

Metallic Protectives Ltd v Secretary of State for the Environment [1976] JPL 166, DC.

Trentham (G Percy) Ltd v Gloucestershire County Council [1966] 1 All ER 701, [1966] 1 WLR 506, CA.

Trevors Warehouses Ltd v Secretary of State for the Environment (1972) 23 P & CR 215, DC.

Vickers-Armstrong v Central Land Board (1957) 9 P & CR 33, CA

Appeal

Two enforcement notices dated 4th April 1973 and 13th September 1973 respectively were served on the appellants, Brooks & Burton Ltd, by the Wimborne and Cranborne Rural District Council, acting as agents for the second respondents, the Dorset County Council, as the planning authority, pursuant to s 87 of the Town and Country Planning Act 1971, in respect of the appellants' use of land known as Holt Brickworks, Holtwood, Wimborne, Dorset. The appellants appealed to the first respondent, the Secretary of State for the Environment, against the notices. The Secretary of State ordered an inquiry which was held by his inspector, H St J Grant Esq, from 22nd October to 9th November 1974. On 19th April 1975 the inspector made his report to the Secretary of State. By letter dated 14th October 1975 the Secretary of State pursuant to s 88 of the 1971 Act upheld with amendments the two enforcement notices. The appellants appealed against his decision under s 246 of the 1971 Act. On 22nd July 1976 the Divisional Court of the Queen's Bench Division (Lord Widgery CJ, Melford Stevenson and Caulfield JJ) dismissed the appeal. The appellants appealed to the Court of Appeal pursuant to leave of the Divisional Court and, to the extent that that leave did not cover the issue of the validity of the enforcement notice of 4th April, by leave of the Court of Appeal. The facts are set out in the judgment of the court.

Monique Viner and *William Hicks* for the appellants.
Peter Boydell QC, *Harry Woolf* and *Robert Seabrook* for the Secretary of State.
The second respondents did not appear.

Cur adv vult

28th July. **LAWTON LJ** read the following judgment of the court: In this appeal, in which the Dorset County Council have not appeared, the main questions for decision have been these. First, was an enforcement notice dated 13th September 1973 served on the appellants by the Wimborne and Cranborne Rural District Council, acting as agents of the Dorset County Council as the planning authority, null and void? Secondly, even if that enforcement order was valid, did the Secretary of State misdirect himself in law on the facts found by the inspector and as to the construction of the Town and Country Planning (Use Classes) Order 1972 ('the Use Classes Order')? Thirdly, was an enforcement notice dated 4th April 1973, and served by the same planning authority, valid having regard to the facts found by the inspector?

The land to which these enforcement notices applied was about four miles north-north-east of Wimborne Minster. We shall refer to this land as the 'appeal site'. It covers about five acres but the activities which led to the serving of the two enforcement notices were on only part of the site, the area being about 1.78 acres. We shall refer to this as the 'block-making site'. The appeal site lies behind some houses in the hamlet of Holt and is approached by an accommodation road off an unclassified road running through the hamlet. This site, together with some adjoining land, was for a long time before 1963 known as Holt Brickworks. We shall refer to all that land as the 'brickworks land'. Brick-making on a small scale was carried on there from 1929 until 1958. Clay was hauled up by machinery from clay-pits on this land. It was moulded in a shed. The moulded bricks were then dried in open-sided sheds known as hacks, and when sufficiently dry they were burnt in kilns. By 1937 there were three kilns. As brick-making was taking place on 1st July, 1948, that activity became an established use under the Town and Country Planning Act 1947: see s 12(1). Under the Town and Country Planning (Use Classes) Order 1950[1], the 'burning of building bricks' became a class VI use. In 1958 brick-making stopped. The then owner of the brickworks land applied to the planning authority for permission to use three acres

1 SI 1950 No 1131

of it for light industrial purposes, a class III use. A large part of that three acres was on the appeal site. The application was granted on 28th January 1959. Later in that year the brickworks land was sold to a Mr Stokes, together with the goodwill of the brick-making business. Mr Stokes found it impracticable to carry on the brick-making business. The land was unused from 1959 until the end of 1963; but the buildings and machinery remained.

In the summer of 1963 Mr Stokes agreed to sell the brickworks land to three partners, who were two brothers named Sturtevant and a Mr King. The conveyance was dated 14th October 1963. The partners wanted to use a small part of the brick-works land to make concrete blocks. They started to do so in November 1963. By Christmas 1963, commercial production can be said to have been established. Planning permission for this change of use had neither been asked for nor given. It was a development of the land in breach of planning control, but as it had started before the end of 1963 and no enforcement notice had been served in respect of it before 1973, the partners and their successors in title became immune from enforcement; but the use for concrete block-making was not one for which planning permission had been granted: see ss 23 and 87 of the Town and Country Planning Act 1971 and *LTSS Print and Supply Services Ltd v London Borough of Hackney*[1]. That this use was not a lawful one, even though the occupiers were immune from enforcement proceedings, is of importance in relation to the appellants' submissions as to the validity of the enforcement notice dated 4th April 1973.

By 1972 Mr King was dead. One of the Sturtevant brothers had sold out to the other. He was carrying on with the help of his son. Their operations were then on a small scale. They made concrete blocks for garden use. Two sheds were in use. One had block-making machinery in it which was driven by a diesel engine. This caused some noise which could be heard outside the boundaries of the appeal site. The other was used as a staff room and had a lavatory in it. The blocks when made were dried in the open air. This was done by placing them on concrete strips set in hoggin which had been laid down. About six men were engaged in block-making. The potential production for the machinery and manpower was about 300,000 blocks a year but this was not accomplished. The vehicular traffic to and from the block-making site was light. The office work was done in a bungalow in a corner of the block-making site. Planning permission for the erection of this bungalow had been given in 1959 but its use was limited to light industrial purposes.

In 1972 the appellants became interested in the brickworks land. They had ideas for increasing the production of concrete blocks by the use of more modern machinery. They made enquiries about the planning position. In the autumn of 1972, one of the appellants' directors, a Mr Brooks, called at the local planning office at Wimborne Minster and had an interview with a Mr Belcher, who was the local building inspector. Mr Belcher said he knew the brickworks land and that concrete blocks had been made there for ten years or more. A few days later Mr Brooks called on Mr Belcher again. On this occasion Mr Belcher said that he had looked up the records and that planning permission for industrial use had been given for three acres and that he could see no reason why Mr Brooks's company should not carry on with concrete block-making. He suggested that Mr Brooks should call on the planning officer, a Mr Belsten. This Mr Brooks did, accompanied by another director. Mr Belsten got out the plans and checked the records. He confirmed that there was a permitted use on three acres under class III. Mr Brooks told him that his company had plans to install a new mixer and to concrete the yards. Mr Belsten said that they could carry on making concrete blocks.

The appellants' two directors assumed that their company would not require planning permission for what they had in mind to do by way of block-making on the appeal site. No application was ever made for planning permission. When in

1 [1976] 1 All ER 311, [1976] QB 663

1973 the appellants learned that the planning authority were claiming that they should have obtained permission for what they were doing and served the enforcement notice dated 13th September 1973 they were indignant. In the inquiry which was held as a result of the service of this and other enforcement notices, the appellants contended that the planning authority were estopped by what Mr Belcher and Mr Belsten had said to them from alleging that there had been any development of the appeal site which required planning permission. The inspector rejected this contention. So did the Secretary of State. On the appeal from the latter's decision which the appellants made to the Divisional Court they again raised the issue of estoppel and again failed. The Divisional Court's order did not indicate that leave to appeal on that issue had been given. At the hearing counsel for the appellants asked this court for leave to appeal on that issue. After some discussion she abandoned that application. This was a wise decision as on the evidence and the inspector's findings estoppel would have been difficult, probably impossible, to establish. We say no more about this issue.

Confident that they could lawfully use the appeal site for what they wanted to do, the appellants agreed to buy it in November 1972. It was conveyed to them on 14th December. Once in possession they set about modernising and expanding the business which the Sturtevants had carried on. They planned to produce concrete blocks for general building use as well as for ornamental garden use. Blocks of the new type were to be made in the open air with modern equipment. For this purpose they obtained and installed in the open air on the block-making site some machinery called a batching plant. It was large, standing about 25 feet [7·62 metres] off the ground. It could be seen from neighbouring properties. It made some noise, as did the diesel generator which provided it with electricity. A small amount of cement dust was released when cement was fed into it. Other smaller machines were brought on to the block-making site and installed in the open. The machinery which the Sturtevants had used for making garden blocks was retained and used in one of the two sheds in wet weather. The other shed was used, as it had been in the Sturtevants' time, as a workshop with welding equipment and tools in it. Part was set aside as a staff room, adjoining which was a lavatory. The bungalow was used solely as offices. The new machinery produced many more blocks than had been produced in the Sturtevant days. Production began to run at a rate of about 1,200,000 per annum. More men had to be employed, 15 or so instead of six. The traffic to and from the site increased considerably; more materials were brought on to the site, more blocks taken away. The materials had to be stored pending use. This was done on a small piece of land, about $\frac{1}{4}$ acre in size to the south-east of the area which had been used by the Sturtevants for block-making. Lorries were also parked there from time to time.

The people living around did not like what was now going on. Complaints were made to the planning authority. They looked into the matter. What was going on was not a use of the block-making site 'as a light industrial building' under class III of the Use Classes Order which was the use for which permission had been granted in 1959. The reason for this was that the appellants' block-making activities were undoubtedly a detriment to the amenity of the neighbourhood by reason of noise and dust: see the definition of 'light industrial building' in art 2(2) of the Use Classes Order, which is as follows:

> '"light industrial building" means an industrial building (not being a special industrial building) in which the processes carried on or the machinery installed are such as could be carried on or installed in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit.'

The planning authority decided to use its enforcement powers and to refuse belated applications for planning permission which the appellants made when they appreciated that there was doubt about the planning situation. Two enforcement notices

dated 7th February 1973 were served. This appeal is not concerned with either of them. The next notice was dated 4th April 1973, and required the appellants to demolish the batching plant which they had installed. There was another notice, dated 2nd July 1973, requiring the appellants to discontinue use of the land for a temporary office. We have not been concerned with that notice. The last of the notices was dated 13th September 1973. The object of this notice was to stop the appellants making concrete blocks in the way they had been doing. As this notice is said to be null and void, it is necessary to refer to it in some detail. It was in common form with four recitals followed by a paragraph telling the owners, i e the appellants, what they were required to do. One of the recitals set out the planning authority's allegation. It was as follows:

> 'It appears to the Council that after the 31st day of December 1963 there has been a breach of planning control in that the said land [i e the appeal site] has been developed by the making of a material change in the use thereof and of the buildings situated therein to a use for the purpose of manufacture of concrete blocks, and other industrial purposes other than those indicated under class III of the Town and Country Planning (Use Classes) Order 1972 without the grant of permission required in that behalf under Part III of the Town and Country Planning Act, 1962, or Part III of the Act of 1971.'

The material parts of the requirement were as follows: the appellants were required within two months—

> 'to discontinue the use of the said land and of the buildings situate on the said land for the manufacture of concrete blocks and other industrial uses and to remove from the said land and the buildings situate thereon plant and machinery used or designed for the manufacture of concrete blocks and restore the land and buildings to their original condition before the said development took place.'

The appellants by letter dated 15th October 1973 appealed to the Secretary of State against the service of these enforcement notices. He ordered an inquiry which was held by his inspector, Mr H St J Grant, from 22nd October to 9th November 1974. He heard evidence and listened to elaborate submissions. He made a lengthy report to the Secretary of State dated 19th April 1975. It contained no less than 604 paragraphs. He recommended that the enforcement notices with which this appeal is concerned should stand, with modifications of the periods of time for compliance.

The Secretary of State gave his decision in a long and carefully worded letter dated 14th October 1975. The relevant parts of his decision can be summarised as follows. First, that although the enforcement notice dated 13th September 1973 was not null and void, it should be varied. In the recitals the reference to class III of the Use Classes Order should be deleted and there should be substituted words to indicate what the planning authority were complaining about, namely the use of a mobile machine, the extension of the area used for block-making and the intensification of use; and the requirement paragraph should be amended to read so as to call on the appellants to discontinue the use of the appeal site 'for the manufacture of concrete blocks by a mobile block-making machine and to remove from the said land the mobile block-making machine and other plant used in connection with it'. Secondly, that the use of the appeal site by the Sturtevant partnership from shortly before 1st January 1964 until the appellants took it over from them had been a class IV use, not a class III one; that this use, although not a permitted one, had become one which was immune from enforcement proceedings. Thirdly, that there had been a material change of use by the appellants. This had come about in three ways: by block-making in the open, by different working procedures 'together with intensification of the potential capacity of the plant' and by the extension of the area used for block-making to include land to the west to provide a concreted area for

the storage of blocks produced by the mobile block-making machine. It was accepted by counsel for the Secretary of State that there had been no extension to the west of the area used for block-making. The only extension had been a small one of about ¼ acre to the south-east and that was not used for actual block-making but for the storage of materials and the occasional parking of vehicles. The Secretary of State accepted the other recommendations made by the inspector.

The appellants appealed to the Divisional Court against the Secretary of State's decision. The appeal was made under s 246 of the Town and Country Planning Act 1971. It could only be made on points of law. On the hearing of this appeal Lord Widgery CJ commented critically on what he called 'the degree of technicality into which the law of town and country planning has now come'. We share his antipathy for this development, of which this case is a striking example. The Divisional Court adjudged first, that the enforcement notice dated 13th September 1973 was not null and void and could lawfully be amended in the way the Secretary of State had done secondly, that the part of the appeal site on which block-making was being carried out in the open had never acquired the capacity for use as an industrial building because it had never been land ancillary to an industrial building; and thirdly, that, because of the activities being carried on in the open, apart altogether from the changes in the volume and methods of manufacture, there had been a material change in the use of the appeal site and in consequence unlawful development. The Divisional Court did not give any ruling on the enforcement notice dated 4th April 1973; but it dealt at length with the issue of estoppel, with which we are no longer concerned. The appeal was dismissed.

Before this court, counsel for the appellants renewed and elaborated the arguments which she had put before the Divisional Court. It will be convenient to start with those directed to the alleged total invalidity of the enforcement notice dated 13th September 1973. Leave to appeal was not given by the Divisional Court on this issue. It is clear from the court's order that the Divisional Court did not think that such leave had been asked for. In the light of what appears in the transcript, there is no reason why they should have thought that leave was being asked on this issue. But, solely because we were told that there had been some misunderstanding on the part of counsel on both sides, who believed that such leave had been asked for and given, we decided that we should grant leave. Otherwise we would not have done so. Counsel for the appellants contended on this issue that this notice was founded on a misconception as to what had happened in the past. The planning authority had wrongly assumed that the Sturtevant partnership had used the appeal site for class III purposes whereas they had used it for class IV purposes. This, submitted counsel for the appellants, was a fatal defect. We do not agree. The planning authority had overstated their case; but that did not mean they had no case at all. Provided the analogy is not taken too far, an enforcement notice can be likened to an indictment. In an indictment the prosecution may charge more than they can prove, as, for example, by charging causing grievous bodily harm with intent, when they cannot, as it turns out, prove the intent; but if they can prove the causing of grievous bodily harm, a conviction can be founded on the indictment. So with this enforcement notice. The allegation was that the appellants were using the appeal site for the manufacture of concrete blocks in a different way from that in which it had been used in the past; and so it had been but not as differently as the planning authority had alleged. Counsel for the appellants' complaint about the requirement part of the enforcement notice was based on its alleged ambiguity. It left uncertain, she said, what the appellants had to do to comply with it. This uncertainty was made the greater by the reference in the recitals to an earlier alleged class III use. Again we do not agree. Had this enforcement notice been drafted by a skilled conveyancer it would, no doubt, have been made more specific; but it was not. It was probably drafted by or for a planning officer and was intended to be read by the appellants' directors. We have no doubt as to how they would have construed it. They were

to stop doing what they were doing and to run the appeal site in the same way as the Sturtevant partnership had run it. It was effective enough for its purpose but capable of improvement. This is what it got from the Secretary of State by way of amendment. In our judgment it was far from being a notice which was null and void within the principles referred to by Upjohn LJ in *Miller-Mead v Minister of Housing and Local Government*[1].

As an alternative to her submission that this enforcement notice was null and void, counsel for the appellants argued that the making of the amendment after the inquiry had been held had resulted in an injustice to the appellants because they had attended the inquiry to meet the allegations and requirements contained in the unamended notice and had had no opportunity of dealing with the case revealed by the amended notice. She said that, as the appellants' counsel, she would have conducted their case differently if the amended form of notice had been before the inspector. She told us the respects in which she would have conducted the case differently. There is nothing in this submission. As we have already said, it was clear from the start what the inquiry was about and the appellants must have known what it was about. Had the amendment been under consideration by the inspector, counsel for the appellants might have emphasised one point more than another, but it could not have made any real difference to the case which the appellants were putting forward.

The appellants challenged the Secretary of State's decision about there having been a material change in the use of the appeal site. In his decision letter he had given two reasons for saying that there had been such a change in use. The first was that the processes carried out on the open land were not dependent at all on any use of the industrial buildings. Accordingly, insofar as such processes were new ones, the use could not be regarded as falling within class IV of the Use Classes Order, since they were not 'a use as a general industrial building'. The new processes were development within s 22(1) of the 1971 Act, but as they were not dependent at all on any use of the industrial buildings they did not attract the benefit of s 22(2)(*f*), which excludes from the definition of development in s 22(1) any uses 'in the case of buildings or other land which are used for a purpose of any class specified in an order made by the Secretary of State under this section, the use for any other purpose of the same class'. New processes within class IV carried on inside the buildings would have been permissible under s 22(2)(*f*) but new ones carried on outside were not. The second reason was that on the evidence there had been a material change of the use of the whole block-making site by the introduction of a materially different working procedure together with intensification of the potential capacity of the plant.

The Divisional Court did not give any ruling on that part of the Secretary of State's decision about a material change of use coming about through the intensification of the manufacturing procedure on the appeal site. Lord Widgery CJ in his judgment, with which Melford Stevenson and Caulfield JJ agreed, said that the open land which the appellants had used for concrete block-making had never acquired the capacity for use as an industrial building because it was never land ancillary to an industrial building and that some connection of that kind was necessary before the characteristic of the use can be acquired by open land. It was on this issue that leave to appeal, so far as appears from the order of the Divisional Court, was in fact given by that court.

Both the Secretary of State and Lord Widgery CJ put a gloss on the relevant provision in the Use Classes Order which is art 2(3). It provides as follows: 'Reference in this order to a building may, except where otherwise provided, include references to land occupied therewith and used for the same purposes.' The Secretary of State said that the concrete block-making in the open was not dependent on any use of the industrial buildings. The word 'dependent' is not to be found in art 2(3); nor is the phrase 'land ancillary to an industrial building' which Lord Widgery CJ used.

1 [1963] 1 All ER 459 at 470, 471, [1963] 2 QB 196 at 226

The relevant words are 'land occupied therewith and used for the same purposes'. In the context, the words 'lands occupied therewith' must mean land other than the site of the building. The words 'and used for the same purposes' are words of limitation restricting the extent of the land which can be included with a structure so as to constitute a 'general industrial building'. The amount of land which comes within art 2(3) will usually be small, for example a loading bay or a yard used for storing fuel; but in exceptional cases it may be extensive, as in a linen-weaving factory which bleaches its woven products in the open air. Counsel for the appellants pointed out that this Use Classes Order does cover uses which are dependent on or ancillary to something else; but when it does so it uses language different from that in art 2(3). Thus art 3(3) refers to a use 'which is ordinarily incidental to and included in any use specified in the Schedule to this order'; and classes VI and VII except from their general words of definition processes which are 'ancillary to the getting, dressing or treatment of minerals'.

Counsel for the Secretary of State submitted that art 2(3) should be construed in the restricted sense used by the Secretary of State and the Divisional Court. This construction had been applied, he said, ever since use classes orders had first been made, which was nearly 30 years ago. It was one which conformed to the general policy of the Town and Country Planning Acts and the use classes orders made under them. Section 22(2)(*f*) of the 1971 Act excluded from the definition of 'development' in s 22(1) 'in the case of buildings or other land' changes of use which were within the same class of use as had been carried on previously. The policy behind this was that a change of use within the same class inside a building was unlikely to be detrimental to the amenities of the neighbourhood. The reference to 'other land' in s 22(2)(*f*) and in art 3(1) of the Use Classes Order was irrelevant to this case because the only relevant use was that 'as a general industrial building' under class IV. These words 'other land' were put in to cover industrial activities within classes VI, VII and VIII which might be carried on in the open air. If art 2(3) were not construed in a restrictive sense, a class IV change of use in a building and on the 'land occupied therewith and used for the same purposes' might result in a deleterious interference with the amenity of the neighbourhood. Counsel for the Secretary of State also submitted that a wider construction of art 2(3) could result in the kind of absurdity to which Lord Widgery CJ referred in his judgment when he said:

> 'But what I do not believe is possible is for a piece of land to acquire, as it were, industrial rights for planning purposes merely because in the corner is a tiny building used for industrial purposes.'

Nor do we; and this is so under the wider construction which we adjudge to be the correct one. The test is the use to which the land occupied with the building has been put. If it has been used for the same purpose as the building it can be regarded planning-wise as one unit with the building; but if it has not been so used it cannot be. In our judgment this is the plain meaning of the words used in art 2(3). If policy requires a more restricted meaning to be put on the article, the order will have to be amended.

When the construction which we have adjudged to be correct is applied to the inspector's findings of fact, the result must be that during the Sturtevant occupation of the appeal site the part of the block-making site in the open was used for the same purpose as the shed in which the concrete block-making machinery was installed. The blocks produced in the shed were dried in the open on concrete strips set in hoggin. This was all part of the block-making process. The whole block-making site was a 'general industrial building' for the purposes of the Use Classes Order; and, as long as the appellants confined their operations on this site to class IV uses, they were entitled to the benefit of s 22(2)(*f*) even though any new processes and intensification of use amounted to a material change of use.

Counsel for the appellants submitted that on the evidence there had not been a

material change of use anyway because all that had been proved had been a change in the degree of use, not the kind of use. She said that the Secretary of State had misdirected himself in law in deciding that a change in the degree of use could be a material change of use. Having regard to what we have adjudged to be the right construction of art 2(3), it matters not whether the intensification of use found by the inspector to have taken place did amount to a material change of use, provided the new use was a class IV one; and it clearly was. Nevertheless counsel for the appellants' submission on intensification of use calls for examination because she told us that there is no reported case in which a change in the degree of an existing use, often referred to as intensification of use, has been adjudged to be a material change in use. As her researches have clearly been thorough, this may be so as a matter of the strict application of the law relating to precedent. In *Guildford Rural District Council v Penny*[1], Lord Evershed MR, without deciding the point, expressed the opinion that 'Mere intensity of user may ... affect a definable character of the land and of its use'. In *Glamorgan County Council v Carter*[2], Salmon J expressed the opinion on the facts before him that 'Once it is established that the site is as a site a caravan site, it does not seem to me that the use is materially changed by bringing a larger number of caravans on it'. On numerous occasions since 1959 the Secretary of State, probably relying on the opinion of Lord Evershed MR, has decided that an intensification of use may be a material change of use. Particulars of some of these decisions are to be found in the Encyclopedia of Planning Law and Practice[3]. What is clear is that, when hearing appeals from the Secretary of State in cases where there has been a question whether there has been a material change of use, the courts have consistently held that the question is one of fact and have declined to substitute any decision of their own for that of the Secretary of State: see *East Barnet Urban District Council v British Transport Commission*[4] and the cases referred to in the Encyclopedia of Planning Law and Practice[5]. We have no doubt that intensification of use can be a material change of use. Whether it is or not depends on the degree of intensification. Matters of degree are for the Secretary of State to decide. He did so in this case. There was ample evidence to support his decision on this point. It cannot be upset in this court.

Counsel for the Secretary of State sought to uphold the Secretary of State's decision about change of use on another ground. He submitted that when the appellants started to make concrete blocks for general building use in the open air on the appeal site they began a new operation which was an unauthorised development within s 22(1) of the 1971 Act. They were not, he argued, merely intensifying an existing use. We do not agree. The primary purpose for which the Sturtevants had used the site and the appellants were using it was for concrete block-making. It is this primary purpose which determined the character of the use: see *Brazil (Concrete) Ltd v Amersham Rural District Council*[6].

There remains one detail to be dealt with in relation to change of use, namely the use to which the appellants put the small area of ¼ acre to the south-east of the appeal site. The Secretary of State admittedly was mistaken about the situation of, and the use to which the appellants put, the additional land to which he referred in his decision letter. This, in our judgment, is of no materiality in relation to the enforcement notice dated 13th September 1973.

We turn now to the appellants' contention that the enforcement notice dated 4th April 1973 was invalid. The appellants did not get leave from the Divisional Court to appeal against this notice but on the hearing of the appeal, in order that this

1 [1959] 2 All ER 111 at 113, [1959] 2 QB 112 at 125
2 [1962] 3 All ER 866 at 867, [1963] 1 WLR 1 at 5
3 Vol 4, pp 6077-6079
4 [1961] 3 All ER 878, [1962] 2 QB 484
5 Vol 4, p 6079
6 (1967) 65 LGR 365

further issue might be considered in the light of our decision, differing from the Divisional Court in one respect, as to the enforcement notice of 13th September 1973, we granted leave.

The allegation in the April enforcement notice was that in breach of planning control the appeal site had been developed by the erection of a concrete batching plant. The requirement was that the appellants should demolish this plant and remove all materials arising from such demolition and restore the land to the condition it was in before the unauthorised development had taken place. In the early part of 1973 the appellants erected the batching plant on the block-making site and began to use it in May 1973. It stood on the concrete yard. Counsel for the appellants made an elaborate submission to justify the erection of this machinery. It was to the effect that the Sturtevants' use of the appeal site had not been in contravention of planning control. This was based on the history of the appeal site and of the adjoining land when the brickworks were operating, and on the contention that burning bricks and making concrete blocks were substantially the same operation, since the burning of bricks and the drying of blocks were mere finishing processes after moulding had been done. The Secretary of State rejected this argument and decided that the concrete block-making started by the Sturtevants had been a material change in the use of the site. That use was a class IV use and not a class III use for which planning permission had been granted in 1959. It followed that the Sturtevant use was not a use for which planning permission had been granted although with the passing of time it became a use which was immune from enforcement: see s 87 of the 1971 Act and *LTSS Print and Supply Services Ltd v London Borough of Hackney*[1]. Counsel for the appellants accepted that the *LTSS* case[1], being a decision of this court, was binding on us. It follows, in our judgment, that the appellants, as successors to the Sturtevants, could not take advantage of the provisions of art 3(1) of the Town and Country Planning General Development Order 1973, which permits development of any class specified in Sch 1 to the order. Paragraph 1 of class VIII in Sch 1 permits the installation or erection by way of addition or replacement of machines not exceeding 15 metres in height. The batching plant was under this height. But advantage of this permission can only be taken by an industrial undertaker on land used 'otherwise than (i) in contravention of previous planning control or (ii) without planning permission granted or deemed to be granted under this Act'. This qualification renders counsel for the appellants' argument of no avail to the appellants. She wished to reserve the right to argue elsewhere that the *LTSS* case[1] had been wrongly decided. In our judgment no valid criticism of the enforcement notice dated 4th April 1973 can be made.

The appeal will be allowed and the case will be remitted to the Secretary of State in accordance with RSC Ord 94, r 12(5), for him to reconsider and determine it in the light of our opinion as to the right construction of art 2(3) of the Use Classes Order.

Appeal allowed. Case remitted to Secretary of State. Leave to appeal to House of Lords refused.

Solicitors: *Riders*, agents for *Derek T Wilkinson & Co*, Bournemouth (for the appellants); *Treasury Solicitor.*

Mary Rose Plummer Barrister.

1 [1976] 1 All ER 311, [1976] QB 663

The Trustees of the Castell-y-Mynach Estate v The Secretary of State for Wales and another [1984] Lexis Citation 186

[1985] JPL 40

QUEEN'S BENCH DIVISION (CROWN OFFICE LIST)

NOLAN J

8 JUNE 1984

8 June 1984

P Roderick for the Applicants; S Brown for the First Respondent; The Second Respondent did not appear and was not represented

LC Williams & Prichard, Cardiff; Treasury Solicitor

NOLAN J

By this motion, the Applicants seek the reversal of the decision of the First Respondent under Sections 53 and 36 and the Ninth Schedule of the Town and Country Planning Act 1971, dated the 23rd November, 1983, dismissing the Applicants' Appeal to the First Respondent against the determination of the Second Respondent, the Taff-Ely Borough Council, that the repairs and restoration of the property known as Brystafach, Pentyrch in the County of Mid Glamorgan to its former condition for residential use required planning permission. The substantial issue which had to be considered by the First Respondent was whether those repairs and restorations involved a material change of use. The Second Respondent is not represented in the proceedings before me.

The decision of the First Respondent is contained in a letter dated the 23rd November and is addressed to the solicitors acting for the Applicants. In the course of that letter, the First Respondent quoted paragraph 22 in the report of the Inspector appointed by him. That passage reads: "During the period from 1965 when the building was last occupied as a dwelling until 1967 there remained some likelihood that land surrounding and including the appeal site might be developed for residential purposes. Since 1967 however the development plan position has been that no proposals for redevelopment affecting the site remained. Although the estate owners retained Brystafach they had made no attempts to maintain the building in a condition suitable for it to be used as a dwellinghouse. Indeed no effort had been made to secure the building in any way. The implication of their lack of action over a period of some 18 years and the deterioration of the building ot a near derelict and totally uninhabitatable state is that a reasonable person might assume that the residential use of Brystafach had been abandoned."

The First Respondent, in his decision, said: "As to the issues to be decided he notes the evidence on the structural condition of the building and agrees with the Inspector's views expressed in paragraph 22 of the report that no attempt had been made to maintain the building in a condition suitable for it to be used as a dwelling house even though since 1967 no proposals for redevelopment affecting the site remained, and that the condition of the building

has deteriorated to such an extent that a reasonable person might assume that the residential use has to all intents and purposes been abandoned."

In the first part of the submissions deployed by Mr Roderick before me, he argued that a wrong approach is to be detected in this passage from the decision letter of the First Respondent with regard to the relevant considerations. In particular, he submits, there is an undue reliance upon the objective appraisal of the condition of the building when what should have been taken into account were four factors, of which the actual physical state of the building is only one. I shall return to that point later.

Before doing that, it will be convenient to give a little more information about the site and the contentions of the parties as they appear in the Inspector's report. In paragraph 5 of his report, the Inspector said: "The appeal building itself was used as a dwelling until 1965 and clearly retains the general appearance of having been a dwelling which has now fallen into considerable disrepair. The building is constructed of stone and brick under a pitched slate roof. The western and eastern stone gable walls appear fairly sound but a large part of the nortern flank wall has collapsed leaving a section of severely damaged roof hanging unsupported. The northern and southern flanking walls are mostly constructed of stone to the ground floor with a cavity brick wall to the first floor. Both flank walls, particularly the northern wall, appear unsound. Many slates have been lost from the roof and evidence of substantial rot and structural damage to the roof timbers can be seen. No doors or window frames remain to the building. Internally all fittings have been removed. No ground floor construction can be seen and all internal timber including floor joists, staircase and some ceiling joists to the roof have been removed. The general internal appearance is one of almost total disrepair and dereliction. Some signs of entry by cattle could be seen amongst the rubble on the floor."

I pause at this point to observe that one argument that had been canvassed against the Applicant was that the original residential use of the property had been replaced by agricultural use involving the occupation of the premises by cattle as a shelter.That, as we shall see, was not an argument which commended itself to the Inspector.

The report of the Inspector goes on in the ordinary way to set out first the case for the Applicants. In the course of setting it out, the Inspector observes that at no time did the owners of the estate have any intention of abandoning the rights of the existing use. He repeats this part of their submission at the end of paragraph 12 of his report. He says: "On the fourth factor the specific exclusion of the property from the agricultural tenancy of the surrounding land indicated a specific intention on the part of the owners to retain the property."

In that same paragraph, it is clear the Applicants had begun by making these submissions: "In considering cases of this nature it was agreed that four factors should be considered (a) physical condition of the building; (b) period of non-use; (c) whether there had been any other use; and (d) evidence regarding the owner's intentions." It is common ground before me, as appears from the authorities, that these are the four principal factors to be taken into account in a case of this sort.

In setting out the case for the Council, the Inspector notes the submission that the Appellants themselves -- the Applicants before me -- had made a conscious decision not to re-let the property after the licensee had died in 1965. The Inspector went on to make a number of findings of fact after completing the summary of the case for the Council. The general nature of those findings may be anticipated from what I have said. As far as the building itself is concerned, he described it in his findings as having "fallen into considerable disrepair. No internal fittings, ceilings, first floor, staircase, windows or doors remained at the time of my inspection. It was agreed by the parties that the structure retained the general appearance of a house."

In paragraph 21 of his conclusions, the Inspector rejects the submissions of intermediate use for agricultural purposes. In doing so, he uses these words: "Judging from the precarious state of parts of the structure I would

consider it unlikely that a farmer concerned about the welfare of his stock would regard the building as a safe or useful shelter for his cattle."

In substance, the issue was whether the building was abandoned or not. It was on that basis that the Secretary of State made his decision. In developing his argument before me, Mr Roderick dwelt on the four factors. He submitted that inadequate attention was paid to the owners' express intentions, supported as they were by corroborative evidence. I think that there is force in Mr Brown's remarks that in a contest of this sort, the owner's declarations of his own intentions cannot avoid being self-serving. Unless he claimed such an intention, he would be abandoning the contest. It is therefore not surprising that the courts should have approached all four factors, taking them together, in order to establish whether abandonment had occurred.

The position is, to my mind, helpfully summarised by Mr Justice Bridge, as he then was, in Ratcliffe v Secretary of State for the Environment and another 235 EG 901, which was quoted by Mr Justice McNeill in Nicholls v Secretary of State for the Environment and another [1981] JPL 890. Mr Justice McNeill, quoting Mr Justice Bridge, said: "'There" -- referring to Hartley -- "one found the clearest explanation of the principles to be applied to resolve any question of whether a use of land had been abandoned for planning purposes. It was clear from that case that once a use has been abandoned, it could not be resumed without planning permission. Cessation of use followed by non-use might be merely temporary or might amount to abandonment. Abandonment depended on the circumstances. If land remained unused in such circumstances that a reasonable man might conclude that the previous use had been abandoned, then a tribunal should conclude that it had been abandoned.'"'

However, Mr Roderick submitted that one should look at the evidence before the Inspector and the Secretary of State relating to the four factors. There was no intermediate use in this case, the suggestion of occupation by the cows having been discounted. Although the period of non-use was 16 or 17 years, that is not an exceptionally long period for a dwelling house to remain unused. Mr Roderick referred me to other instances in which dwelling houses, although in similar states of disrepair to the house in the present case, were not treated as demonstrating abandonment. The physical condition, submitted Mr Roderick, was such as to leave this building still resembling a house and on that ground, the Secretary of State misdirected himself in going by the view of a reasonable man rather than apprising his mind of the crucial issue, which was the true intention of the owners. But where as here you have an extreme case of dereliction, a building considered by the Inspector as unlikely to be fit for us as a cattle shelter, it seems to me that the objective view of a reasonable man was a highly relevant matter for the Inspector and the First Respondent to take into account.

Mr Roderick also relied on the fact that the site had not been included in an agricultural tenancy as corroboration of the intention of the owners. Secondly, he submitted that there had been no positive act of abandonment. In the sense that there had been no formal abandonment that too is true, although it is perhaps fair to say that the acknowledged and conscious decision not to re-let the property after the licensee had died in 1965, coupled with the fact that the property was allowed to fall into an uninhabitable state must come close to positive abandonment.

Finally, as corroborative evidence, Mr Roderick relied on the approach made by the owners to the Council in 1981 when they suggested giving up the house as residents and abandoning their claim for residential use in return for permission to build a house elsewhere. Mr Roderick submitted that that supports the genuineness of their view that it was still a residential property.

To my mind, what is decisive is that the argument before the Inspector, reviewed by the First Respondent, was conducted on the agreed basis that all four factors relevant to this matter were taken into account. The weight that any particular factor bears must depend on the particular case. It is true that in this case the extreme state of disrepair seems to have affected the mind of the First Respondent, as it did the Inspector, more than anything else. However, to my mind, that was not at all inconsistent with the view formed, whichever one of the four factors one looks at. The only strong evidence the other way was the expressed intention of the owners, which was repeated at the hearing. However, genuinely expressed and put forward, it appears to have yielded to the weight of the other

factors in the mind of the Inspector. Therefore, I can see no error of law on the grounds advanced by Mr Roderick in his first submission.

His second submission is to the effect that the Inspector ignored an important and crucial argument put foward by the Applicants, namely, he ignored their argument that applications in respect of three other properties in the locality had been allowed in the sense that it was agreed that no planning permission was required for them to be used again as residences. It was said that all these properties were in a similar state of disrepair and had been vacated for a similar period of time to that of the building in this case. The one distinction drawn between those properties and the property in the present case by the Second Respondent was the use by cattle, which the Inspector discounted. That argument was put before the Inspector and recorded in paragraph 12 of his report. The Council's counter-argument is set out in paragraph 17 of the report. Paragraph 17 states: "It was accepted that the evidence of an agricultural use was a significant difference between this case and the three other cases referred to by the appellants. However the degree of dereliction and the absence of any action by the owners to maintain or secure the building was sufficient evidence of an intention to abandon any residential use of the building. That was a view supported by the county planning officer to the Mid-Glamorgan County Council in a letter of consultation dated 13 January 1983. He considered that the period of non-use and the condition of the building to be evidence of an intention to abandon it as a residence."

Here one finds, in relation to those other three properties, a decision made partly -- although not entirely -- on the basis of there being no question of agricultural use in their cases. The decision was made by the Council. The Inspector had information about the applications in respect of those properties. He acknowledged what had happened, but they were not before him. It was for him to make his own recommendations in relation to the property in question and he did so. He could not be bound by decisions made by another body in relation to other properties. Although the circumstances were similar, they were not accepted as being identical. It follows that I can see no error of law in the approach adopted by the Inspector or by the First Respondent in relation to the matter which the Inspector had to decide. Therefore, the application must fail.

Application dismissed with costs.

All England Law Reports/1972/Volume 3 /Burdle and another v Secretary of State for the Environment and another - [1972] 3 All ER 240

Burdle and another v Secretary of State for the Environment and another

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, WILLIS AND BRIDGE JJ

20, 22 JUNE 1972

Town and country planning - Development - Material change of use - Planning unit - Determination of what constitutes appropriate unit - Factors to be considered - Planning unit to be taken as whole unit of occupation unless smaller unit recognisable as site of activities amounting to a separate use physically and functionally.

A occupied a site on which there stood a dwelling-house to which was attached a lean-to annexe and certain other buildings. On that site, within the open curtilage, A had carried on, since a time prior to 1963, the business of a scrap yard and car breakers' yard. As an incident to that business from time to time he sold on the site car parts arising from the break-up of cars and occasionally sold car parts acquired from elsewhere. In 1965 the appellants purchased the site and substantially reconstructed the lean-to annexe, in particular by providing it with external display windows. They started using that building for the sale, on a substantial scale, of vehicle spare parts acquired new from manufacturers and for the sale of other goods. In February 1971 the local planning authority served an enforcement notice which stated that it appeared that 'a breach of planning control has taken place namely the use of premises ... as a shop for the purpose of sale of inter alia motor car accessories ... without the grant of planning permission ... ' The appellants appealed to the Secretary of State and both parties presented the case to the inspector on the footing that the whole site was the planning unit with which the inquiry was concerned, the appellants contending that, looking at the site as a whole, the intensification of retail sales had not been such as to amount to a material change of use. The inspector concluded that whether or not the notice was 'properly directed to the whole property or to the annexe' the appeal should fail. In his decision letter however the Secretary of State stated that the appellants' argument that 'the whole site was used for sales and should be regarded as a long established shop' could not be accepted having regard to the definition of 'shop' in the Town and Country Planning Acts and the enforcement notice as worded could relate only to the lean-to annexe. He therefore considered and dismissed the appeal on that limited basis. On appeal,

Held - (i) The reasons given by the Secretary of State for concluding that the lean-to annexe, rather than the site as a whole, was the appropriate planning unit for consideration could not be supported. Although the word 'shop' was inappropriate to describe the whole site it did not follow that the accident of language used by the authority in framing the enforcement notice could determine conclusively what was the planning unit to which attention was to be directed (see p 243 *j* to p 244 *a*, post).

(ii) In determining what was the appropriate planning unit a useful working rule was to assume that it was the whole unit of occupation, unless and until some smaller unit could be recognised as the site of activities which amounted in substance to a separate use both physically and functionally. Since it was impossible to conclude, on the factual and evidential material available, that the Secretary of State would have come to the conclusion that the lean-to annexe was the appropriate planning unit if he had approached the matter on that basis, the appeal would be allowed and the case sent back to him for reconsideration (see p 244 *b d e h* and

j to p 245 *c*, post); dictum of Diplock LJ in *G Percy Trentham Ltd v Gloucestershire County Council* [1966] 1 All ER at 704 applied.

Notes

For a material change of use constituting development, see 37 *Halsbury's Laws* (3rd Edn) 259-263, para 366, and for cases on the subject, see 45 *Digest* (Repl) 328-334, *14-30*.

Case referred to in judgments

Trentham (G Percy) Ltd v Gloucestershire County Council [1966] 1 All ER 701, [1966] 1 WLR 506, 130 JP 179, 64 LGR 134, *Digest* (Cont Vol B) 689, *30d*.

Cases also cited

Bendles Motors Ltd v Bristol Corporation [1963] 1 All ER 578, [1963] 1 WLR 247.

Wipperman and Buckingham v London Borough of Barking (1965) 130 JP 103.

Appeal

By an originating notice of motion dated 4 February the appellants, Derek Stanley Burdle and Dennis Williams, sought an order that the matter of two enforcement notices pursuant to s 47 of the Town and Country Planning Act 1962 and s 15 of the Town and Country Planning Act 1968 dated 3 February 1971 and made by the second respondents, New Forest Rural District Council ('the authority'), and a decision of the first respondent, the Secretary of State for the Environment, pursuant to s 16 of the 1968 Act notified by letter dated 7 January 1972 might be remitted to the Secretary of State for the Environment for rehearing and determination together with the opinion or direction of the court on the matters set out in the grounds of appeal. The facts are set out in the judgment of Bridge J.

R J Roddis for the appellants.

Gordon Slynn for the Secretary of State.

Alan Fletcher for the authority.

22 June 1972. The following judgments were delivered.

BRIDGE J

delivered the first judgment at the invitation of Lord Widgery CJ. This is an appeal under s 180 of the Town and Country Planning Act 1962 from a decision of the Secretary of State for the Environment given in a letter dated 7 January 1972 upholding, subject to variation, an enforcement notice which had been served by the New Forest Rural District Council as delegate of the local planning authority on the present appellants. The appellants occupy a site at Ringwood Road, Netley Marsh, in the New Forest area, which has a frontage of 75 feet and a depth of 190 feet, and on which there stand a dwelling-house to which is attached a lean-to annexe and a number of other buildings which it is not necessary to describe.

The relevant history of the matter is that before the end of 1963, which of course in relation to changes of use is the critical date under the Town and Country Planning Act 1968, the appellants' predecessor in title, a Mr Andrews, carried on, on the site, within the open curtilage, the business of a scrap yard and a car breakers' yard. As an incident of that business he effected from time to time on the site retail sales of car parts arising from the cars broken up on the site. There was some evidence at the inquiry at which this history emerged of a very limited scale of retail sales of car parts arising from sources other than the break-up of vehicles in the course of the breakers' yard business.

The lean-to annexe adjoining the dwelling-house was used by Mr Andrews as an office in connection with the scrap yard business. In 1965 the present appellants purchased the property; whereas Mr Andrews had carried on business under the modest title of 'New Forest Scrap Metals', the present appellants promptly changed the title to the more grandiose 'New Forest Autos'. They found the lean-to annexe in a somewhat decrepit state, and effected a substantial reconstruction and alteration of it which clearly materially altered its appearance. Inter alia they provided it with two external display windows. They started to use that building for retail sales on a

substantial scale for vehicle spare parts not arising from the break-up of vehicles as part of the scrap yard business, but new spares of which the appellants had themselves been appointed stockists by the manufacturers. They also embarked on retail sale of camping equipment and the goods to be sold by retail from the annexe lean-to were displayed both in the new shop windows if one could so call them, and on shelves within the buildings. Finally it is to be observed that as well as advertising themselves as stockists of spare parts for all makes of motor cars, they included in the advertising material the phrase 'New accessories and spares shop now open'.

Those activities prompted the local planning authority to serve on 3 February 1971 the enforcement notice which is the subject of the appeal to this court. That notice recites:

> '... that it appears to the Council: That a breach of planning control has taken place namely the use of premises at New Forest Scrap Metals, Ringwood Road, Netley Marsh, as a shop for the purpose of the sale inter alia of motor-car accessories and spare parts without the grant of planning permission required in that behalf in accordance with Part III of the Town and Country Planning Act, 1962.

The steps required to be taken by the notice are the discontinuance of the use of the premises as a shop and the restoration of the premises to their condition before the development took place. Concurrently with that notice with which the court is concerned, it is to be observed merely as a matter of history that there was also served an enforcement notice directed at the building alterations which had been effected to the lean-to annexe, but as the Secretary of State allowed an appeal against that enforcement notice, it is unnecessary for us to consider it.

The enforcement notice alleging a change of use, be it observed, uses the perhaps ambiguous expression 'premises' to indicate the unit of land to which it was intended to apply. We were told in the course of argument by counsel for the authority that the authority's intention was to direct this notice at the whole of the appellants' site; it alleged a material change of use of the whole site. It seems to have been so understood by the appellants, and when the matter came before an inspector of the Department of the Environment following the appeal to the Secretary of State by the appellants against the notice, both parties presented their cases on the footing that the whole site was the planning unit with which the inquiry was concerned.

The authority's case was that the change in the character and degree of retail sales from the site, as a matter of fact and degree, effected a material change of use of the whole site which had taken place since the beginning of 1964. Indeed, in these proceedings, counsel for the authority has submitted before us that that is

still the proper approach which the Secretary of State should adopt if the matter goes back to him. On that view, so counsel said, the notice as applied to the whole site should be upheld subject to any necessary reservation to preserve to the appellants their right to effect retail sales in the manner and to the extent that such sales were effected by their predecessor before the beginning of 1964.

The appellants' case at the inquiry was in essence that, as a matter of fact and degree, looking at the site as a whole, the intensification of retail sales had not been sufficient to amount to a material change of use.

The inspector, after indicating his findings of primary fact, expressed his conclusions thus:

> 'The legal implications of the above facts are matters for the consideration of the Secretary of State and his legal advisers but it appears to me, from the almost complete absence of reference to wholesale deliveries, that the original business was based on the scrapyard, grew out of the then proprietor's specialisation in the Austin "Seven", an obsolete vehicle, and would not have survived as a mainly retail business. In contrast, while sales of salvaged spares survive, the combination of advertising with improved facilities for display, and the emphasis on new

> items in that display, all now support the appellants' claim that the annexe is a shop. But in becoming a shop a material change has taken place, without planning permission and later than 1 January 1964. Whether or not notice A [which is the use notice] is properly directed to the whole property or to the annexe, the appeal should therefore fail on ground (d).'

I read that conclusion as indicating first that the inspector was aware, although it does not appear from the report that it was raised by the parties, that there was an issue for consideration as to what was the appropriate planning unit to be considered, either the whole site on the one hand, or on the other hand the lean-to annexe, but he took the view that whichever unit one considered, there had been a material change of use, and accordingly he thought the notice could be upheld on that footing. Speaking for myself, if the Secretary of State had adopted and endorsed that view, I do not see that such a conclusion could have been faulted in this court as being erroneous in point of law.

But the Secretary of State did not simply endorse his inspector's conclusion; what he said in the decision letter was this:

> 'Both enforcement notices allege development associated with a shop. It is clear that enforcement notice B [that is the notice relating to the building operations] relates to the building called variously the annexe or lean-to. Enforcement notice A refers to the use of premises as a shop and at the inquiry it was argued for your clients that the whole site was used for sales and should be regarded as a long established shop. This is not an argument that can be accepted in the light of the clearly established definition of a shop for the purposes of the Town and Country Planning Acts as a building used for the carrying on of any retail trade etc The view is taken that enforcement notice A as worded can relate only to the lean-to or annexe. It is proposed to amend the notice to make this clear. The appeal against enforcement notice A has been considered on that limited basis.'

The Secretary of State then went on to ask himself the question: has there been a material change of use of the lean-to annexe? and on the facts, as it seems to me inevitably, he answered that question in the affirmative. Given that the lean-to annexe was the appropriate planning unit for consideration, the decision of the Secretary of State that there had been a material change of use of it was, as I think, clearly right, and, in spite of the argument of counsel for the appellants, I cannot accept that the Minister in any way exceeded his jurisdiction in ordering that the scope of the notice be cut down if it was originally intended to apply to the whole site, so as to limit the ambit of its operation to the lean-to annexe. As such, that was a variation of the notice in favour of the appellants.

But the real complaint and grievance of the appellants is that the Secretary of State has for insufficient or incorrect reasons directed his mind to the wrong planning unit and thereby deprived them of a consideration and decision by the Secretary of State, as opposed to the inspector, of the real question which the appellants

say should have been considered, namely: has the change of activities on the whole site effected a change of use of the whole site which is the appropriate planning unit to be considered?

For my part I am unable to accept that the reasons as expressed by the Secretary of State in his decision letter were good reasons for concluding that the lean-to annexe was the appropriate planning unit for consideration. I accept at once that whether one uses the definition of 'shop' in the Town and Country Planning (Use Classes) Order 1963[a] or the ordinary dictionary meaning of the word 'shop', it is really an absurdity to describe the whole of this site as a shop, but what I cannot

[a] SI 1963 No 708

accept is that the accident of language which the planning authority choose to use in framing their enforcement notice can determine conclusively what is the appropriate planning unit to which attention should be directed.

What, then, are the appropriate criteria to determine the planning unit which should be considered in deciding whether there has been a material change of use? Without presuming to propound exhaustive tests apt to cover every situation, it may be helpful to sketch out some broad categories of distinction.

First, whenever it is possible to recognise a single main purpose of the occupier's use of his land to which secondary activities are incidental or ancillary, the whole unit of occupation should be considered. That proposition emerges clearly from the case of *G Percy Trentham Ltd v Gloucestershire County Council* ([1966] 1 All ER 701 at 704, [1966] 1 WLR 506 at 513), where Diplock LJ said:

> 'What is the unit which the local authority are entitled to look at and deal with in an enforcement notice for the purpose of determining whether or not there has been a "material change in the use of any buildings or other land"? As I suggested in the course of the argument, I think that for that purpose what the local authority are entitled to look at is the whole of the area which was used for a particular purpose including any part of that area whose use was incidental to or ancillary to the achievement of that purpose.'

But, secondly, it may equally be apt to consider the entire unit of occupation even though the occupier carries on a variety of activities and it is not possible to say that one is incidental or ancillary to another. This is well settled in the case of a composite use where the component activities fluctuate in their intensity from time to time, but the different activities are not confined within separte and physically distinct areas of land.

Thirdly, however, it may frequently occur that within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes. In such a case each area used for a different main purpose (together with its indicental and ancillary activities) ought to be considered as a separate planning unit.

To decide which of these three categories apply to the circumstances of any particular case at any given time may be difficult. Like the question of material change of use, it must be a question of fact and degree. There may indeed be an almost imperceptible change from one category to another. Thus, for example, activities initially incidental to the main use of an area of land may grow in scale to a point where they convert the single use to a composite use and produce a material change of use of the whole. Again, activities once properly regarded as incidental to another use or as part of a composite use may be so intensified in scale

and physically concentrated in a recognisably separate area that they produce a new planning unit the use of which is materially changed. It may be a useful working rule to assume that the unit of occupation is the appropriate planning unit, unless and until some smaller unit can be recognised as the site of activities which amount in substance to a separate use both physically and functionally.

It may well be that if the Secretary of State had applied those criteria to the question: what was the proper planning unit which fell for consideration in the instant case? he would have concluded on the material before him that the use of the lean-to annexe for purposes appropriate to a shop had become so predominant and the connection between that use and the scrap yard business carried on from the open parts of the curtilage had become so tenuous that the lean-to annexe ought to be regarded as a separate planning unit.

But for myself I do not think it is possible on the factual and evidential material which is before this court for us to say that that was by any means an inevitable

conclusion at which the Secretary of State was bound to arrive, and that being so I do not think it would be appropriate for us to usurp his function of deciding the question: what is the appropriate planning unit here? to be considered as a matter of fact and degree. Accordingly I reach the conclusion that this appeal should be allowed and that we should send the case back to the Secretary of State with a direction to reconsider his decision in the light of the judgment of this court.

WILLIS J.

I agree.

LORD WIDGERY CJ.

I entirely agree for the reasons so fully and clearly given by Bridge J.

Appeal allowed.

Solicitors: Heppenstall, Rustom & Rowbotham, Lymington (for the appellants); The Solicitor, Department of the Environment; Sharpe, Pritchard & Co (for the council).

Jacqueline Charles Barrister.

*186 Panton & Farmer v Secretary of State for the Environment, Transport & the Regions and Vale of White Horse District Council

Positive/Neutral Judicial Consideration

Court
Queen's Bench Division

Judgment Date
16 December 1998

Report Citation
(1999) 78 P. & C.R. 186

Queen's Bench Division

(Mr Christopher Lockhart-Mummery, Q.C. sitting as a Deputy High Court Judge):

December 16, 1998

Town and country planning—Application for Certificate of Lawful Use—Different parts of premises in different uses—Whether duty to modify description of lawful use if necessary—Whether duty to identify uses immune from enforcement under legislation prior to Planning and Compensation Act 1991 —Methods by which accrued planning rights can be lost through operation of law—Correct approach of decision-maker in lawful use applications—Meaning of existing use

The first applicant owned, and the second applicant occupied a listed three-storey mill, to which had been added a two-storey extension on the eastern side, known as the flat. The first applicant wished to store wine at the property as part of his wine business and applied for a Certificate of Lawful Use under section 191(1)(a) of the Town and Country Planning Act 1990 . The uses asserted to be lawful at the date of the application included dwellinghouse use (class C3), storage (Class B8) and the sale of food and drink (Class A3). The second respondents failed to determine the application and the applicants appealed to the first respondent. It was contended in respect of each use that the use had commenced before the end of 1963; alternatively, after January 1, 1964 and continued for a period of 10 years before July 27, 1992; alternatively, for a period of 10 years prior to April 11, 1997 (the date of the application) and subsisted on that date. The appointed Inspector granted a certificate of lawful use relating only to the residential use of the flat. The applicants challenged her decision in the High Court on the basis that, *inter alia* , she had failed to consider whether there had been material changes of use to non-residential uses prior to the end of 1963 which would now be classed as lawful uses and she had also misunderstood the term “existing user”.

Held, allowing the applications, there is a duty on a local planning authority, passing to the Secretary of State for the Environment, Transport and the Regions on appeal, to issue a Certificate of Lawful Use in respect of the premises applied for where a lawful use is demonstrated, and, if the facts so require, to modify the description of that use from that described in the application. Secondly, immunity from enforcement action for material changes of use occurring before July 1, 1948, or December 31, 1963, is not lost by the provisions relating to certificates of lawful use introduced by the Planning and Compensation Act 1991 . Such an accrued planning use right can only be lost in one of three ways by operation of law. First, by abandonment, secondly by the formation of a new planning unit and thirdly, by way of a material change of use (whether by way of implementation of a further planning permission or otherwise). (Discontinuance orders can also be made.) A decision-maker should determine when the breach of planning control occurred (*e.g.* before July 1, 1948, by December 31, 1963 or at a date 10 years prior to the application for the certificate of lawful use). Then, if the material change of use took place prior to one of those dates, he should consider whether that use has been lost by operation of law in one of the four possible ways. A use which is dormant, in the sense of being inactive at the date of the application, can be capable of being an “existing user” within the terms of section 191(1) of the 1990 Act if it has not been lost by operation of law in one of those ways.

*187

Cases referred to:

(1) *Nicholson v. Secretary of State for the Environment (1998) 76 P. & C.R. 191* .
(2) *Pioneer Aggregates (U.K.) Ltd v. Secretary of State for the Environment [1985] A.C. 132; 48 P. & C.R 95* .
(3) *William Boyer (Transport) Ltd v. Secretary of State for the Environment [1996] 1 P.L.R 103* .

Legislation referred to:

Town and Country Planning Act 1990, section 191 .

Applications under section 288 of the Town and Country Planning Act 1990 by Bernard John Panton and Allan Wentworth Farmer to quash a decision by the Secretary of State for the Environment, Transport and the Regions, whereby his Inspector issued a limited Certificate of Lawful Use in relation to part of Dandridges Mill, Mill Orchard, East Hanney in the area of the Vale of White Horse District Council, the second respondents. The facts are set out in the judgment of Mr Christopher Lockhart-Mummery Q.C. below.

Representation

The first applicant appeared in person.
Nicholas Burton appeared for the second applicant.
Ian Albutt appeared for the first respondent.
The second respondents did not appear and were not represented.

Mr Christopher Lockhart-Mummery Q.C.:

This judgment is given following the hearing of two applications under section 288 of the Town and Country Planning Act 1990 to quash the grant, by an Inspector on behalf of the first respondent, of a certificate of lawful use or development (LDC) in relation to Dandridges Mill, Mill Orchard, East Hanney, in the area of the Vale of White Horse District Council, the second respondent.

The premises consist of a Grade II listed three-storey mill constructed in about 1820. An extension was added some time in this century on the eastern side of the building, above the ground floor sluice room and millrace, comprising two storeys, and known alternatively as the flat or maisonette. The mill was bought by Mr Farmer, one of the Applicants, in November 1960, and owned by him until June 1987. It was then sold to Mr Panton, the other Applicant, who granted Mr Farmer the right to remain in occupation for life. Mr Panton lives, and has done since about 1982, in the nearby dwelling, Old Mill House.

The events which have led to the present proceedings were provoked by Mr Panton's wish to store wine in the mill as part of his wine business. This proposal was challenged by the local planning authority, the second respondent, and accordingly Mr Panton applied, on April 11, 1997, for a LDC under section 191(1)(a) of the 1990 Act. The existing uses for which a certificate was sought were dwellinghouse (Class C3) on the eastern side of first and second floor (*i.e.* the flat) industrial process as restricted by Class B1, storage (Class B8), display of goods for sale (Class A1), and sale of food and drink (Class A3). The second respondent having failed to make a decision on this application, Mr Panton appealed to the first respondent under section 195 of the Act.

It is fair to say that Mr Panton promoted his appeal pursuant to every possible avenue open to him. In relation to each use, he contended that the use had commenced before the end of 1963, alternatively after January 1, 1964 and continuing for 10

years before July 27, 1992, alternatively for a period of 10 years prior to April 11, 1997, and subsisting on that date. The ***188** significance of such dates are that, respectively, the first was the date by which a use had to be commenced in relation to a claim for an established use certificate under the former statutory provisions replaced, by way of amendment to the 1990 Act, by the Planning and Compensation Act 1991 ; secondly, July 27, 1992 was the date when the new provisions in relation to enforcement and LDC's introduced by the 1991 Act came fully into effect; thirdly, the period of 10 years prior to the application is the "rolling" period of 10 years necessary for achieving immunity, alternatively a LDC, under the current statutory provisions.

The relevant statutory provisions are as follows. Section 191 of the 1990 Act provides, so far as relevant:

> "(1) If any person wishes to ascertain whether:
>
> (a) any existing use of buildings or other land is lawful … he may make an application for the purpose to the local planning authority specifying the land and describing the use …
>
> (2) For the purposes of this Act uses and operations are lawful at any time if:
>
> (a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and
>
> (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.
>
> …
>
> (4) If, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operations or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case they shall refuse the application.
>
> …
>
> (6) The lawfulness of any use, operations or other matter for which a certificate is in force under this section shall be conclusively presumed."

Section 192 provides, so far as relevant:

> "(1) If any person wishes to ascertain whether:

> (a) any proposed use of buildings or other land … would be lawful, he may make an application for the purpose to the local planning authority specifying the land and describing the use or operations in question."

Section 195(2) provides, so far as relevant.

> "(2) On any such appeal, if and so far as the Secretary of State is satisfied—
>
> (b) in the case of an appeal under sub-section (1)(b), that if the authority had refused the application their refusal would not have been well-founded,
>
> he shall grant the Appellant a certificate under section 191 or, as the case may be, 192 accordingly or, in the case of a refusal in part, modify the certificate granted by the authority on the application".

***189**

The lawful development certificate provisions are included in Part VII of the 1990 Act, which deals with planning enforcement. Other relevant provisions in that Part include section 171A , which provides so far as relevant:

> "(1) For the purposes of this Act—
>
> (a) carrying out development without the required planning permission …
>
> constitutes a breach of planning control."

Section 171B introduces the new time limits effected by the Planning and Compensation Act 1991 . In relation to the matters which principally arise in this case—that is to say, material changes of use for commercial purposes—the relevant provision is subsection (3) :

> "(3) In the case of any other breach of planning control, no enforcement action may be taken after the end of the period of 10 years beginning with the date of the breach."

In response to Mr Panton's compendious claims on his appeal, the Inspector recorded as follows:

> "6. As explained in paras 2 and 3 of former Circular 17/92 to which you referred, now cancelled and superseded by Circular 10/97 , section 10 of the Planning and Compensation Act 1991 introduced the new system for establishing the lawfulness, for planning purposes, of proposed or existing operations, uses or activities in, on, over or under land, by applying to the local planning authority for an LDC. As stated in the former Circular, the procedure for applying for an LDC replaces the now obsolete concept of 'established use', and the procedures for 'established use certificate' (EUC) applications, and appeals to the Secretary of State in sections 191 to 196 of the 1990 Act. All the new and revised time-limits for taking planning enforcement action, including the new 10-year rule in section 171B(3) of the 1990 Act, as amended by the 1991 Act, applied with effect from 27 July 1992. Annex 8 of Circular 10/97 , referred to at the Inquiry, explains the provisions and procedures for applying for an LDC under the provisions of section 191 of the 1990 Act, as amended, and defines what is lawful for planning purposes. Para. 8.23 of the Circular makes it clear that the statement in an LDC of what is lawful relates only to the state of affairs on the land at the date of the certificate application".

She continued in paragraph 7:

> "7. I therefore consider that the main issue to be determined in this case is whether the uses applied for in the application for an LDC are lawful by reason of having commenced 10 or more years before the application was made on 11 April 1997 (4 years in the case of the Class C3 single dwellinghouse use) and were existing on that date".

It is apparent already that the Inspector is seemingly falling into errors. First, she appears to be ignoring the claims, undoubtedly based on evidence (see below) that there had been material changes of use to non-residential uses prior to December 31, 1963. Second, and as appears further below, she ***190*** appears to be misunderstanding the significance of the concept of "existing use" at the time of the application.

Her decision letter contains a clear and substantial record of the evidence which had been placed before her. I refer, in this judgment, only to brief extracts so far as necessary. In paragraph 8, in response to the claims in relation to Class B1 and A1 uses, she recorded:

> "Mr A.W. Farmer gave evidence in his sworn affidavit, that he purchased the appeal site on November 1, 1960. There were two buildings on the land—the Old Mill House and the Mill. Soon after he bought the Mill in 1960 he began to modify it so that he could use it as the workshop and studio for his business constructing models and sculpting. To the best of his recollection he first used the Mill for his business during 1962. Prior to his move from London the bulk of his work was commissioned by buyers. However, due to an unpredicted adverse effect of the move on his business, he changed its emphasis to producing designs of his choice for display and sale from the Mill's studio".

In paragraph 9 she referred to various pieces of documentary evidence, consistent with Class B1 use at various periods of the history. She gives a detailed description of the inspection undertaken by the Second Respondent's planning officer at the premises in May 1997. She gives a full description of what she observed on her visit to the premises following the inquiry, on February 18, 1998. She continued in paragraph 11:

> "11. From my consideration of all the evidence, including Mr Farmer's sworn affidavit dated April 10, 1997 and various letters submitted concerning commissions/orders dating from the 1950s and 1960s, I conclude on the balance of probability that Mr Farmer's work of artistic construction/ sculpting has declined significantly since the 1960s to its present position of being de minimis and barely more than a hobby. In reaching this conclusion I attach considerable weight to Mr Farmer's statement in his sworn affidavit, borne out by his evidence to the inquiry, that his work had progressively become more for his own pleasure and directed to exhibitions rather than commercial purposes. You also acknowledged in your application that the death of Mr Farmer's wife and his own age (now 87) have meant that there is no significant commercial purpose to Mr Farmer's activities in the Mill. No evidence was submitted of any sales or commissions during the period 1987 to 1997 and Mr Farmer said in evidence that there were no commissions at present. Taking into account the case law … I conclude that because his activity is the artistic work of construction/sculpting and not the making or manufacturing of an article in the course of a trade or business it does not fall within Class Bl(c) use for any industrial process, of the Town and Country Planning (Use Classes) Order 1987 , but is a sui generis use".

In relation to the claim in respect of Class A3, she records in paragraph 13:

> "13. Mr A.W. Farmer's evidence in his sworn affidavit is that when he bought the Mill in 1960, his wife moved her catering business … from London to the Mill. Part of the Mill was converted to a kitchen and its ancillary storage for the catering business. The ***191** catering business involved the sale of hot food for consumption off the premises."

She then records the decline of that business, related, in the main, to the declining health and subsequent death of Mrs Farmer. She concluded on this aspect in paragraph 14:

> "14. I therefore conclude from the evidence on the balance of probability, that a catering business operated from the Mill in the 1960s, 1970s and early 1980s but that the operation ceased in 1987 when Mr Farmer's wife became ill. As there is no evidence that a catering business operated from the Mill between 1987 and 1997, your application for a certificate of lawfulness in respect of an existing use for the sale of Class A3 food and drink of the Town and Country Planning (Use Classes) Order 1987 fails to satisfy the statutory requirements of the 1990 Act as explained in Annex 8 of Circular 10/97 ".

She then proceeds to record the evidence relating to the claim for a use under Class B8. Paragraph 16 records:

> "16. I saw on my visit that apart from the crockery and other items stored on the ground floor of the Mill in connection with the former catering business, and miscellaneous items including some car seats and garden furniture, the bulk of the items stored were domestic household items including furniture. I conclude from all the evidence, taking into account the small area of ground floor used for the purpose, that the storage of the various items referred to, belonging to Mr Farmer, friends and neighbours, between 1987 and 1997 amounted to no more than a use ancillary to the primary use of the Mill which I conclude below is for residential purposes. It does not therefore constitute a primary storage use within Class B8 of the Town and Country Planning (Use Classes) Order 1987 ".

In relation to the claim in respect of Class C3 (use as a dwellinghouse) she records in paragraph 18:

> "18. The Council do not dispute that there has been a residential use in the Mill for more than 10 years before April 11, 1997. I conclude from all the evidence, on the balance of probability, that there has been a residential use in the Mill continuously for more than 10 years before the date of the LDC application. As the use as a single dwellinghouse commenced more than four years ago it is lawful for planning purposes".

Her overall conclusions are found in paragraph 19:

> "19. Having regard to my findings above on the various uses applied for, I conclude from all the evidence and on the balance of probability, that Mr Farmer has occupied the Mill as his home since 1968, and since at least 1987 has used all the floors in the building to a greater or lesser extent for domestic purposes and ancillary uses for artistic construction/sculpting and storage. I therefore conclude that the primary use of the Mill is as a dwellinghouse within Class C3 of the Town and Country Planning (Use Classes) Order 1987 with ancillary uses for the purposes of artistic construction/sculpting ***192*** and storage, and that these uses have existed continuously for more than 10 years prior to the date of the LDC application".

Paragraph 20 records that she proposed to issue a certificate in respect of the use of the first and second floor of the eastern side of the Mill as a dwellinghouse within Class C3 and ancillary uses for the purposes of artistic construction/sculpting and storage. The certificate attached to her decision letter certified that on 11 April 1997 the use described in the first schedule, in respect of the land specified in the second schedule, was lawful within the statutory provisions. The second schedule refers to land at Dandridges Mill. The first schedule provides:

> "Use of the eastern side of first and second floor as a dwellinghouse within Class C3 of the Town and Country Planning (Use Classes) Order 1987 and ancillary uses for the purposes of artistic construction/sculpting and storage".

Against that background, six main submissions were made. First, that even on the basis of the Inspector's findings as to the primarily residential use (with ancillary uses) the certificate granted by her wrongly confined such a use to the flat only. Second, that she had failed to understand, and to give effect to, the significance of the evidence as to material changes of use having occurred before December 31, 1963. Third, that she had failed to understand the true legal significance of the term "existing use" for the purposes of section 191 . Fourth, that she had overwhelmingly directed her attention to the state of affairs in 1997 and 1998, without proper regard to the full history of the various uses. Fifth, that she should have found that Mr Farmer's use was a B1 use, not *sui generis* . Sixth—a point taken by Mr Panton only—that the inquiry had been conducted in a manner which was procedurally unfair to him. (I should record that Mr Panton—appearing in person, and, if I may say so, with considerable skill—raised a large number of grounds, which I believe are properly encapsulated in the above six points. Further, for reasons which will become apparent, matters arising under the fourth submission will need little separate treatment.)

The first submission can be shortly dealt with. The Inspector has found that the lawful use of the Mill is for residential purposes, with certain ancillary uses. She has, however, failed to certify that any part of the nineteenth century mill premises has any lawful use. (It was accepted by the first respondent that this was the construction and effect of the certificate.) It was accepted by Mr Albutt, on behalf of the first respondent, that it would have been open to the Inspector, under section 191(4) , to certify residential use in respect of the whole of the premises, and that the failure to do so was an error. It was submitted, however, that this should not lead to the quashing of the certificate. No prejudice had been suffered, since Mr Panton could re-apply for a certificate in respect of the main part of the Mill.

It is clear from section 191(4) that there is a duty on the authority (passing to the first respondent on appeal) to issue a certificate in respect of the premises applied for, where a lawful use is demonstrated, and if the facts and circumstances so require, to modify the description of the use from that described in the application. This Inspector has failed to carry out this duty in relation to the premises the subject of the application. The presence or absence of prejudice is, in my judgment, irrelevant. Having said that, Mr Panton was entitled to a LDC for the uses demonstrated in evidence, and the ***193** prejudice suffered by him and Mr Farmer is, surely, self-evident. They should be entitled to occupy the mill, at least for residential and ancillary purposes, without any fear of an enforcement notice, and without the need to apply for a further LDC (for which an additional application fee would now be payable). This certificate has not been issued in accordance with the statutory provisions, and on this ground alone should be quashed.

I turn to the second issue. Under section 45(2)(a) of the Town and Country Planning Act 1962 , an enforcement notice had to be served, in relation to any development, within four years from the carrying out of that development. Section 15(3) of the Town and Country Planning Act 1968 contained a similar limitation period, but such period did not apply to a change of use apart from a change of use to a single dwellinghouse. However, that immunity was preserved by sub-section (1) , whereby enforcement of planning control could only take place in relation to breaches occurring after the end of 1963. The Acts of 1971 and 1990 were consolidations, and could not be interpreted as removing the acquired immunity. The question, therefore, is whether the Planning and Compensation Act 1991, introducing an entirely new basis for immunity from development control, on the basis of a "rolling" 10 year period of use, removed such already accrued immunities. There is nothing in the Act so to suggest, and indeed the craftsman seems to have been astute to avoid removing accrued immunities: see section 4 of the 1991 Act, and the Planning and Compensation Act 1991 (Commencement No. 5 and Transitional Provisions) Order

1991 . Indeed, if it were necessary, section 16 of the Interpretation Act 1978 would seem to protect the immunity acquired under the previous legislation.

It is clear, therefore, that an immunity accrued under the previous statutory provisions was not prejudiced by the 1991 provisions. The Court of Appeal expressly proceeded on this basis in *William Boyer (Transport) Limited v. Secretary of State for the Environment [1996] 1 P.L.R. 103* at 107, and that position was accepted by Mr Albutt. (The same principles would apply in relation to a material change of use taking place before July 1, 1948.) Further, in accordance with long established principles, such an accrued planning use right could only be lost in one of three ways, by operation of law. First by abandonment, second by the formation of a new planning unit, and third, by way of a material change of use (whether by way of implementation of a further planning permission, or otherwise): *Pioneer Aggregates Limited v. Secretary of State [1985] A.C. 132* . (Further, of course, a discontinuance order can be made under section 102 of the 1990 Act.)

Before turning to examine how this decision dealt with the above matters, I must deal with the issues arising under the third submission. Mr Albutt's skeleton argument appeared to suggest that an "existing" use for the purposes of section 191(1) described one which was active at the time of the application. During the hearing I suggested the term "dormant use", as representing a use which had arisen by way of a material change of use, but was now inactive, possibly for a long period of time. Such decline, even cessation, of physical activity could, of course, occur in countless different circumstances. The dormant use would still exist in planning terms, in the sense that the use right had not been lost by operation of law by one of the three events referred to above.

It is clear that a dormant use, in this sense, can be an "existing" use for the purposes of section 191(1) , and this position was in terms accepted by the ***194*** First Respondent. This becomes clear when one appreciates that the LDC provisions have to be construed in the context of the enforcement provisions as a whole. Section 191(1) enables the grant of a certificate where a use is lawful, one example of lawfulness being immunity from enforcement through the passage of time. By section 171B(3) the relevant period of time (in relation to a use other than as a single dwellinghouse) is the passage of 10 years *from the date of the breach* . The subsection is silent on any requirement for continuation of the use. Indeed, this approach is consistent with the fundamental principles of statutory development control in relation to material changes of use. The provisions are concerned with the carrying out of development, that is to say not use, but material change of use.

Further, this approach to the term "existing", shared by the first respondent in this case, is consistent with the approach taken by the Secretary of State in relation to the former provisions. Under the previous provisions relating to established use certificates, the use had to have "continued since the end of 1963", and be "subsisting at the time of the application". In a number of appeal decisions, the Secretary of State accepted that these provisions could apply to an inactive, or dormant, use, provided that it had not been abandoned.

Finally, there is nothing inconsistent, in my view, between this approach and the judgment of Mr Robin Purchas Q.C. (sitting as a deputy High Court judge) in *Nicholson v. Secretary of State for the Environment 76 P. & C.R. 191* . That decision concerned the time limits for enforcement in relation to breaches of condition. Mr Purchas held that a LDC could only be granted where the non-compliance with the planning condition was current at the date of the application. As Mr Purchas pointed out, if there were a period, following non-compliance, of compliance with the condition, the breach would be at an end, and a later breach would constitute a fresh breach, in relation to which time would begin to run again under section 171B(3) . As he pointed out:

> "In this context a failure to comply with a condition is not to be confused with the continuation or abandonment of a planning use".

The learned deputy judge continued in the following terms at page 199:

> "That construction seems to me consistent with the linked provisions in section 191 for lawful development certificates in respect of uses and operations … it is plain, accordingly, that in respect of uses the use must exist at the time of the application … That seems to me to presuppose that there is something in existence at the time of the application which would be capable of contravention if there was in fact a relevant enforcement notice then in force … to my mind, the natural reading of section 191 in respect of uses and operations is that the section requires that the uses and operations should exist at the time of the application in the sense that I have indicated. That would be consistent with the approach that I have taken to non-compliance".

There is nothing inconsistent, in my view, between those remarks and the approach that I take in the present case, an approach accepted by the first respondent. The burden of Mr Purchas's reasoning is that there must be, at the date of the application, a use or operation at the land upon which an enforcement notice could "bite". An enforcement notice is no less properly ***195** served in relation to a dormant use than in relation to one which is being carried on in an active or physical sense.

Against that background, accordingly, the approach by the decision-maker in a case such as the present ought, in my view, logically to be as follows. First, to ask and answer the question: when did the breach of planning control, *i.e.* the material change of use to the use specified in the application, occur? (To qualify, this would be before July 1, 1948, by December 31, 1963, or at a date 10 years prior to the current application.) Second, if the material change of use took place prior to one of those dates, has that use been lost by operation of law, in one of the three possible ways? Third, if it is satisfied that the description of the use specified in the LDC application does not properly describe the nature of the use which resulted from the material change of use, then the decision-maker must modify/substitute such description so as properly to describe the nature of the material change of use which occurred.

Against that background, it is entirely clear, in my judgment, that such was not the approach taken by the Inspector in the present case. As Mr Burton, appearing for Mr Farmer, rightly observed, she started on April 11, 1997 and looked backwards, when she should have started at the inception of the material change of use (or uses) and looked forward. The overwhelming focus of her examination and assessment of the factual evidence was on the state of affairs at the date of the application and at her site visit. This could be highly relevant if she was considering whether the uses resulting from the earlier material changes of use had been abandoned. However, she nowhere makes such finding, and it was expressly conceded by the first respondent that no such finding had been made. The point becomes especially clear by reference to the claim for B1 use, and the passage from paragraph 8 of the decision letter which I cited earlier. Mr Albutt accepted that this passage appeared to be, or was, a finding that in 1960/1962 there had been a material change of use to use for B1 purposes. However there is, as I have said, no finding that such use has been abandoned.

The point is especially clear in relation to the B1 use, but is applicable to the other uses claimed. In relation to the claim for the A3 use, unhappily there is no clear finding as to whether or when there had been a material change of use to A3, although paragraph 13 of the letter is consistent with the finding that there may have been a material change of use to A3 prior to 1964. The position in relation to the claim for the B8 use is even less clear. The evidence may, on proper examination,

show a material change of use of part of the premises to storage (otherwise than ancillary to residential use), having taken place prior to April 11, 1987. Whether it does show such a conclusion will have to be the subject of reassessment on re-determination of this matter.

Accordingly, Mr Albutt's defence of this decision letter rested on one single proposition. This was that the findings in the letter, especially paragraph 19, were tantamount to a finding that, whatever material changes of use may have taken place in the past to commercial uses, there had subsequently been a material change of use to residential use in respect of the whole premises, a primary use to which the uses for artistic construction/sculpting and storage were merely ancillary.

It is entirely clear, in my judgment, that the Inspector has not approached the matter in this way. If this had been the issue in her mind, I would expect it to have been defined clearly as such in paragraph 7. I would expect a clear ***196** finding not simply of use, but of material change of use. The whole tenor of the decision letter relates to the decline of the former commercial uses to levels found much reduced in their active intensity in 1997/1998. The Inspector supplied—in relation to another issue—Man affidavit to the court the terms of which were wholly inconsistent with the first respondent's submissions on her behalf. The affidavit includes the following passages:

> "I gave most weight to the evidence that related to the items stated to be in the building at the date of the application … I merely emphasised that the relevant date for the purposes of determining the Class B8 use was the date of the application, as opposed to any earlier date proposed by the applicant".

These remarks are wholly at odds with the suggested approach, namely, that she was considering whether previous uses had been lost by the undertaking of a material change of use to residential purposes. I am not saying that the facts might not be *capable* of founding a conclusion that, as a matter of fact and degree, there had been a material change of use to residential of the whole premises, but I am satisfied that the decision letter cannot properly, for the reasons indicated, be construed as amounting to such a finding.

Since I reject the submission that the decision letter can be construed as a valid finding that the previous uses had been replaced by a material change of use to residential use, the appeal will have to be re-determined, and the matters arising under the fifth submission accordingly fall away for the purposes of this hearing. The re-determination will have to assess the nature of the material change of use which may have been undertaken by Mr Farmer in the early 1960s, and whether such use was later supplanted by a material change of use to another use, whether residential or *sui generis* . I say nothing further as to the proper definition of the uses arising from the evidence, which will be a matter for the first respondent to determine.

In relation to the sixth submission, Mr Panton raised several points to the effect that he had been unfairly disadvantaged by the procedure at the Inquiry. I indicated at the hearing that I was not satisfied that there had been any unfairness in the manner in which the Inspector conducted the Inquiry. Further, these points are now academic, since the matter will in any event be the subject of re-determination.

For these reasons, these applications succeed.

Representation

Solicitors— Morgan Cole , Oxford; Treasury Solicitor .

Order

Reporter —Megan Thomas.

Applications allowed with costs. ***197**

EBC SOUTH LTD

52 Botley Road

Park Gate

SO31 1BB

27/02/24

Dear Kevin,

To dismantle the Arden Theatre at Titchfield festival Theatre as per your email is a mammoth task.

To remove just the seating would take at least 3 weeks, but if you were to include the mezzanine, we would need at least 2 months to complete this.

To remove the Lighting would take at least 1 month as this is extremely complicated and specialised and would include many scaffolding changes.

To reinstate the dividing wall, we would first need to contact a structural engineer to carryout structural calculation to see whether it is viable to dig a new footing at this depth by hand as it is not accessible for heavy machinery to be used. This would need to go through the stage basement which is below the water table and would require extensive measures to prevent the water from entering the building. Then to reinstate the wall this would take at least 3 months.

To fill the remaining basement with aggregate would take about 2 weeks as access to the pump system we would need to be built as disconnecting the pump would cause the basement to flood over time and could spill over into the building causing further problems.

To dismantle the stage area including the revolve would take at least 6 weeks to complete.

Overall, kevin you would be looking at approximately 9 months' work.

Kind regards Chris Buchanan

Managing director

Fareham Retail and Commercial Leisure Study Update Report

Fareham Borough Council

Monday, April 27, 2020

LICHFIELDS

LICHFIELDS

Lichfields is the pre-eminent planning and development consultancy in the UK

We've been helping create great places for over 50 years.

lichfields.uk

15096/01/PW/PW
18403370v2

Contents

1.0 Introduction

Purpose of the report

1.1 Lichfields was commissioned by Fareham Borough Council to prepare the Fareham Retail and Commercial Leisure Study (FRCLS 2017). The key objective of the FRCLS was to provide a robust and credible evidence base to inform the emerging Local Plan 2036 for Fareham Borough. It provided a quantitative and qualitative assessment of the need for new retail and main town centre uses within Fareham Borough.

1.2 It provided a description of existing retail and leisure facilities within the Borough and identified the role the main town and district centres play in meeting the needs of customers. The study includes an assessment of:

1 changes in circumstances and shopping patterns since the previous studies were undertaken, not least the effects of the recession and the availability of 2011 Census data;

2 the future need and (residual) capacity for retail, food and beverage and leisure floorspace for the period up to 2036;

3 the potential implications of emerging developments both within and outside Fareham, in terms of impact on town centres and potential changes to shopping patterns;

4 the existing retail hierarchy and network of centres and advises whether any changes are required; and

5 development plan policies, allocations and recommendations on how each centre can develop its role.

1.3 This 2020 report provides a partial update of the FRCLS 2017 and should be read alongside the FRCLS 2017. This update report replaces the following sections of the FRCLS 2017:

- Section 2 - The Hierarchy of Centres (paragraphs 2.1 to 2.29);
- Section 3 - Retail Need Assessment (paragraphs 3.1 to 3.44 and 3.71 to 3.91);
- Section 4 - Other Town Centre Uses (paragraphs 4.8 to 4.38 and 4.52 to 4.56);
- Section 5 - Accommodating Growth (paragraph 5.1 to 5.16 and 5.48 to 5.69);
- Section 6 - Conclusions;
- Appendix 2 - Convenience assessment;
- Appendix 3 - Comparison assessment;
- Appendix 4 - Food/beverage assessment; and
- Appendix 5 - Analysis of Centres (part – role and mix of uses).

2.0 Hierarchy of centres

Introduction

2.1 Section 2 of the FRCLS provided an overview of the shopping hierarchy in Fareham Borough and the surrounding sub-region. This overview is updated below.

2.2 The revised NPPF indicates (paragraph 85) that planning policies should continue to define a network and hierarchy of centres and promote their long-term vitality and viability, but centres are now expected to grow and diversify to respond to rapid changes in the retail and leisure industries.

Centres in Fareham and the surrounding area

2.3 Fareham Borough is bounded by Eastleigh, Winchester, Portsmouth and Gosport local authorities. The Borough contains Fareham town centre as the main centre, supported by district centres at Locks Heath and Portchester plus local centres and parades catering for local needs, as shown in Figure 2.1 overleaf.

2.4 The existing Fareham Borough Local Plan Part 1: Core Strategy (adopted August 2011) and existing Local Plan Part 2: Development Sites and Policies (June 2015) sets out policies on retail and town centres, which seek to maintain the current hierarchy of the retail centres and promote competition and consumer choice, whilst maintaining and strengthening the individual character, vitality and viability of the centre.

2.5 The Javelin Group's Venuescore ranks the UK's top 3,500 retail destinations including town centres, malls, retail warehouse parks and factory outlet centres across the country. Each destination is given a weighted score based on the number of multiple retailers present, including anchor stores, fashion operators and non-fashion multiples. The score attached to each retailer is weighted depending on their overall impact on shopping patterns, for example a department store will achieve a high score. The updated results for the destinations and other relevant centres outside of the Borough are shown in Table 2.1.

2.6 As of 2016/17, Fareham town centre achieves the highest Venuescore in the Borough, reflecting its position in the retail hierarchy, although its score has reduced by 6 points. Most centres experienced a small decline in scores between 2015/16 and 2016/17, due to the national trend of shop closures within town centres.

2.7 Residents in Fareham Borough continue to have good access to several larger centres, as well as having a choice of smaller centres for day to day shopping needs. Nevertheless, Fareham town centre has an important role as the main retail destination in the Borough.

2.8 Venuescore data closely correlates to the actual market size of the shopping destination in terms of consumer expenditure. Javelin also assesses the market position of centres based on the retailers present and the centre's relative position along a spectrum running from discount to luxury or down-market to aspirational (i.e. lower, middle to upscale), as shown in Table 2.1. This information is used in the retail industry to assess the relative strength of shopping destinations. The market position relates specifically to the fashion offer together with other easily classified operators, because the range and choice of clothing and fashion shopping is the key driver in the relative attraction of large comparison shopping destinations. Javelin also provided other measures of the strength of centres as outlined below.

Figure 2.1 Fareham Borough network of centres and parades

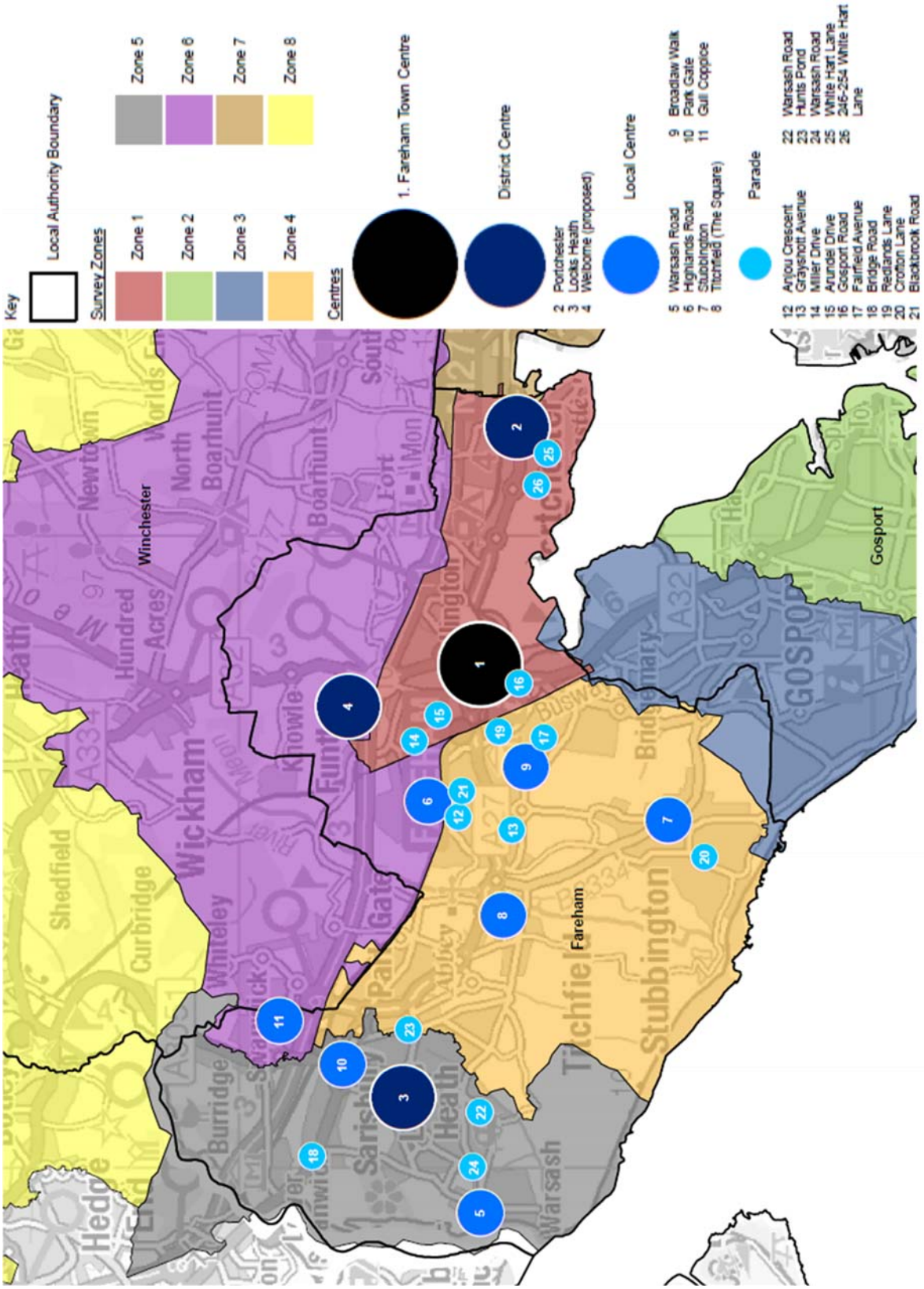


Table 2.1 UK Shopping Index and Rank

Centre	Venuescore 2015/16	Venuescore 2016/17	Change	UK Rank 2016/17	Market position
Southampton	355	338	- 17	20	Middle
Chichester	207	209	+2	74	Upper middle
Portsmouth	184	180	-4	101	Middle
Winchester	166	169	+3	125	Upper middle
Fareham town centre	140	134	-6	179	Middle
Gunwharf Quays, Portsmouth	127	121	-6	200	Upscale
Eastleigh	109	105	-4	238	Middle
Waterlooville	108	105	-3	238	Middle
Southsea	92	91	-1	292	Middle
Whiteley Shopping Centre	78	82	-4	332	Upper middle
Gosport	64	69	-5	408	Lower middle
Petersfield	73	68	-5	416	Middle
Southampton, Shirley	72	68	-4	416	Lower middle
Havant	62	62	0	473	Lower middle
North End, Portsmouth	50	46	-4	666	Lower middle
Bitterne	44	43	-1	710	Lower middle
Portswood, Southampton,	41	42	-1	733	Lower middle
Cosham, Portsmouth	38	37	-1	847	Lower middle
Fratton, Portsmouth	33	27	-6	1187	Lower middle
Hedge End	32	33	+1	968	Middle
Collingwood/Speedfields RP	28	30	+2	1074	Lower middle
Oceans / Burrfields RP, Portsmouth	24	23	-1	1368	Middle
Locks Heath	21	16	-5	1888	Middle
Clement Attlee Way, Portsmouth	16	16	0	1888	Middle
Port Solent	14	15	+1	2021	Upper middle
Broadcut Retail Park	14	14	0	2171	Middle
Farlington, Portsmouth	16	14	-2	2171	Middle
West Street (Portchester)	12	12	0	2566	Lower middle
Stubbington	n/a	10	n/a	3133	Lower middle

Source: Javelin Venuescore 2015/16 and 2016/17

2.9 Southampton is at the top of the shopping hierarchy, some way ahead of Portsmouth and Winchester. Fareham town centre is a second-tier centre, behind Winchester, but still ranked ahead of Eastleigh, Waterlooville, Whiteley and Petersfield.

2.10 Although not the largest centre, Gunwharf Quays in Portsmouth continues to be the only "upscale" centre in the sub-region, suggesting that it has a predominance of higher quality fashion shopping. The higher order centres of Chichester, Winchester and Whiteley are classified as "upper-middle" centres in fashion terms.

2.11 Within Fareham Borough, including Fareham town centre, Locks Heath and Broadcut Retail Park are classed as "middle", which suggest their retail offer is mass market.

2.12 In addition to its market position and Venuescore, each destination is also assessed in terms of a range of other attributes, as follows:

- Age focus (is the offer targeting younger or older consumers?)
- Fashionability of its offer (is the clothing offer traditional or progressive?)

- Food/service bias (how strong is the food and beverage offer?)

2.13 The Javelin Group classifies retailers in terms of their "fashionability" ranging from "traditional" at one end, to "updated classic", "fashion moderate", "fashion forward" through to "progressive" at the other, i.e. least fashionable to the most fashionable.

2.14 The age position of the fashion offer is also classified ranging from "young", "middle" to "old", for example shops such as Hollister, H&M, Miss Selfridge and Superdry appealing more to the young and others such as Evans and Edinburgh Woollen Mill appealing more to the old. The results for centres within Fareham and the surrounding area are shown in Table 2.2 below.

Table 2.2 Venuescore UK Fashion and Food/Service attributes

Centre	Age	Fashion Position	Food/service index (average =100)
Southampton	Mid	Fashion moderate	103
Chichester	Old	Update classic	82
Portsmouth	Mid	Fashion moderate	81
Winchester	Old	Update classic	105
Fareham town centre	Mid	Fashion moderate	91
Gunwharf Quays, Portsmouth	Old	Upper middle	162
Eastleigh	Old	Update classic	128
Waterlooville	Old	Traditional	47
Southsea	Old	Traditional	54
Whiteley Shopping Centre	Mid	Fashion moderate	82
Gosport	Old	Traditional	71
Petersfield	Old	Traditional	72
Southampton, Shirley	Old	Update classic	108
Havant	Old	Fashion moderate	138
North End, Portsmouth	Old	Update classic	119
Bitterne	Old	Update classic	71
Portswood, Southampton,	Old	Progressive	145
Cosham, Portsmouth	Mid	Update classic	132
Fratton, Portsmouth	Old	Fashion moderate	68
Hedge End	Old	Fashion moderate	19
Collingwood/Speedfields RP	Old	Fashion moderate	20
Oceans / Burrfields RP, Portsmouth	Old	Progressive	53
Locks Heath	Old	Progressive	115
Clement Attlee Way, Portsmouth	Old	Fashion moderate	76
West Street (Portchester)	Old	Fashion moderate	51
Stubbington	Old	Fashion moderate	122

Source: Javelin Venuescore 2015/16 and 2016/17

2.15 The centres within the sub-region tend to cater predominantly for older customers, with moderate or traditional tastes. This includes Fareham, Portchester and Stubbington, which have a fashion moderate offer. Some centres have a more progressive (fashionable) offer including Locks Heath and Portswood. It should be noted that Portchester, Stubbington and Locks Health are small centres with limited or no clothing shops, therefore Javelin's fashion classification is less reliable than the classifications for larger centres. Most town centres of a similar size to Fareham town centre across the country tend to be fashion moderate, tending to attract older customers. Table 2.2 suggests there is a good variety of fashion shopping destinations within the sub-region.

2.16 Fareham and Portchester have a below average food/service offer and there appears to be scope to improve Fareham town centre and Portchester's food and beverage/service offer, e.g. restaurants, cafés and bars. The need for these uses is explored in more detail later in this report.

Retail provision in Fareham Borough

2.17 The assessment of the existing retail and service provision in the main centres has been updated and detailed information is provided in the health check of Fareham town centre and centre audits of the district and local centres, set out in later sections. A summary of existing retail provision in provided in Table 2.3 below. Figure 2.2 shows the updated proportional mix of Class A1 to A5 uses within the main centres of Fareham town centre, Portchester and Locks Heath compared with the UK average.

Table 2.3 Existing Class A1 retail provision in Fareham Borough

Centre	Status	Class A1 shop units	Convenience goods floorspace (sq.m gross)	Comparison goods floorspace (sq.m gross)
Fareham	Town Centre	166	9,233	31,496
Portchester	District Centre	37	1,856	2,741
Locks Heath	District Centre	18	5,092	1,093
Stubbington	Local Centre	28	1,665	1,517
Park Gate	Local Centre	20	954	698
Highlands Road	Local Centre	12	1,234	562
Titchfield	Local Centre	13	509	392
Warsash	Local Centre	20	611	699
Gull Coppice	Local Centre	3	269	0
Broadlaw Walk	Local Centre	3	461	307
		320	**21,884**	**39,505**

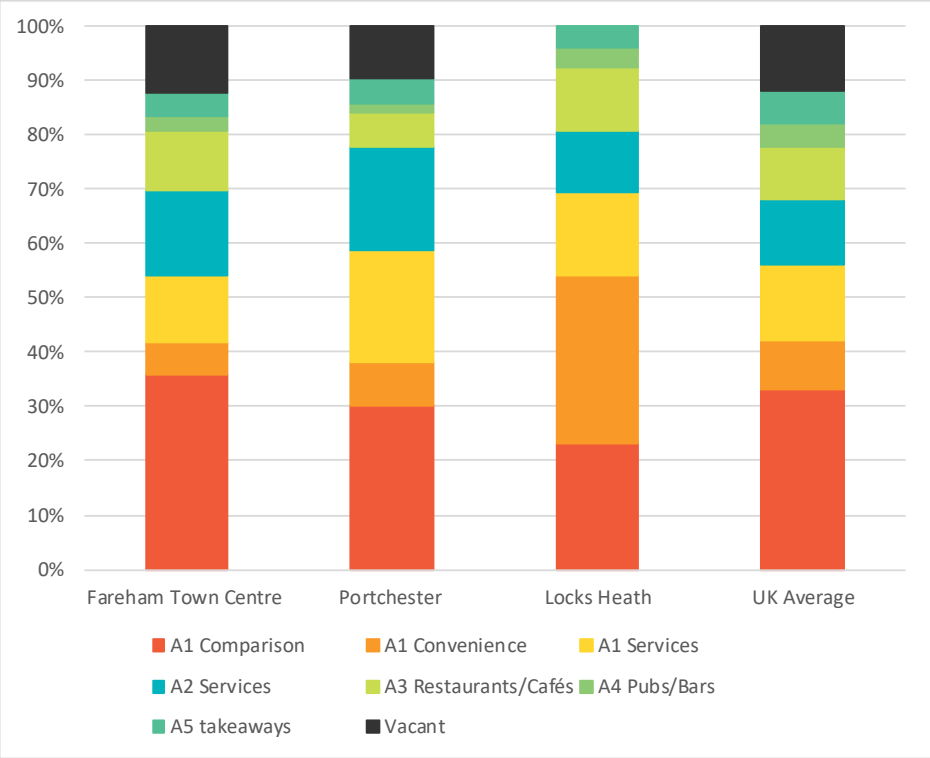
Source: Fareham Borough Council Centre Health Check data 2018

2.18 Retail provision has not changed significantly in the main designated town, district and local centres since 2016. However, the amount of Class A1 comparison goods floorspace has reduced slightly from 43,147 sq.m gross to 39,505 sq.m gross.

2.19 The audit of centres later in this report confirms that Fareham town centre, Portchester and Locks Heath are the main shopping destinations within the Borough. Fareham town centre is by far the biggest centre in terms of number of shop units and the amount of retail sales floorspace.

2.20 Fareham town centre provides a good range of shops and facilities that serve residents within its relatively wide catchment area, with a critical mass of convenience and comparison shopping floorspace and a good range of non-retail services. Portchester and Locks Heath are much smaller centres and serves a more localised catchment, providing a range of retail uses and services, particularly with regard to A1 comparison (e.g. charity shops and chemists), A1 Services (e.g. hairdressers) and A2 services (e.g. banks and estate agents). Locks Heath has higher than average proportion of A1 convenience retail floorspace when compared with the national average, due to the Waitrose store and conversely a below average proportion of A1 comparison retail floorspace.

Figure 2.2 Fareham Borough – Main centres mix of Class A1 to A5 units



Source: Fareham Borough Council Centre Health Check data 2018

2.21 Figure 2.2 shows Fareham town centre has a mix of Class A1 to A5 broadly consistent with the UK average, in particular the proportion of comparison goods retail units remains above the national average. Portchester and Locks Heath have a lower proportion of comparison goods retail units, but conversely a higher proportion of convenience retailing and non-retail services.

2.22 Portchester is also similar to the national average mix of uses, although it has a higher proportion of A1 and A2 non-retail services, reflecting the centre's day to day shopping and service role. Portchester has a below average proportion of Class A3 to A5 food and beverage outlets.

2.23 Locks Heath has a lower proportion of comparison goods retailers, consistent with its role as a day to day shopping and service destination. Locks Heath has a higher proportion of convenience goods retailers. Portchester and Locks Heath have a lower proportion of vacant units than the national average, with Locks Heath having no vacant units (recorded in 2018). A full audit of the main centres is provided later in Section 4, 5 and 6 of this report.

2.24 Stubbington, Park Gate, Highlands Road, Titchfield, Warsash, Gull Coppice (Whiteley) and Broadlaw Walk are identified in the existing Local Plan Part 2: Development Sites & Policies as Local Centres. These centres generally have a small range of shops and services of a local nature, serving small catchment areas. For example, they provide a small supermarket, newsagent, post office, takeaways and pharmacy. These Local Centres are supplemented by Local Parades which include a limited range of shops of a local nature to serve a small catchment. An audit of the local centres and parades in the Borough is provided in Section 7 of this report.

3.0 Fareham town centre

3.1 The FRCLS 2017 (Appendix 5) provided a health check of Fareham town centre based on land use information for Winter 2015. This section provides a partial update of the previous health check based on 2018 land use information. This section should be read alongside the FRCLS 2017 (Appendix 5) health check.

Key roles

3.2 Fareham town centre is the main shopping and commercial centre in the Borough. It is a traditional market town and is designated as the only town centre in the Borough in the Fareham Local Plan, Core Strategy (2011). It has a reasonable number of retail and service uses. The centre serves shoppers from across the Borough and beyond, particularly for comparison shopping. Its key roles include:

- **convenience shopping** - including one large Tesco food superstore at Quay Street (4,620 sqm net). This is complemented by one medium sized Aldi (884 sq.m net), which the household survey results suggest is trading strongly. In addition, there is an Iceland (374 sq.m net) and a B&M Bargains store. These facilities are supported by a number of small convenience outlets that serve basket/top-up food shopping trips;
- **comparison shopping** - there is a reasonable range of multiple and independent shops selling both high and lower order comparison goods. There is a concentration of multiples (chain stores), mainly located in the Primary Shopping Area of the pedestrianised area of West Street, Fareham Shopping Centre and Market Quay;
- **services** - there is a good range of high street national banks, and a reasonable selection of cafés, restaurants, takeaways, travel agents and hairdressers/beauty parlours;
- **entertainment** - there is a Reel Cinema and several pubs and bars; and
- **leisure and community facilities** – including health and fitness gyms and civic offices.

3.3 In addition to the FRCLS 2017, a retail study was undertaken by GVA in October 2012 and a Health Check Study Summary Paper was prepared by Fareham Borough Council in 2018. These reports provide a useful benchmark to access the significance of changes in recent years.

3.4 Fareham town centre is at the heart of the wider Fareham town and the retail core of the Borough. Fareham town centre prime retail pitch is focused around the pedestrianised area of West Street, Fareham Shopping Centre and Market Quay. To the east and west of this prime pitch retail and town centre uses extend along West Street.

3.5 The household shopper survey (FRCLS 2017, Appendix 7) provided an indication of the varied role of the town centre. Fareham town centre is the main destination for 32.8% of respondents for most of their non-food shopping. The updated combined turnover of Fareham town centre is £386 million, split approximately into 16% convenience goods trade, 62% comparison goods and 22% food and beverage. This indicates Fareham town centre's varied role.

3.6 The updated Venuescore ranking for Fareham indicates the town centre has continued to fall marginally from 175th position in 2013, to 178th in 2015/2016 and 179th in 2016/2017. The development of the Whiteley Shopping Centre, which now ranks 332nd has affected centres in the sub-region. The Whiteley Centre opened in May 2013 and is 6km north west of the Fareham town centre. The Whiteley Centre has a large Tesco and 42 comparison goods shops, the majority of which are multiple retailers. This retail offer is supported by 20 cafés/restaurants, a Cineworld and an indoor climbing centre.

Mix of uses

3.7 Fareham town centre has a total of 306 retail/service uses. The diversity of uses present in the centre in terms of the number of units is set out in Table 3.1, and the results are compared with the national average. Since the 2016 health check the overall number of Class A units in the centre has increased by 4, which could either be due to subdivision of units, or a change of use to Class A or reclassification of uses, but the increase in vacant units has resulted in the reduction of occupied Class A premises from 275 in 2016 to 268 in 2018.

Table 3.1 Fareham town centre mix of Class A units

Type	Units 2014	Units 2016	Units 2018	% units 2018	UK average 2018
A1 comparison	111	112	110	35.9	33.3
A1 convenience	13	16	18	5.9	9.0
A1 services	37	40	38	12.4	13.9
A2 financial services (1)	58	57	47	15.4	11.9
A3 restaurants/cafés	29	31	34	11.1	9.7
A4 pubs/bars	10	6	8	2.6	4.5
A5 takeaways	11	13	13	4.2	6.0
Vacant	32	27	38	12.4	11.8
Total	**301**	**302**	**306**	**100.0**	**100.0**

Source: Fareham BC Retail Health Check Data (1) includes betting shops and pawnbrokers (Sui Generis)

3.8 The mix of Class A uses in Fareham is broadly similar to the national average and has not changed significantly in recent years. The number of A1 comparison goods units has reduced by 3 since 2016, but provision remains at a marginally higher proportion than the national average.

3.9 The number of vacant units has increase by 11 since 2016 and the number of A2 financial and professional services has reduced by 10, but the proportion remains above the national average. The proportion of vacant units is now marginally higher than the national average.

3.10 Table 3.2 below summarises the town centre mix of uses by floorspace. Fareham town centre has a total gross floorspace of 73,775 sq.m gross of which 42.7% is comparison retail, the comparable figure in 2016 was higher at 47.6%. The amount of comparison goods floorspace has reduced by 2,290 sq.m gross since 2016.

Table 3.2 Fareham town centre Use Class floorspace mix 2018

Type of use	Floorspace (sq.m gross)	% total floorspace
Comparison retail	31,496	42.7
Convenience retail	9,233	12.5
A1 services	3,751	5.1
A2 services	8,590	11.6
A3 restaurants/cafés	6,147	8.3
A4 pubs/bars	2,932	4.0
A5 takeaways	1,318	1.8
Vacant	10,308	14.0
Total	**73,775**	**100.0**

Source: Fareham BC Retail Health Check Data 2018

3.11 The floorspace vacancy rate (14% of all floorspace) has increased from 7.2% in 2016 and is now marginally higher than the unit vacancy rate (12.4% of all units). Notable new vacant units include the former Marks & Spencer (5 Delme Square), Argos (97-99 West Street) and Zodiac

99p store (142-144 West Street). The majority of the convenience goods floorspace is concentrated in the Tesco store.

Retailer representation

3.12 Table 3.3 provides a breakdown of comparison shop units by category. Despite the reduction in units and floorspace, Fareham town centre continues to provide a reasonable selection of comparison shops (110) reflecting its size and role in the shopping hierarchy. The proportion of comparison goods units remains marginally higher than the national average, reflecting the main shopping role of the centre.

Table 3.3 Fareham town centre mix of comparison goods units

Type	Units 2016	Units 2018	% units 2018	UK average 2018
Clothing and footwear	27	27	24.5	23.3
Furniture, carpets and textiles	4	9	8.2	7.6
Books, arts, cards and stationers	6	7	6.4	8.5
Electrical, music and photography	10	11	10.0	9.5
DIY, hardware and homeware	15	9	8.2	6.5
China, glass and gifts	2	1	0.9	5.2
Cars, motorcycles and accessories	0	0	0	0.5
Chemists, drug stores and opticians	7	8	7.3	10.9
Variety, department and catalogue	4	2	1.8	1.7
Florists, nurserymen and seedsmen	4	1	0.9	2.2
Toys, hobby, cycle and sports	11	11	10.0	5.3
Jewellers	5	6	5.5	5.0
Charity and second-hand shops	17	14	12.7	9.5
Other comparison good retailers	0	4	3.7	4.3
Total	**112**	**110**	**100.0**	**100.0**

Source: Fareham BC Retail Health Check Data

3.13 The mix and choice of comparison goods shops has not changed significantly since 2016. The number of charity shops and DIY/hardware shops has reduced, while furniture/carpets/textile shops have increased. The number of variety stores has changed due to the closure of Marks & Spencer and Argos. However, most of the Goad Plan comparison goods categories continue to be represented within the centre, but as in 2016 the choice in some categories is limited. There continues to be a reasonable representation and mix of mid-market national multiple comparison retailers present within Fareham town centre, including:

Accessorize	Monsoon	Warren James	Robert Dyas	Wilkinsons
Bon Marche	Peacocks	Next	Sony Centre	Boots
Claire's Accessories	tReds	Clintons	Specsavers	Superdrug
Clarks	Store Twenty One	Card Factory	B&M Bargains	H Samuel Limited
Dorothy Perkins	River Island	Thornton's	Carphone Warehouse	TK Maxx
New Look	Shoe Zone	W H Smith	The Works	
M & Co.	Topshop/Topman	Waterstones	Sports Direct	
Game	Milletts	Vision Express	Debenhams	

3.14 National multiple retailers continue to be concentrated around the pedestrianised area of West Street, Fareham Shopping Centre and Market Quay. Fareham Shopping Centre remains the only

enclosed shopping centre and is anchored by Debenhams, Boots, Next and B&M Bargains. B&M Bargains has occupied the former BHS store since 2016, but the large Marks & Spencer store has closed.

Service uses

3.15 Fareham town centre continues to provide a good range of non-retail service uses, with a choice of service providers across all categories, as shown in Table 3.4. The number of restaurant/café and pub/bar uses has increased since 2016.

Table 3.4 Fareham town centre mix of selected service uses

Type	Units 2016	Units 2018	% units 2018	UK average 2018
Restaurants/cafés	31	34	27.0	23.3
Fast food/takeaways	13	13	10.3	7.6
Pubs/bars	6	8	6.3	8.5
Banks/other financial services	25	24	19.0	9.5
Betting shops/casinos/amusement	3	3	2.4	6.5
Estate agents/valuers	11	11	8.7	5.2
Travel agents	4	4	3.2	0.5
Hairdressers/beauty parlours	30	29	23.0	10.9
Launderettes/dry cleaners	1	0	0	1.7
Total	**124**	**126**	**100.0**	**100.0**

Source: Fareham BC Retail Health Check Data

3.16 As in 2016, the proportion of units in some categories is notably different to the national average. The centre has a significantly above average proportion of banks/other financial services, which includes a strong presence of businesses in the peripheral areas of the town centre, i.e. the High Street and the unpedestrianised part of West Street. These areas continue to provide an important non-retail service function.

3.17 Fareham town centre has retained the selection of restaurants, café and bar chains, which support the cinema. This provision suggests the evening economy is reasonably strong. The chain restaurants/pubs/takeaways include:

Ask Italian	Costa	Nando's	Rancho Steak House
Burger King	Domino's Pizza	Papa Johns	Slug and Lettuce
Café Nero	McDonalds	Subway	Wetherspoon

3.18 The adopted Local Plan Part 2 identifies a vision for more A3 restaurants and cafés within the centre. Part of the Council's vision for the centre is to create 'living streets' to build on the town's identity and incorporate a "vibrant mix of shops, cafés, restaurants, businesses, community uses and housing that gives life and activity to the principal streets of High Street and West Street during the day and evening".

3.19 Most of the main high street banks/building societies are represented within Fareham town centre including, Santander, TSB, Barclays, Halifax, HSBC Bank, Lloyds, Nationwide, Nat West and Yorkshire Building Society.

3.20 In addition to these service uses, Fareham town centre is represented by a limited range of leisure, entertainment and cultural uses, including Reel Cinema, Sports Direct Fitness, Curves Fitness Centre, Ferneham Hall, Ashcroft Arts Centre and Westbury Manor Museum.

3.21 The Civic Centre, library and medical facilities also help to attract visitors to the town centre. The centre has a number of Class B1 and B2 employment uses but this sector is not significant.

Strengths

- Fareham town centre is the main shopping centre within the Borough and its catchment extends across the Borough and beyond.
- The centre provides a good range of convenience shopping facilities. The Tesco and Aldi stores attract a significant number of food and grocery shopping trips that provide spin-off trade for other shops and services.
- There is a higher than average proportion of comparison shops including a diverse range of national multiple retailers and independent shops. The facilities are primarily mid-market.
- The centre provides a range of service facilities, including banks and building societies, restaurants and cafés. There is a small selection of chain restaurants and bars, which with the cinema generate evening activity in the centre.
- The Fareham Shopping Centre provides covered shopping and provides a focus for multiple retailers, anchored by Debenhams, Boots, Next and B&M Bargains.
- The centre is a relatively attractive environment, with an extensive pedestrianised area, which has seen investment in the public realm including street furniture, art, children's play and lighting.
- The street markets add diversity to the retail offer and character of the centre and help to draw more visitors.
- The buildings within the centre are of reasonably good quality, with attractive mix of period buildings along the High Street to the east of the centre.
- The centre has several public car parks which are distributed around the centre, within close proximity to the main shopping areas.

Weaknesses

- The vacancy rate in terms of units and floorspace has increased since 2016 and is now slightly higher than the national average, and the centre has recently lost Marks & Spencer and Argos.
- The centre does not offer the same quality and range of facilities available in Southampton and Portsmouth, especially clothing and footwear retailers. Many Fareham residents choose to shop at these centres.
- The centre has a limited provision of higher quality up-market retailers.
- The household survey results suggest the street market is not a particularly strong draw.
- The town centre has a below average proportion of public houses and bars.
- There are gaps in leisure provision including bowling and bingo and the market share of theatre trips is low.
- The Fareham Shopping Centre is dated in appearance with low ceilings, poor natural light and units with a number of vacancies.
- The household survey indicates there is dissatisfaction with the cost of car parking.

Opportunities

- The increase in the vacancy rate since 2016 provides a good supply of premises available to attract new operators to Fareham.
- There is a relatively large resident population within Fareham's primary catchment areas. Continued growth in expenditure should provide further opportunities to expand and improve shopping and leisure provision within Fareham.
- Fareham has major development opportunities for further retail and leisure expansion including the Civic area, south of Market Quay and east of the railway station.
- Improvements to Fareham town centre's leisure offer may increase visitors within the centre which in turn will offer opportunity for increased food and beverage uses within the centre and increase expenditure elsewhere.

Threats

- The increase in the vacancy rate since 2016 and the creation of large voids could adversely affect investment confidence in Fareham, making the reoccupation of vacant units less likely.
- Competing centres, such as Southampton, Portsmouth and the Whiteley Shopping Centre are likely to continue to improve their environment, retail and leisure offer, which may increase expenditure leakage from Fareham.
- The continued polarisation of investment within larger centres may limit operator demand for new premises in Fareham. Lower commercial values may affect the viability of regeneration proposals.
- Development of new district and local centres within the Welborne development will need to complement rather than compete with the town centre.

4.0 Portchester district centre

4.1 The FRCLS 2017 (Appendix 5) provided a health check of Portchester district centre based on land use information for Winter 2015. This section provides partial update of the previous health check based on 2018 land use information. This section should be read alongside the FRCLS 2017 (Appendix 5) health check.

Key roles

4.2 Portchester is designated as a District Centre in the adopted Fareham Borough Local Plan Part 1: Core Strategy (August 2011). It has a modest range of retail and service uses, and primarily functions as a day to day top up shopping and service centre for local residents. Its key roles include:

- **convenience shopping** - the main food store is the Co-op (1,028 sq.m net). This is supported by an Iceland (384 sq.m net) and a limited number of small convenience shops.
- **comparison shopping** - there is a limited range of comparison goods retailers within the centre, comprising predominantly independent retailers with a few national multiples.
- **services** - there is a Post Office, a high street bank and dry cleaners, a reasonable selection of cafés, restaurants, takeaways and hairdressers/beauty parlours.
- **community facilities entertainment** – including the Portchester Health Centre and Portchester Library.

4.3 Portchester District Centre is located to the east of the Borough and is focused around a pedestrianised area of West Street. There is free surface car-parking to the south and community services to the west.

4.4 The 2015 household shopper survey provided an indication of the role of Portchester. Only 0.5% of respondents within the study area as a whole, suggested they do most of their non-food shopping in Portchester district centre.

4.5 The convenience goods expenditure attracted to Portchester is estimated to be £15.67 million in 2017 (Appendix 2), which is equivalent to 5% of the total convenience goods spending in stores and centres within Fareham Borough. The comparison goods turnover of Portchester district centre is estimated to be lower at £7.81 million in 2017 (Appendix 3), equivalent to 1.8% of the total comparison goods spending in centres within Fareham Borough. The food and beverage turnover of Portchester District Centre is estimated to be £13.02 million (Appendix 4), which is equivalent to 10.7% of the total food and beverage spending at facilities within Fareham Borough.

4.6 The combined turnover of Portchester district centre is £36.5 million in 2017, which is less than a tenth of Fareham town centre's turnover. Portchester's turnover is split approximately 43% convenience goods trade, 21% comparison goods and 36% food and beverage. This split reflects Portchester's lower order shopping in service role. Javelin's Venuescore rank for Portchester district centre is 2,566th in 2016/2017, which is one of the smallest centres included by Javelin.

Mix of uses

4.7 Portchester is a small centre with a total of 63 retail/service uses. The diversity of uses present in the centre in terms of the number of units is set out in Table 4.1, compared with the national average. The number of Class A units has reduced by one since 2016 but remains higher than the number in 2014. The number of vacant units has increased by two, but the vacancy rates is still marginally below the national average.

4.8 As in 2016, the centre has a similar proportion of comparison and convenience units when compared with the national average, but the actual number of outlets is small. Consistent with its role as a service centre, Portchester continues to have an above average proportion of A1 and A2 services, but below average proportions of A3/A4/A5 units when compared with the national average.

Table 4.1 Portchester district centre mix of Class A units

Type	Units 2014	Units 2016	Units 2018	% units 2018	UK average 2018
A1 comparison	21	23	19	30.2	33.3
A1 convenience	5	5	5	7.9	9.0
A1 services	9	11	13	20.6	13.9
A2 financial services (1)	13	13	12	19.0	11.9
A3 restaurants/cafés	3	4	4	6.3	9.7
A4 pubs/bars	1	1	1	1.6	4.5
A5 takeaways	3	3	3	4.8	6.0
Vacant	2	4	6	9.5	11.8
Total	**57**	**64**	**63**	**100.0**	**100.0**

Source: Fareham BC Retail Health Check Data 2018 (1) includes betting shops and pawnbrokers (Sui Generis)

Retailer representation

4.9 In 2016 Portchester had a modest selection of comparison units (23). This provision has reduced to 19. Table 4.2 provides a breakdown of comparison shop units by category.

Table 4.2 Portchester district centre mix of comparison goods units

Type	Units 2016	Units 2018	% units 2018	UK average 2018
Clothing and footwear	1	1	5.3	23.3
Furniture, carpets and textiles	3	2	10.5	7.6
Books, arts, cards and stationers	2	2	10.5	8.5
Electrical, music and photography	1	0	0	9.5
DIY, hardware and homeware	2	2	10.5	6.5
China, glass and gifts	0	0	0	5.2
Cars, motorcycles and accessories	0	0	0	0.5
Chemists, drug stores and opticians	3	3	15.8	10.9
Variety, department and catalogue	0	0	0	1.7
Florists, nurserymen and seedsmen	2	2	10.5	2.2
Toys, hobby, cycle and sports	3	3	15.8	5.3
Jewellers	0	0	0	5.0
Charity and second-hand shops	5	4	21.1	9.5
Other comparison good retailers	1	0	0	4.3
Total	**23**	**19**	**100.0**	**100.0**

Source: Fareham BC Retail Health Check Data

4.10 Portchester continues to provide representation in most Goad categories, but there are now further gaps in provision with 6 out of the 14 categories not represented. These unrepresented categories are generally higher order goods i.e. electrical, china/glass/gifts/fancy goods, cars/motorcycles/motor accessories, jewellers and variety/department/ catalogue stores.

Within the represented categories the choice of shops is limited, with the exception of charity/second hand shops.

Service uses

4.11 As in 2016, Portchester has a reasonable range of non-retail service uses with all Goad categories represented except travel agents, as shown in Table 4.3. The choice of facilities in each category remains limited, with the exception of hairdressers which has increased since 2016.

Table 4.3 Portchester district centre mix of selected service uses

Type	Units 2016	Units 2018	% of units 2018	UK average 2018
Restaurants/cafés	4	4	15.4	23.3
Fast food/takeaways	3	3	11.5	7.6
Pubs/bars	1	1	3.8	8.5
Banks/other financial services	2	2	7.7	9.5
Betting shops/casinos/amusement	1	2	7.7	6.5
Estate agents/valuers	4	3	11.5	5.2
Travel agents	0	0	0	0.5
Hairdressers/beauty parlours	8	10	38.5	10.9
Launderettes/dry cleaners	1	1	3.8	1.7
Total	**24**	**26**	**100.0**	**100.0**

Source: Fareham BC Retail Health Check Data

Strengths

- The centre continues to serve a localised catchment area within Zone 1- Fareham East. The centre has retained a reasonable mix of convenience and lower order comparison shopping and services.
- The proportion of vacant units has increased but remains slightly below the national average.
- The centre is compact with a safe and attractive pedestrianised area, which is well landscaped and has street furniture.
- There is a convenient and large public car park adjacent to the centre.

Weaknesses

- The centre has a relatively poor higher order comparison offer, attracting a limited market share of comparison goods spending within Fareham Borough. The choice of comparison shops within each category is small and the number of units has reduced since 2016.
- Food stores are relatively small and do not adequately cater for bulk food shopping trips.
- The household survey results suggested the street market is not a particularly strong draw.
- The location of the centre next to the busy A27 makes it difficult for residents to the north to access the centre on foot.
- Surrounding residential areas and the A27 may limit the potential to expand the centre.

Opportunities

- The centre has a large and relatively attractive pedestrianised area, which could be better utilised.
- The role of the small street market is relatively undeveloped. An improved/expanded street market could help Portchester's local distinctiveness and its ability to compete with larger centres.
- The existing large surface car park may provide an opportunity to expand Portchester's existing retail, service and leisure offer.

Threats

- The increase in vacancy rate since 2016 suggests demand for premises may have reduced. In particular the number of comparison goods shops has reduced. The continuation of this trend could lead to further vacancies.
- The new Lidl store at Castle Trading Estate will have diverted food and grocery trade away from Portchester district centre. At present there is no evidence to suggest this trade diversion has undermined the vitality and viability of the centre.
- The continued polarisation of investment within larger centres may limit operator demand for new premises in Portchester. Lower commercial values may affect the viability of regeneration proposals.

5.0 Locks Heath district centre

5.1 The FRCLS 2017 (Appendix 5) provided a health check of Locks Heath district centre based on land use information for Winter 2015. This section provides a partial update of the previous health check based on 2018 land use information. This section should be read alongside the FRCLS 2017 (Appendix 5) health check.

Key roles

5.2 Locks Heath is designated as a District Centre in the adopted Fareham Borough Local Plan Part 1: Core Strategy (August 2011). Locks Heath District Centre is located to the west of the Borough of Fareham. It is a purpose-built centre built in 1983. It is set in a courtyard layout, with shops surrounding a public open space.

5.3 The centre provides a small selection of shops and services, a large area of free surface parking and an adjacent library, community centre, public house and petrol station. There is a reasonable range of retail and service uses, and it primarily functions as a day to day top up shopping and service centre for local residents. Its key roles include:

- **convenience shopping** – a large Waitrose store (2,420 sq.m net), supported by an Iceland store (399 sq.m net), butcher, baker, newsagent and off license.
- **comparison shopping** - a limited range of comparison goods independent retailers with no national multiples present;
- **services** - including a Post Office, building society and travel agency, a reasonable number of cafés, restaurants, takeaways and a hairdresser.
- **entertainment** - including the Lockswood Community Centre and Library.

5.4 Javelin's Venuescore rank for Locks Heath District Centre is 1,888th in 2016/2017.

Mix of uses

5.5 Locks Heath has 26 retail/service uses, up from 25 in 2016. The diversity of uses present in the Centre in terms of the number of units is set out in Table 5.1, compared against the national average. As in 2016, the centre has a significantly higher proportion of convenience units and a lower proportion of comparison units than the UK average. The centre has a higher proportion of A1 Service and A3/A5 Units, and a below average proportion of A2 and A4 units compared to the national average. The mix of use has not changed significantly since 2016.

Table 5.1 Locks Heath district centre mix of Class A units

Type	Units 2014	Units 2016	Units 2018	% units 2018	UK average 2018
A1 comparison	6	6	6	23.1	33.3
A1 convenience	7	7	8	30.8	9.0
A1 services	3	4	4	15.4	13.9
A2 financial services (1)	3	3	3	11.5	11.9
A3 restaurants/cafés	2	3	3	11.5	9.7
A4 pubs/bars	0	1	1	3.8	4.5
A5 takeaways	1	1	1	3.8	6.0
Vacant	1	0	0	0.0	11.8
Total	**23**	**25**	**26**	**100.0**	**100.0**

Source: Fareham BC Retail Health Check Data (1) includes betting shops and pawnbrokers (Sui Generis)

Retailer representation

5.6 Locks Heath has a small selection of comparison units (6) and this has not changed since 2016. Table 5.2 provides a breakdown of comparison shop units by category. The range and choice of comparison shopping is very limited. The offer includes a chemist, optician, a card/gift shop and two charity shops.

Table 5.2 Locks Heath district centre mix of comparison goods units

Type	Units 2016	Units 2018	% units 2018	UK average 2018
Clothing and footwear	0	0	0	23.3
Furniture, carpets and textiles	0	0	0	7.6
Books, arts, cards and stationers	1	1	16.7	8.5
Electrical, music and photography	0	0	0	9.5
DIY, hardware and homeware	1	1	16.7	6.5
China, glass and gifts	0	0	0	5.2
Cars, motorcycles and accessories	0	0	0	0.5
Chemists, drug stores and opticians	2	2	33.3	10.9
Variety, department and catalogue	0	0	0	1.7
Florists, nurserymen and seedsmen	0	0	0	2.2
Toys, hobby, cycle and sports	0	0	0	5.3
Jewellers	0	0	0	5.0
Charity and second-hand shops	2	2	33.3	9.5
Other comparison good retailers	0	0	0	4.3
Total	**6**	**6**	**100.0**	**100.0**

Source: Fareham BC Retail Health Check Data

Service uses

5.7 Locks Heath also has a limited range and choice of non-retail service uses, although all the Goad categories are represented. Table 5.3 provides a breakdown of service units by category. The choice of uses in each category is limited. The mix of service uses has not changed since 2016.

Table 5.3 Locks Heath district centre mix of selected service uses

Type	Units 2016	Units 2018	% of units 2018	UK average 2018
Restaurants/cafés	3	3	27.3	23.3
Fast food/takeaways	1	1	0.9	7.6
Pubs/bars	1	1	0.9	8.5
Banks/other financial services	1	1	0.9	9.5
Betting shops/casinos/amusement	1	1	0.9	6.5
Estate agents/valuers	1	1	0.9	5.2
Travel agents	1	1	0.9	0.5
Hairdressers/beauty parlours	1	1	0.9	10.9
Launderettes/dry cleaners	1	1	0.9	1.7
Total	**11**	**11**	**100.0**	**100.0**

Source: Fareham BC Retail Health Check Data

Strengths

- Locks Heath continues to provide day to day retail and service for local residents in the west of the Borough.
- Locks Heath has a particularly strong convenience offer for a centre of its size, with a large Waitrose store and an Iceland store that attract customers from a wider area.
- The centre provides a range of service facilities, but the choice of facilities is limited.
- As in 2016, there are no vacant units in the centre.
- There is convenient free car parking adjacent to the centre.
- Buildings within the centre are generally in reasonable to good condition.

Weaknesses

- As in 2016, the centre has a very limited provision of comparison shops.
- The centre has a low proportion of national multiple retailers.

Opportunities

- The Waitrose is a key anchor to the District centre, which may help to attract more national multiple retailers to complement the retail offer within the centre. However, at present there are no available vacant units to attract new operators.

Threats

- Increased competition from the redeveloped Whiteley Shopping Centre was expected to divert trade from Locks Heath. At present there is no evidence to suggest this trade diversion has undermined the vitality and viability of the centre.

6.0 Local centres and parades

6.1 The FRCLS 2017 (Appendix 5) provided an audit of local centres and parades based on land use information for Winter 2015. This section updates the previous analysis based on the latest 2018 land use information.

6.2 The FRCLS 2017 described the comprehensive network of smaller local centres and local parades, which offers a balanced distribution of local facilities serving local communities across the Borough. These facilities complement the main centres and have an important role in serving the day-to-day needs in their local areas. The Fareham hierarchy of centres is set out in the Draft Fareham Local Plan Policy R1, as follows:

- **1 Town centre** - Fareham;
- **3 District centres** - Locks Heath, Portchester, Welborne (proposed);
- **8 Local centres** - Stubbington, Broadlaw Walk, Highlands Road, Gull Coppice (Whiteley), Titchfield, Warsash, Park Gate and Welborne (proposed); and
- **12 Small parades**.

6.3 The assessment of these centres and parades has been updated. As in the FRCLS 2017, each centre/parade has been attributed a Local Needs Index based on the availability of shops and services. The focus is the "needs" of local residents. There is no clear definition of need, but residents are likely to expect to find some or all of the following shops, services and community uses within easy walking distance of their home:

1 food or convenience store suitable for top-up shopping;
2 bank;
3 post office;
4 newsagent;
5 off licence;
6 chemist;
7 takeaway, café or restaurant;
8 public house;
9 bookmakers;
10 laundrette/dry cleaners;
11 hairdressers/beauty salon;
12 florist;
13 estate agents;
14 community hall;
15 doctor's/dentist surgery; and
16 library.

6.4 All local centres and local parades have been re-allocated a score out of 16, based on the shops and services listed above (one point per category represented) available in the centre. The results are summarised in Table 6.1 below.

Table 6.1 Local Needs Index Summary 2018

Centre	Status	Total shop units	Local Needs Index	Convenience shops	Vacant units
Stubbington	Local	43	14	7	1
Park Gate	Local	53	11	2	5
Highlands Road	Local	19	10	4	0
Titchfield	Local	23	7	4	0
Warsash	Local	31	7	3	0
Gull Coppice (Whiteley)	Local	6	6	1	0
Broadlaw Walk	Local	5	5	1	0
White Hart Lane, Portchester	Parade	14	6	2	2
Bridge Road, Sarisbury	Parade	6	4	1	1
Barnes Lane, Sarisbury	Parade	9	3	1	2
Anjou Crescent, Fareham	Parade	6	3	1	0
Gosport Road, Fareham	Parade	5	2	1	1
Crofton Lane, Stubbington/Hill Head	Parade	6	3	1	0
Miller Drive, Fareham	Parade	4	2	1	1
Warsash Road, Dibles Rd, Warsash	Parade	6	4	1	0
Arundel Drive, Fareham	Parade	3	2	1	1
Hunts Pond Rd, Titchfield Common	Parade	3	1	0	0
Redlands Lane	Undesignated	5	2	0	0
Fairfield Avenue	Undesignated	4	2	1	0
Greyshott Avenue	Undesignated	3	2	1	0
Total		**248**	**Average= 4.4**	**34**	**13**

Source: Fareham BC Retail Health Check Data 2018

6.5 The local needs index provides a useful indicator of whether a local centre or important local parade is meeting some or all the needs of local residents. There is a wide range of scores across the centres. Only three local centres i.e. Stubbington, Park Gate and Highlands Road have high Local Index Scores (over 10). Titchfield and Warsash are also relatively large local centres with over 20 shop units.

6.6 As in 2016, most local parades have a low local index score (5 or less) and less than 10 shop units in total.

6.7 Since 2016 the average score for each centre/parade has reduced slightly from 4.6 to 4.4. The number of units has remained relatively unchanged, increasing by one from 247 to 248, but the number of vacant units has increased from 10 to 13. These changes are not significant, and the hierarchy of centres as set out in Draft Fareham Local Plan Strategic Policy R1 is appropriate.

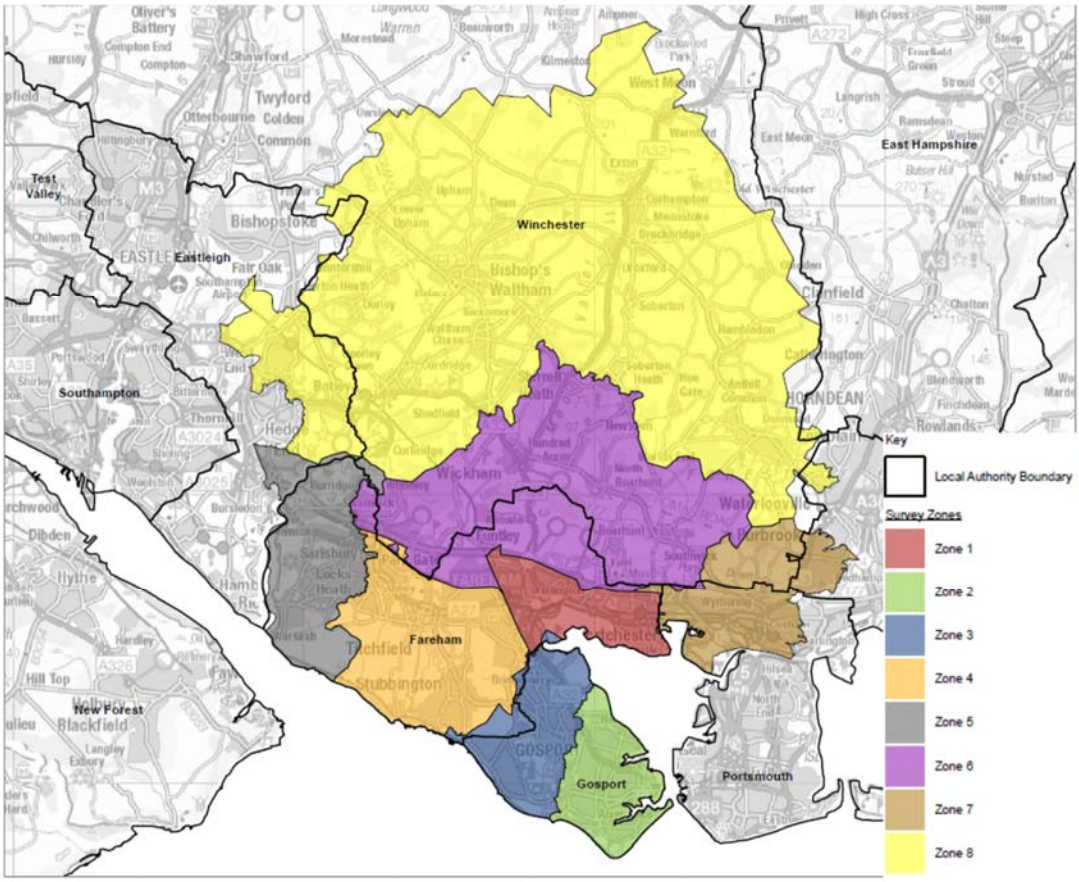
7.0 Retail need assessment

Introduction

7.1 This section re-assesses the need for Class A1 retail uses within Fareham Borough up to 2036. The approach continues to follow the key steps identified within the Planning Practice Guidance (PPG), as described in the FRCLS 2017. A summary of the methodology is set out in Appendix 1.

7.2 The quantitative analysis is based on the study area adopted in the FRCLS 2017, as shown in Figure 7.1 below.

Figure 7.1 Fareham Study Area



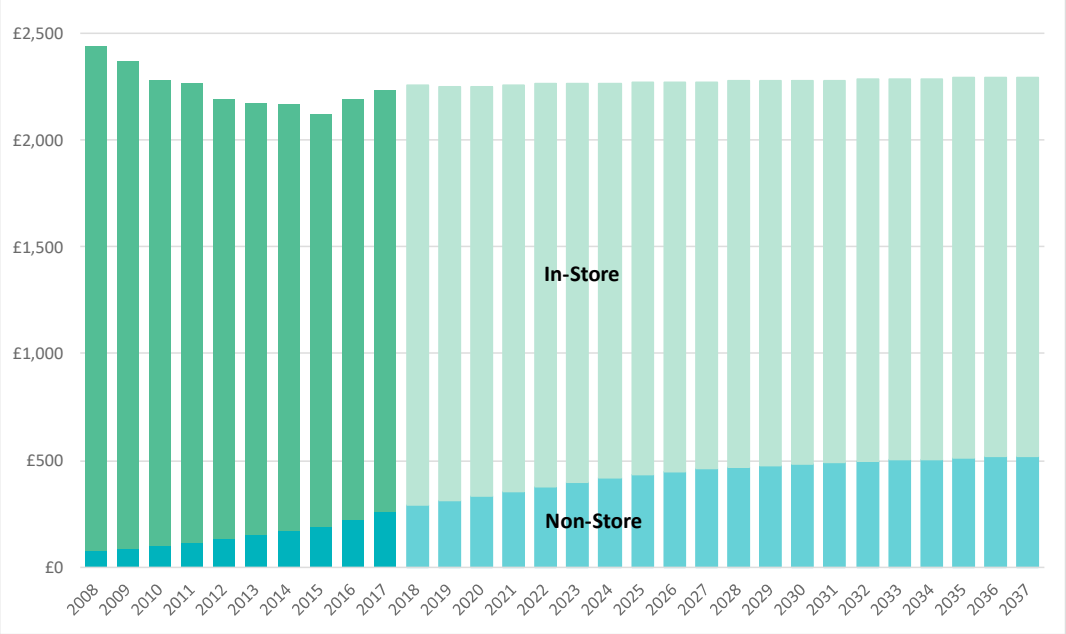
Retail trends

7.3 Historic trends indicate that consumer expenditure has consistently grown in real terms, generally following a cyclical growth trend. Expenditure growth has fuelled demand for new retail floorspace, including major out-of-centre development. Since the last recession expenditure growth has been much slower. The demand for retail floorspace has reduced. Underlying trends still show consistent growth that should continue in the future. Experian's latest post Brexit forecasts suggests slower growth in the short-term and home shopping/ internet spending is expected to grow at a faster rate than traditional shopping. Experian's short-term expenditure projections (2020 and 2021) expect retail and leisure growth but do not reflect the coronavirus pandemic. These projections now seem optimistic and at least a short term fall in expenditure on comparison goods, food/beverage (consumed away from the home),

cultural and leisure spend now seems likely. The convenience goods/food store sector could benefit from a transfer of expenditure due to the temporary closure of pubs, bars, restaurant and cafés. Home delivery retail businesses could also benefit. At present there is no available data to confirm these potential impacts or the effectiveness of the Government's counter measures.

7.4 For convenience goods, Experian's latest forecasts (February 2020) anticipate limited growth (0.1% per annum). Actual average growth in convenience goods expenditure growth per capita in the UK between 2008 to 2018 and forecast future growth is shown in Figure 7.2.

Figure 7.2 UK average convenience goods retail expenditure per person (£ per annum)

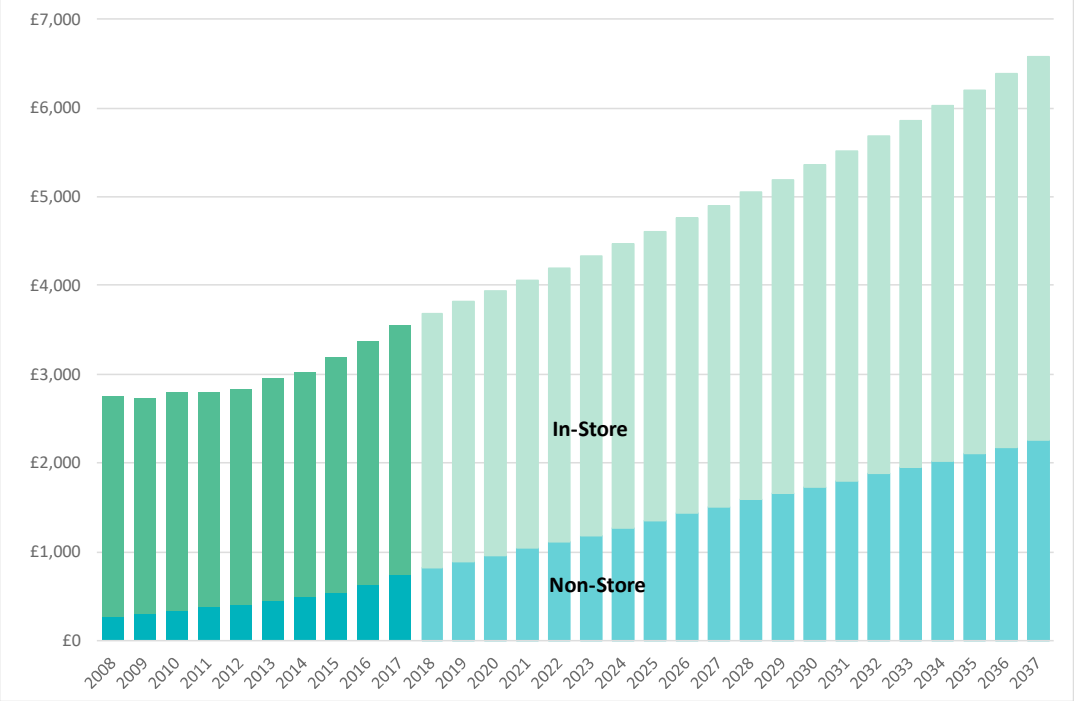


Source: Experian Briefing Note 17 (February 2020)

7.5 Figure 7.2 indicates that convenience goods expenditure per person decreased between 2008 and 2015 but recovered up to 2018. Experian expects slow growth in the future, but most of the growth will relate to non-store sales. Any need for new convenience goods retail floorspace in Fareham Borough is likely to relate to population growth, high current levels of trading and/or qualitative areas of deficiency.

7.6 For comparison goods, higher levels of growth are expected in the future (between 3.0% to 3.2% per annum), still at a lower rate than previous pre-recession trends (8% per annum between 1997 and 2007). Historically comparison goods expenditure has grown significantly more than convenience goods expenditure, and Experian's latest national growth rate recommendations are consistent with these past trends. Actual and forecast average growth in comparison goods expenditure growth per capita is shown in Figure 7.3. As indicated above, the short-terms growth projections for 2020 and possibly 2021, now seem optimistic in the light of the coronavirus pandemic. Nevertheless, the long-term strategy for Fareham Borough will need to assume a return to underlying growth and should plan for this potential growth.

Figure 7.3 UK average comparison goods retail expenditure per person (£ per annum)



Source: Experian Briefing Note 17 (February 2020)

7.7 New forms of retailing (multi-channel and home shopping) have and will continued to grow. Home/electronic shopping and home delivery has increased with the growth in the use of personal computers, smart phones and the internet. Click and collect / click and return shopping has become more popular. The future growth of multi-channel retailing including home computing, internet connections and interactive TV will continue to influence retailing in the high street and from traditional stores. National trends within this sector will have implications for all areas including Fareham Borough, because they have affected the amount of expenditure growth that is available to support development and reduced operator demand for new floorspace. Recent trends suggest continued strong growth in multi-channel activity. Experian's Retail Planner Briefing Note 17 (February 2020) states:

"The strong increase in online shopping in the past decade has lifted the share of special forms of trading (SFT) to a level where it now accounts for close to 20% of total retail sales.

… We expect the SFT market share to continue to increase over the forecast period, reaching 26% by 2025 and around 30% by 2030."

7.8 The floorspace capacity assessment in this update makes an allowance for future growth in e-tailing based on Experian projections.

7.9 Figure 7.3 indicates that comparison goods expenditure per person grew slowly between 2008 and 2014, but higher growth was achieved up to 2018. Experian expect steady growth in the future. Even allowing for disproportionately higher growth in non-store sales, comparison goods expenditure available for traditional forms of retailing is still expected to grow in real terms.

7.10 The implications of these trends on the demand for retail and food/beverage space has been considered. Some operators provide online sales from their traditional premises e.g. food store operators and click/collect operations, therefore growth in online sales may not always mean there is a reduction in the need for traditional retail floorspace.

7.11 Given the likelihood that multi-channel expenditure will continue to grow at a faster pace than other consumer expenditure, the need assessment adopts relatively cautious growth projections for expenditure and an allowance is made for operators to increase their turnover/sales density, due to growth in home shopping and click and collect.

7.12 Assessing future expenditure levels needs to consider the likely pace of economic growth. Careful consideration is needed to establish the appropriate level of expenditure growth to be adopted over the plan period. This study provides a long-term view for the plan period. Growth trends in population, home shopping/internet sales and in turnover efficiency also need to be considered and a balanced approach taken.

Demand for floorspace

7.13 Lower expenditure growth and deflationary pressures (i.e. price cutting) in the non-food sector have had an impact on the high street in the past decades. Because of these trends, the UK average shop vacancy rate (based on Goad Plan data) increased from around 10% in 2005 to about 14% in 2012. Vacancy rates gradually improved to 11.8% in 2018 but have now increased to 12.4% in 2020. It is possible there will be a sharp increase in shops vacancies in most town centres as and when the impacts of the coronavirus pandemic are felt.

7.14 The Council's centre health check data obtained in 2018 suggests there were 57 vacant Class A1-A5 shop units within the Borough. This equates to an overall vacancy rate of 8.9%, which is lower than the Goad national average of 11.8%. The vacancy rate is marginally higher than the UK average vacancy rate in Fareham town centre (12.4%). Overall, the vacancy figures suggest centres in the Borough are performing satisfactorily despite challenging market conditions. The future strategy for Fareham Borough's designated centres should seek to reduce shop vacancy rates in order to maintain and enhance their vitality and viability.

7.15 A combination of slower economic growth and multi-channel shopping have had a significant impact on the retail and leisure sectors, and continuing uncertainties are still having an effect. Many high profile national operators have failed, leaving major voids within centres and retail parks. The latest operators to experience difficulties include Debenhams, House of Fraser, New Look, Carpetright, Prezzo, Chimichanga, Strada, Byron, Marks & Spencer and Jamie Oliver, which indicates current market conditions are challenging. It seems likely the coronavirus pandemic will result in further casualties both multiples and independents.

7.16 Many town centre development schemes have been delayed or cancelled and the demand for traditional bulky goods retail warehouse operators has also been affected. Even some of the main food store operators have seen a reduction in growth, with discount operators taking market share from the main operators.

7.17 Property owners, landlords and funds have also come under pressure with struggling occupiers seeking to renegotiate terms through company voluntary arrangement (CVA) i.e. an insolvency process designed to let a firm with debt problems reach an agreement with creditors to help pay off part or all of its debts. Elsewhere, retailers have been continuing to 'right size' their portfolios, with operators announcing store closures. These trends have impacted on rental income and the capital value of retail/ leisure assets. These trends are likely to be exacerbated by the coronavirus pandemic, at least in the short-term.

7.18 Whilst the CVA process has created headaches for landlords in terms of rent negotiations, at the same time newly freed-up space has opened up new opportunities. Vacated premises have been reconfigured and reused for food/beverage, trampolines, climbing and indoor golf.

7.19 In addition to new forms of retailing, retail operators have responded to changes in customers' requirements. Retailers have also changed their trading formats to include smaller store formats

capable of being accommodated within town and local centres (such as the Tesco Express/ Metro, Sainsbury's Local, Little Waitrose and Marks & Spencer's Simply Food formats).

7.20 The number of Tesco Express, Sainsbury's Local and Little Waitrose stores has increased significantly during the last decade. Taking Sainsbury's as an example, data provided by Mintel indicates that the number of Sainsbury's Local stores increased by 76% between 2011 and 2016.

7.21 Several proposed larger food stores have not been implemented across the country. There has been a move away from larger stores to smaller formats, reflecting changes in customers' shopping habits. The expansion of European discount food operators Aldi and Lidl has been rapid during the last decade.

7.22 Comparison retailers have also responded to market conditions. The bulky goods warehouse sector has rationalised, including mergers and failures, and scaled down store sizes. Other traditional high street retailers have sought large out-of-centre stores, for example Next and M&S. Matalan also opened numerous discount clothing stores across the UK. Sports clothing retail warehouses including Decathlon and Sports Direct expanded out-of-centre. These trends have slowed significantly and are unlikely to change for the foreseeable future.

7.23 The demand for premises within the bulky goods sector, i.e. furniture, carpets, electrical and DIY goods, has been particularly weak in recent years. This has led to voids on retail warehouse parks and proposals to extend the range of goods sold to non-bulky goods. This can lead to the relocation of retailers creating more vacant units in town centres.

7.24 Within centres, many high street multiple comparison retailers have changed their format. For over two decades, high street national multiples have increasingly sought larger modern shop units (over 200 sq.m) with an increasing polarisation into the larger national, regional and sub-regional centres. Many multiple retailers now require representation in fewer locations to service catchment areas. Polarisation of investment in the larger centres is likely to continue in the future.

7.25 In general operator demand for space has decreased since the last recession and, of those national multiples looking for space, many prefer to locate in larger or purpose-built centres, e.g. Southampton, Portsmouth and Winchester. Fareham is at a lower level in the hierarchy and multiple operator demand may be lower in the future. Much of the occupier demand in smaller centres has come from the discount and charity sectors or non-retail services, rather than higher order comparison goods shopping.

7.26 The continuation of these trends will influence future operator requirements in Fareham Borough with smaller vacant units becoming less attractive for new multiple occupiers, and retailers increasingly looking to relocate into larger units in major centres. However, smaller vacant units could still be attractive to independent traders and non-retail services, assuming a return to normal levels of growth following the coronavirus pandemic.

7.27 The charity shop sector has grown steadily over the past 20 years and there is no sign this trend will end. Planning policies cannot control the amount of charity shops because they fall within Class A1, the same category as other shops. In many centres, charity shops have occupied vacated shop premises during the recession. This trend is evident in Fareham Borough. Charity shops can often afford higher rents than small independent occupiers because of business rate discounts. It does not follow that these charity shops will be replaced by traditional shops when the market recovers, particularly in the more peripheral retail frontages.

Non-retail Services

7.28 The growth of money lending/pay day loan shops, betting shops and hot food takeaways has raised concerns amongst many local planning authorities and has resulted in a change to permitted development rights to control the growth of these uses in town centres. This trend has not been particularly prevalent in Fareham Borough. Recent changes to the GPDO has had an impact on some town centres. These measures allow for greater flexibility for changes of use from retail to non-retail uses e.g. Class A uses to C3 residential use and Class A1 uses to Class A2 uses. These measures can change the composition of town centres e.g. the amount of Class A1 space has reduced. However, these measures may lead to a reduction in vacant shop premises, particularly in peripheral shop frontages.

Updated retail capacity assessment

Population and expenditure

7.29 The projected population within the study area between 2011 to 2036 is set out in Table 1 in Appendix 2. The FRCLS 2017 adopted population data from Experian for each zone based on the 2011 Census. The 2011 base year population for each zone was projected to 2036 based on the Office of National Statistic's latest 2014-based sub-national projections, which is consistent with the stand methodology.

7.30 Experian's EBS national expenditure information (Experian Retail Planner Briefing Note 17 – February 2020) has been used to forecast expenditure within the study area. Table 2 in Appendix 2 sets out the updated forecast growth in spending per head for convenience goods within each zone in the study area up to 2036. Forecasts of comparison goods spending per capita are shown in Table 2 in Appendix 3.

7.31 As a consequence of growth in population and per capita spending, convenience goods spending within the study area is forecast to increase by 9.2% from £687.81 million in 2017 to £751.32 million in 2036, as shown in Table 3 (Appendix 2). Comparison goods spending is forecast to double between 2016 and 2036, increasing from £1,092.21 million in 2017 to £1,909.22 million in 2036, as shown in Table 3 (Appendix 3). These figures relate to real growth and exclude inflation.

7.32 It should be noted that comparison goods spending is forecast to increase more than convenience spending as the amount spent on groceries does not necessarily increase proportionately with disposable income, whereas spending on non-food goods is more closely linked to income.

Market shares/Penetration rates

7.33 To assess the capacity for new retail floorspace, the penetration rates estimated for facilities within the study area from the FRCLS have been adopted.

7.34 The results of the 2016 household shopper survey relating to main and top-up food and grocery shopping were adopted to estimate base year convenience goods shopping patterns. The base year estimates of market share or penetration within each study area zone for convenience goods shopping are shown in Table 4, Appendix 2. These base year market shares have been adjusted to reflect changes since 2016, i.e. the new Lidl store at Castle Trading Estate in Portchester, the closure of Marks & Spencer food hall and the opening of B&M Bargains in Fareham town centre. The adjusted current market shares are shown in Table 6 in Appendix 2.

7.35 The base year market shares for comparison goods shopping are shown in Table 4 in Appendix 3, and the adjusted current market shares are shown in Table 6 in Appendix 3.

Benchmark turnover

7.36 The updated total benchmark turnover of convenience sales floorspace within Fareham Borough is £291.87 million (Table 12 in Appendix 2). The previous figure in the FRCLS 2017 was £272.61 million (at 2014 prices). The benchmark has increased (+£19.26 million) primarily due to inflation to the new 2017 price base, the new Lidl food store at Castle Trading Estate (benchmark turnover of £8.94 million) and growth in company average sales densities for Tesco and Co-op.

Base year and current spending patterns – 2017/2019

7.37 The updated 2017 base year levels of convenience goods expenditure attracted to shops/stores in Fareham Borough is £308.01 million, as shown in Table 5 in Appendix 2. By 2019 this turnover is projected to have increased to £312.93 million (see Table 7 in Appendix 2).

7.38 As indicated above, the total benchmark turnover of existing convenience sales floorspace is £291.87 million. The current 2019 figures suggest that convenience goods retail sales floorspace in Fareham Borough is collectively trading +7.2% above the national average, with an expenditure surplus of +£21.05 million in 2019, the difference between the actual spending at retail facilities in the Borough and the benchmark turnover i.e. is existing floorspace trading above average (suggesting an expenditure surplus) or trading below average (suggesting an expenditure deficit).

7.39 The comparable base year figures in the FRCLS 2017 was +7.3% above the national average in 2016, and an expenditure surplus of +£19.98 million. The new Lidl store at Castle Trading Estate has not reduced the expenditure surplus, primarily because of population/expenditure growth and the closure of the Mark & Spencer food hall since 2016.

7.40 The revised 2017 base year levels of comparison goods expenditure attracted to shops/stores in Fareham Borough is £430.09 million as shown in Table 5 in Appendix 3. By 2019 this turnover is projected to have increased to £455.64 million (see Table 7 in Appendix 3).

7.41 The comparable 2016 base year figure in the FRCLS 2017 was £410.18 million. The 5% increase in comparison goods turnover (£410.18 million to £430.09 million) reflects inflation between 2014 and 2017 prices, and growth in population and expenditure.

Future convenience goods floorspace capacity

7.42 The future level of available convenience goods expenditure attracted to the Borough at 2021, 2026, 2031 and 2036 is shown at Tables 8 to 11 in Appendix 2. The total level of convenience goods expenditure available between 2017 and 2036 is summarised in Table 14 in Appendix 2.

7.43 Table 14 subtracts the benchmark turnover of existing floorspace and commitments from available expenditure to calculate the amount of surplus or deficit expenditure. The benchmark turnover of existing convenience goods floorspace is expected to increase in the future. Experian's recommended growth rates for turnover efficiency have been applied (as set out in the methodology statement in Appendix 1).

7.44 Convenience goods commitments are shown in Table 13 in Appendix 2 and include the proposed replacement Lidl store at Speedfields and the district and local centres proposed within the Welbourne residential development. These commitments are expected to have a combined convenience goods turnover of £30.26 million.

7.45 Remaining surplus expenditure should be available to support new development or the re-occupation of vacant space. The surplus expenditure projections have been converted into

potential new floorspace estimates in Table 15 (Appendix 2). Expenditure is converted into floorspace estimates based on an assumed average sales density figure of £12,000 per sq.m.

7.46 The projections in Table 14 in Appendix 2 indicate that commitments, if implemented, will absorb the current 2019 convenience goods expenditure surplus (£21.05 million) and projected expenditure growth up to 2026.

7.47 Long-term expenditure growth after 2026 will generate a surplus of +£9.12 million at 2031 and +£17.25 million at 2036. This expenditure growth could support 760 sq.m net (1,437 sq.m gross) at 2031 increasing to 1,086 sq.m net (2,053 sq.m gross) by 2036, as shown in Table 15 in Appendix 2.

7.48 The comparable FRCLS 2017 projections were similar at 543 sq.m net (776 sq.m gross) at 2031 and 1,105 sq.m net (1,578 sq.m gross) at 2036.

Future comparison goods floorspace capacity

7.49 The future level of available comparison goods expenditure at 2021, 2026, 2031 and 2036 is shown in Tables 8 to 11 in Appendix 3. The total level of convenience goods expenditure available between 2017 and 2036 is summarised in Table 15 in Appendix 3.

7.50 Table 15 subtracts the projected turnover of existing floorspace and commitments from available expenditure to calculate the amount of surplus or deficit expenditure. The turnover of existing comparison goods floorspace is expected to increase in the future. Experian's recommended growth rates for turnover efficiency have been applied (as set out in the methodology statement in Appendix 1).

7.51 Comparison goods commitments are shown in Table 14 in Appendix 3, i.e. the district and local centres proposed within the Welbourne residential development. These commitments are expected to have a combined comparison goods turnover of £17.06 million.

7.52 Allowing for growth in turnover efficiency, remaining surplus expenditure should be available to support new development/or the re-occupation of vacant space. The surplus expenditure projections have been converted into potential new floorspace estimates in Table 16 (Appendix 3). Expenditure is converted into floorspace estimates based on an assumed average sales density figure of £6,500 per sq.m at 2017.

7.53 The projections in Table 15 in Appendix 3 indicate that commitments, if implemented, will absorb projected comparison goods expenditure growth up to 2036.

7.54 Long-term expenditure projections up to 2036 suggest a small deficit of -£6.06 million. This expenditure projection indicates a floorspace over-provision of 550 sq.m net (733 sq.m gross) at 2036, as shown in Table 16 in Appendix 3.

7.55 The FRCLS 2017 floorspace projections were 12,524 sq.m net (16,698 sq.m gross) at 2031 and 19,353 sq.m net (25,804 sq.m gross) at 2036. The 2036 floorspace projection has reduced by nearly 20,000 sq.m net (over 26,000 sq.m gross).

7.56 The main reasons for this significant reduction in comparison goods floorspace capacity are:

- Experian previous forecasts suggested comparison good expenditure per capita (allowing for SFT deductions) would grow by +83% between 2016 and 2036. The updated forecasts are lower at +59% between 2017 and 2036;
- Experian previous forecasts suggested comparison good sales densities would grow by +49% between 2016 and 2036. The updated forecasts are +70% between 2017 and 2036, therefore existing retail floorspace is expected to absorb more expenditure growth, leaving less growth for new floorspace.

Conclusions

7.57 The updated quantitative retail capacity projections are summarised in Tables 7.1 and 7.2. These projections are over and above the new district and local centres at Welborne and other commitments.

Table 7.1 Summary of convenience goods retail floorspace projections (sq.m gross) - cumulative

	By 2021	By 2026	By 2031	By 2036
Fareham Central	-385	203	941	1,669
Portchester	-152	-93	-21	50
Locks Heath	-433	-350	-248	-148
Fareham West	286	344	414	483
Total	**-685**	**104**	**1,086**	**2,053**

Source: Source: Table 15 in Appendix 2

Table 7.2 Summary of comparison goods retail floorspace projections (sq.m gross)

	By 2021	By 2026	By 2031	By 2036
Fareham Central	-2,578	-3,827	-2,994	-1,623
Portchester	49	18	45	86
Locks Heath	17	-5	14	44
Fareham West	320	-237	140	759
Total	**-2,192**	**-4,050**	**-2,794**	**-733**

Source: Source: Table 16 in Appendix 3.

7.58 Section 9 of this report examines the implications of the updated retail floorspace projections.

8.0 Other town centre uses

Introduction

8.1 This section re-assesses the potential for commercial leisure and town centre uses in Fareham Borough, including theatres, cultural facilities, cinemas, ten pin bowling, bingo, health and fitness, restaurants/cafes, pubs/bars and takeaways/fast food.

Cinemas

8.2 Fareham Borough contains one multiplex cinema, the Reel Cinema at Market Quay in the heart of Fareham town centre. The cinema has 5 screens and 730 seats. The Cineworld cinema at Whiteley has 9 screens and 1,416 seats. There is also an Odeon cinema at Port Solent with 6 screens and 1,409 seats.

8.3 The Vue cinema (14 screens and 3,111 seats) at Gunwharf Quays in Portsmouth also serves parts of the study area e.g. Gosport and the area north of Portsmouth. Residents in Fareham Borough and the wider study area have good access to a choice of four cinemas providing 34 screens and 6,666 seats.

8.4 The study area population in 2019 (306,007 people) will generate 826,000 cinema trips per annum, based on the national average visitation rate (2.7 trips per annum). Based on the national average of 210 trips per seat per annum, 826,000 trips could support 3,933 cinema seats. By 2036 the study area population (333,000) will generate 899,000 cinema trips, which could support 4,280 cinema seats. The existing cinema provision in the sub-region (four cinemas with 34 screens and 6,666 seats), suggests there is limited potential for further cinema development.

8.5 If up to 60% of cinema trips in the study area (up from 46%) at 2036 (539,400 trips) can be attracted to Fareham and Whiteley, then these trips can theoretically support 2,569 seats, compared with the existing provision of 2,146 seats. The surplus potential at 2026 is only 423 seats.

8.6 These projections and the ageing population suggest it is unlikely that an additional cinema will be viable in Fareham Borough for the foreseeable future.

Other commercial leisure uses

Theatres and concerts

8.7 The FRCLS 2017 indicated that the three venues in Fareham Borough attract only 6.2% of theatre trips within the study area.

8.8 The UK Theatre and Society of London Theatres (SOLT) indicated their member organisations (223) presented nearly 63,000 performances attracting over 34.35 million tickets visits, generating ticket revenue of £1.28 billion in 2018. The average ticket revenue per venue is £5.7 million per annum. The UK average attendance per performance is 545.

8.9 Experian's local expenditure data indicates the study area generates £10.65 million expenditure on live theatre, concerts and shows. Based on the average ticket revenue per venue (£5.7 million) the study area population theoretically generates demand for 1.9 venues.

8.10 The household survey results suggest most of the trips generated in the study area are attracted to Southampton and Central London. There is no clear need for additional theatre provision in Fareham Borough, unless there is potential to relocate or improve an existing theatre.

8.11 The household survey indicated that 28.7% of respondents or their families visit cultural facilities, such as museums and art galleries. A large number of destinations were mentioned by participating households.

8.12 Fareham Borough attracts a relatively small market share of cultural activity within the study area. Given this pattern of use and low market share, it is difficult to quantify the future need for cultural attractions in Fareham Borough. As indicated in the FRCLS 2017, evidence available suggests there is no need to allocate development sites specifically for these types of uses within development plan.

Private health and fitness facilities

8.13 Updated Sport England/Active Places data indicates that there are still 12 registered health and fitness suites in the Borough, of which three are for private use only with 75 fitness stations in total. The remaining nine registered facilities, open to the general public (including registered members) have 616 fitness stations in total as shown in Table 8.1. A Pure Gym recently opened in 2018, increasing the total number of fitness stations to 911. The FRCLS 2017 indicated there were 516 fitness stations.

Table 8.1 Fareham Borough health and fitness facilities 2019

	Type	Number of fitness stations
Fareham Leisure Centre	Pay and Play	120
Sports Direct Fitness	Pay and Play	40
Fusion Fitness Gym	Pay and Play	24
Holly Hill Leisure Centre	Pay and Play	100
24/7 Fitness Fareham	Registered Membership	180
Abshot Country Club	Registered Membership	60
Spirit Health Club	Registered Membership	31
Brookfield Community School	Registered Membership	18
Henry Cort Community College	Sport Club/Community Association	25
HMS Collingwood	Registered Membership	42
Crofton School	Private Use	30
Fareham College	Private Use	21
Pure Gym, Broadcut Retail Park	Registered Membership	220
Total		**911**

Source: Sport England Active Places Data 2019

8.14 The study area population in 2019 (306,007 people) is projected to grow to 317,900 by 2026, and 333,000 by 2036. Health and fitness facilities in Fareham Borough attracts 41.4% of respondents, which suggest a catchment population of 126,700 in 2019, increasing to 131,600 in 2026 and 137,900 in 2036. Fareham Borough appears to have about 7.2 fitness stations per 1,000 people (911 stations in total) in 2019.

8.15 The South of England region has 1,109 Sport England registered health and fitness suites with 57,433 fitness stations (average of 52 stations per facility). This existing provision equates to 6.3 fitness stations per 1,000 people.

8.16 If Fareham Borough's health and fitness catchment population (126,700) had the same provision per head of population as the South East of England region average (6.3 stations per 1,000 people) then the total number of fitness stations that could be supported would be 798, which implies an existing over-supply of 113 stations.

8.17 The catchment population is projected to increase to 131,600 by 2026, which would generate demand for 829 fitness stations compared with the current provision 911 stations. On the basis

that Fareham Borough attracts 41.4% of health and fitness trips from the study catchment area, there is limited scope for additional fitness stations up to 2036.

8.18 Assuming equilibrium between supply and demand in 2019, population growth on its own would generate demand for 31 stations by 2026 or 71 stations by 2036. However, participation rates are much lower in the older age group (aged 65 plus). Most of the population growth relates to the older aged groups.

Tenpin bowling

8.19 The study area population in 2019 (306,007 people) can in theory support about 25 tenpin bowling lanes, based on the national average of one lane per 12,000 people. By 2036 the study area population (333,000) could support 28 lanes. There may be potential to reintroduce a tenpin bowling facility in Fareham over the plan period, but the ageing population may make this opportunity less attractive from an operator's perspective.

Bingo, Games of Change and Gambling

8.20 The Gambling Commission indicates there are 650 bingo facilities in Great Britain (2018) and 152 casinos. This equates to approximately one bingo facility per 100,000 people, and one casino per 425,000 people. Based on these national averages, the study area population (306,000) could support three bingo facilities and at most one casino.

8.21 As in 2017, there are no commercial bingo facilities within Fareham Borough, although participation rates are comparable with the national average. The nearest facilities are Crown Bingo in Gosport and Portsmouth and Buzz Bingo in Cosham. This provision may be sufficient to meet the needs of the study area population.

Trampoline centres

8.22 Indoor trampoline centres are a relatively new leisure activity in the UK. In America outdoor trampoline centres were popular in the late 1950s and 1960s. This format first seen in America has been adopted and modernised and is now becoming a popular indoor leisure activity for a variety of age groups in the UK. The UK's first indoor trampoline centre was opened by Bounce in 2014.

8.23 Trampoline centres offer a new, recreational experience for both children and adults. They typically have over 100 interconnected trampolines on site, consisting of differing courts including a Main Arena, Dodgeball Court, Kids Court, Slam Dunk Area, Foam Pit, Airbag Jump, Touch Walls, Gladiator Pits and Tumble Tracks, as well as an arcade and party rooms.

8.24 There is a Flip Out Trampoline Arena at Cosham. The study area could support further facilities as this sector grows. The development plan should be flexible to respond to any emerging opportunities.

Restaurants, bars and takeaways

8.25 Experian's latest 2017 local expenditure figures have been adopted. Updated expenditure per capita projections on food/beverage consumed away from the home are shown in Table 2 in Appendix 4. Total available expenditure in the study area is shown in Table 3. The total food and beverage expenditure in the study area is £369.91 million in 2017, see Table 3 in Appendix 4.

8.26 Food and beverage expenditure per capita is expected to increase in real terms (excluding inflation) by 24% between 2017 and 2036. Allowing for population growth, total expenditure within the study area is expected to increase from £369.91 million in 2017 to £497.01 million in 2036, an increase of about 34% (Table 3 in Appendix 4).

8.27 There are 117 food and beverage outlets (21,046 sq.m gross) within Fareham Borough, as shown in Table 12 in Appendix 4.

8.28 Base year food and beverage expenditure patterns have been modelled based on the household survey results within the study area zones. Base year penetration rates are shown in Table 4 in Appendix 4 and 2017 expenditure patterns are shown in Table 5. The estimated expenditure currently attracted to facilities within Fareham Borough is £121.53 million in 2017.

8.29 Available food/beverage expenditure has been projected forward to 2019, 2021, 2026, 2031 and 2063 in Tables 7 to 11 in Appendix 4, summarised in Table 14. The projected turnover of existing floorspace is subtracted from the expenditure projections to provide an estimate of surplus expenditure available to support new floorspace.

8.30 As in the FRCLS 2017, a turnover efficiency growth rate of 1% per annum is adopted. The floorspace projections are over and above the proposed development at Welborne (1,190 sq.m gross) as shown in Table 13 in Appendix 4.

8.31 The projections suggest the Welborne commitment will absorb growth up to and beyond 2021. By 2026 there will be a small food/beverage expenditure surplus of £2.2 million, taking account of development at Welborne. By 2031, future expenditure growth generates an expenditure surplus of £7.64 million, which will grow to £13.32 million by 2036.

8.32 These expenditure projections have been converted into floorspace projections in Table 14 in Appendix 4, adopting an average sales density of £5,000 per sq.m gross in 2017, which is projected to grow by 1% in the future due to improved turnover efficiency. The small surplus expenditure at 2026 could support 403 sq.m gross floorspace, which could support 1-2 reasonably large food and beverage outlets, as shown in Table 15 in Appendix 4.

8.33 In the longer-term, surplus expenditure at 2031 could support 1,329 sq.m gross, as shown in Table 15 in Appendix 4, increasing to 2,205 sq.m gross by 2036.

8.34 The comparable FRCLS 2017 projections were much higher at 3,108 sq.m gross at 2031 and 4,243 sq.m gross at 2036.

8.35 The main reason for this reduction in food/beverage goods floorspace capacity is Experian previous forecasts suggested food/beverage expenditure per capita would grow by +32% between 2016 and 2036. The updated forecasts are lower at +22% between 2017 and 2036.

Conclusions

8.36 The revised assessment in this section suggests there:

- is no clear need for additional cinema or theatre/cultural facilities in Fareham Borough over the plan period, due to existing provision in nearby competing towns;
- is limited scope for additional health and fitness gyms in Fareham Borough over the plan period; and
- scope to support around 1,300 sq.m gross floorspace for food and beverage outlets by 2031, increasing to 2,200 sq.m gross by 2036, over and above 1,190 sq.m gross assumed at Welborne.

8.37 In addition to the above, the development plan should be flexible to respond to any emerging opportunities for other commercial leisure uses, e.g. scope for a commercial bingo facility, replacement ten pin bowling centre or trampoline facility.

9.0 Strategy implications

Introduction

9.1 As set out in Section 1, the revised National Planning Policy Framework (NPPF) indicates development plans should allocate a range of suitable sites in town centres to meet the scale and type of development likely to be needed, looking at least ten years ahead. Meeting anticipated needs for retail, leisure, office and other main town centre uses over this period should not be compromised by limited site availability, so town centre boundaries should be kept under review.

9.2 As in the FRCLS 2017, expenditure projections in this update take account of home shopping made through non-retail businesses, because special forms of trading have been excluded. The study update adopts Experian's latest information and projections and assumes that special forms of trading will increase in the future, including the growth of internet shopping.

Accommodating growth and floorspace projections

9.3 As indicated in the FRCLS 2017, the existing stock of premises should help to accommodate projected growth. The retail capacity analysis in this report assumes that existing retail and food/beverage floorspace can, on average, increase its turnover to sales floorspace densities. In addition to the growth in sales densities, vacant shops should help to accommodate future growth.

9.4 Tables 9.1 and 9.2 below summarise the floorspace projections by broad location up to 2031 and 2036. The distribution of floorspace is based on the existing market shares and expenditure patterns. There should be potential scope to redistribute floorspace, particularly from the west of the Borough to the central area and Fareham town centre.

Table 9.1 Summary of floorspace projections up to 2031 (sq.m gross)

	Convenience	Comparison	Food/beverage	Total
Fareham Central	941	-2,994	901	-1,152
Portchester	-21	45	207	231
Locks Heath	-248	14	193	-41
Fareham West	414	140	28	582
Total	**1,086**	**-2,794**	**1,329**	**-379**

Source: Table 15 in Appendix 2, Table 16 in Appendix 3 and Table 15 Appendix 4.

Table 9.2 Summary of floorspace projections up to 2036 (sq.m gross)

	Convenience	Comparison	Food/beverage	Total
Fareham Central	1,669	-1,623	1,588	1,634
Portchester	50	86	300	436
Locks Heath	-148	44	277	173
Fareham West	483	759	40	1,282
Total	**2,053**	**-733**	**2,205**	**3,525**

Source: Table 15 in Appendix 2, Table 16 in Appendix 3 and Table 15 Appendix 4.

9.5 The projections up to 2031 suggest there is limited scope for Class A1 to A5 space, over and above commitments (including development at Welborne). Longer term growth to 2036 suggests 3,525 sq.m gross could be required.

9.6 The existing stock of premises should have a significant role to play in accommodating projected growth. The retail capacity analysis in this report assumes that existing retail floorspace can, on average, increase its turnover to sales floorspace densities, which will absorb some expenditure growth and help to maintain the vitality and viability of centres.

9.7 The Council's health check land use data suggests there are 57 vacant shop units within town, district, local centres and parades, which equates to an overall vacancy rate of about 9%, which is slightly below the Goad national average (11.8%).

9.8 There are 38 vacant units in Fareham town centre totalling 10,300 sq.m gross, a unit vacancy rate of 12.4%. There are six vacant units in Portchester totalling nearly 600 sq.m gross.

9.9 Vacant premises in Fareham town centre and Portchester should help to accommodate growth. It is reasonable to assume the current shop vacancy level can be halved in these centres. Reoccupied units could accommodate about 5,500 sq.m gross of Class A1 to A5 retail space. Based on existing vacancy levels, this potential re-occupied space could be distributed as follows:

- Fareham town centre 5,200 sq.m gross; and
- Portchester district centre 300 sq.m gross.

9.10 If this reduction in vacant units was achieved, then the long-term retail floorspace projection (up to 2036) could be accommodated. The priority should be the reoccupation of vacant floorspace, but this should not preclude investment within appropriate town centre locations. Long-term vacant premises could be targeted and more actively marketed and shopfront/fit-out grants could be considered to assist their reoccupation.

Strategy and development opportunities

9.11 The Draft Fareham Local Plan 2036 indicates a diverse selection of retail and commercial uses will be maintained and enhanced in Fareham town centre, including a greater choice of restaurants and leisure uses. The strategy seeks to make effective use of existing vacant units through redevelopment to support the modern needs of retailers. This approach is consistent with the findings of this report.

9.12 Based on the floorspace projections outlined above, the emerging strategy for Fareham town centre should focus on the reoccupation of vacant units.

9.13 Based on current market shares, a minimum of 1,600 sq.m gross of Class A1 to A5 will be required in Fareham town centre to meet the floorspace projections up to 2036. As indicated above, vacant units in the town centre could reasonably accommodate 5,200 sq.m gross, which suggests there is no need for new development up to and beyond 2036. This approach is consistent with Strategic Policy R1 of the Draft Local Plan.

9.14 There may be potential for Fareham town centre to increase its market share of expenditure and absorb some of the residual growth identified for other parts of the Borough i.e. a further 1,900 sq.m gross by 2036 for the rest of the Borough projections.

9.15 The reoccupation of vacant units in Fareham town centre (5,200 sq.m gross) and Portchester (300 sq.m gross), exceeds the long-term 2036 requirement for new development, which suggests there is no need to allocate further sites for major retail/food and beverage development for the foreseeable future.

9.16 The floorspace projections take account of commitments and the proposed district and local centres at Welborne. Development within district, local centres and parades is likely to be small in-fill development, shop extensions and expansion into upper floors.

10.0 Policy review

Introduction

10.1 The FRCLS 2017 reviewed adopted town centre and retail policies, including shopping frontage and boundary policies options within Fareham town centre. The FRCLS was based on the guidance set out in the NPPF (published by the Department for Communities and Local Government on 27 March 2012).

10.2 In relation to town centres, the revised NPPF does not change the overall aims of policy, although there are some important modifications. These changes are logical points of clarification that address areas of debate that have arisen in recent years. The rapid changes that are affecting the retail sector and town centres, are acknowledged and reflected in the revised NPPF. It recognises that diversification is key to the long-term vitality and viability of town centres, to 'respond to rapid changes in the retail and leisure industries'. Accordingly, planning policies should clarify 'the range of uses permitted in such locations, as part of a positive strategy for the future of each centre'.

10.3 The FRCLS noted the need for town centres to maintain their primary retail function, whilst increasing their diversity with a range of complementary uses. The importance of a balance between retail and other town centre activity has increased in recent years, as town centres increasingly need to compete with on-line shopping. Town centres need a better mix of uses that extend activity throughout the daytime and into the evenings. This section reviews the previous policy recommendations taking account the revised NPPF.

Meeting needs over the plan period

10.4 It is widely accepted that long-term projections have inherent uncertainties. In response to these uncertainties, the revised NPPF indicates that local planning authorities are no longer required to allocate sites to meet the need for town centre uses over the full plan period. The need for new town centre uses should still be accommodated over a minimum ten-year period, which reflects the complexities in bringing forward town centre development sites.

10.5 In line with the Government's economic growth agenda, a positive approach to meeting community needs is still required. The NPPF's presumption in favour of sustainable development (para. 11) remains. For plan-making this means that:

- plans should positively seek opportunities to meet the development needs of their area, and be sufficiently flexible to adapt to rapid change;
- policies should, as a minimum, provide for objectively assessed needs for housing and other uses, as well as any needs that cannot be met within neighbouring areas, unless:
    - i the application of policies in this Framework that protect areas or assets of importance provides a strong reason for restricting the overall scale, type or distribution of development in the plan area; or
    - ii any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the other policies in the Framework.

10.6 The development plan must include strategic policies to address each local planning authority's priorities for the development and use of land in its area. Strategic policies should set out the pattern, scale and quality of development, and make sufficient provision for (para. 20):

- housing (including affordable housing), employment, retail, leisure and other commercial development;

- infrastructure for transport, telecommunications, security, waste management, water supply, wastewater, flood risk and coastal change management, and the provision of minerals and energy (including heat);
- community facilities (such as health, education and cultural infrastructure); and
- conservation and enhancement of the natural, built and historic environment, including landscapes and green infrastructure, and planning measures to address climate change mitigation and adaptation.

10.7 Strategic policies should provide a clear strategy for bringing sufficient land forward, and at a sufficient rate, to address objectively assessed needs over the plan period. This should include planning for and allocating sufficient sites to deliver the strategic priorities of the area (para. 21).

10.8 The preparation and review of all policies should be underpinned by relevant and up-to-date evidence. This should be adequate and proportionate, focused tightly on supporting and justifying the policies concerned, accounting for relevant market signals (para. 31).

10.9 The Draft Fareham Local Plan sets out the Borough wide floorspace projections. The projections should be updated in line with the evidence in this report. Floorspace projections are provided in five-year intervals up to 2036.

Town centre strategy

10.10 The importance of a balance between retail, entertainment and leisure activity has increased in recent years. Town centres need a good mix of uses that extend activity throughout the daytime and into the evenings.

10.11 The revised NPPF indicates planning policies and decisions should support the role town centres play at the heart of local communities, by taking a positive approach to their growth, management and adaptation. Planning policies should (para. 85):

a define a network and hierarchy of town centres and promote their long-term vitality and viability – by allowing them to grow and diversify in a way that can respond to rapid changes in the retail and leisure industries, allows a suitable mix of uses (including housing) and reflects their distinctive characters;

b define the extent of town centres and primary shopping areas, and make clear the range of uses permitted in such locations, as part of a positive strategy for the future of each centre;

c retain and enhance existing markets and, where appropriate, re-introduce or create new ones;

d allocate a range of suitable sites in town centres to meet the scale and type of development likely to be needed, looking at least ten years ahead. Meeting anticipated needs for retail, leisure, office and other main town centre uses over this period should not be compromised by limited site availability, so town centre boundaries should be kept under review where necessary;

e where suitable and viable town centre sites are not available for main town centre uses, allocate appropriate edge of centre sites that are well connected to the town centre. If sufficient edge of centre sites cannot be identified, policies should explain how identified needs can be met in other accessible locations that are well connected to the town centre; and

f recognise that residential development often plays an important role in ensuring the vitality of centres and encourage residential development on appropriate sites.

10.12 The revised NPPF does not refer to primary and secondary frontages, which previously made up the primary shopping area (PSA). The aim of the new NPPF appears to create more flexibility and encourage positive strategies for town centres. However, the proposals should still define the area where retail and main town centre uses will be concentrated i.e. the sequential approach.

10.13 The analysis of centres in this report confirms the hierarchy of centres as set out in Draft Fareham Local Plan Strategic Policy R1 is appropriate and no changes to the designations or policy approach is considered necessary.

10.14 The FRCLS 2017 indicated that Fareham town centre has a widely drawn town centre boundary. Portchester and Locks Heath are relatively small centres and do not have significant areas adjoining the retail area. The FRCLS suggested that, based on land use survey information and shop vacancies at that time, there were no reasons to change the approach in the adopted Local Plan. The FRCLS recommended that emerging development plan policy should continue to indicate (as in adopted Policy DSP20) that new retail development will be focused within the primary shopping area.

10.15 The FRCLS also indicated that shopping frontages should continue to be adopted in Fareham town centre to prevent the deterioration of shopping frontages, because the vacancy rate was below average and there was no need to relax shopping policies to encourage non-retail uses to reoccupy vacant units. However, the updated capacity projections in this report suggest limited potential for additional comparison goods retail floorspace and much lower projections for other uses. The impact of the coronavirus crisis is likely to lead to an increase in vacancy rates at least in the short term. A more flexible approach may be required to maintain the vitality and viability of the town centre.

10.16 There remains no evidence to suggest Fareham town centre had a harmful or disproportionately high level of non-A1 uses, or that the proportion of non-retail uses had increased significantly. As recommended in the FRCLS it is unlikely designated frontages should be extended, but there may be a case for contraction i.e. if the shop vacancy rate increases in peripheral areas. The policy option previously identified to strengthen shop frontages policies to provide more control over the loss of Class A1 retail uses now appears to be less appropriate and relevant based on current circumstances.

10.17 The three remaining broad policy approaches that could be adopted, are as follows:

- retaining the draft development plan policies that seek to control the extent of non-retail uses within designated areas;
- relaxing shop frontages policies to allow a more flexible approach to enable more non-retail uses. This would usually involve reducing the areas of protected frontage or allowing more non-retail uses; or
- a laissez-faire approach that does not seek to protect retail and town centre uses, on the basis that the market will determine the appropriate mix of uses within town centres.

10.18 There is a reasonable degree of flexibility for local authorities to take account of local circumstances during the plan making process, and in this respect the revised NPPF is not prescriptive.

10.19 The future approach in Fareham needs to be considered in the context of recent changes in the mix of uses within frontages, the floorspace projections and changes to the General Permitted Development Order (GPDO).

10.20 As indicated in Section 3.0, the number of vacant units in Fareham town centre has increased from 27 to 38 since 2016, and the amount of vacant space is over 10,300 sq.m gross. Vacant floorspace now exceeds the long term capacity projections identified in this update report. The vacancy rate is likely to increase due to current adverse circumstances.

10.21 Fareham town centre does not have a harmful or disproportionately high level of non-A1 shop uses at present, and the proportion of non-retail uses has not increased significantly in recent years.

10.22 Recent changes to the General Permitted Development Order (GPDO) have had an impact on some town centres. These measures allow for greater flexibility for changes of use e.g. Class A uses to C3 residential use and Class A1 uses to Class A2 uses, generally for small units under 150 sq.m. These measures can change the composition of town centres, e.g. a reduction in the amount of Class A1 space/units. The measures may lead to a reduction in vacant shop premises, particularly in peripheral shop frontages where there are concentrations of smaller units, but conversely it could have an impact on the ability of operators to find space in areas where demand is higher.

10.23 The GPDO seeks to support the high street by introducing additional flexibilities for business, including:

- clarification on the ability of Class A uses to diversify and incorporate ancillary uses without undermining the amenity of the area;
- introduction of a new permitted development right to allow shops (A1), financial and professional services (A2), hot food takeaways (A5), betting shops, pay day loan shop and launderettes to change use to office use (B1); and
- to allow hot food takeaways (A5) to change to residential use (C3).

10.24 Temporary change of uses to a building will be extended from two to three years so that more community uses can take advantage of the temporary rights. These changes will have implications for Fareham's retail centres and the ability to control the mix of uses.

10.25 The FRCLS indicated that just under half of the shop premises in the central area of Fareham are below the GPDO 150 sq.m threshold. Within the more peripheral frontages over 70% were below the threshold. As identified in the FRCLS, the high number of small units in Fareham will limit the effectiveness of shop frontage policies in the emerging Local Plan, particularly in peripheral frontages.

10.26 Draft Strategic Policy R1 is flexible and allows changes of use from Class A1 to other town centre uses, where the proposal would:

- not significantly harm the vitality and viability of the centre/parade;
- retain an active shop window display and the use offers a direct service to the public; and
- maximise opportunities for the efficient use of upper floors.

10.27 This flexible approach is consistent with the revised capacity projections and the need to reduce vacant properties.

Impact and sequential tests

10.28 Applications for retail and town centre uses that are not in an existing centre and are not in accordance with an up-to-date Local Plan will be assessed against NPPF policies and the key sequential and impact tests.

10.29 The sequential approach test indicates main town centre uses should locate in town centres, then in edge of centre locations; and only if suitable sites are not available (or expected to become available within a reasonable period) should out of centre sites be considered (para. 86). When considering edge of centre and out of centre proposals, preference should be given to accessible sites which are well connected to the town centre. Applicants and local planning authorities should demonstrate flexibility on issues such as format and scale, so that opportunities to utilise suitable town centre or edge of centre sites are fully explored (para. 87).

10.30 The NPPF states that local planning authorities should require an impact assessment for applications for retail and leisure development outside of town centres, which are not in accordance with an up-to-date development plan and are over a proportionate, locally set floorspace threshold. If there is not a locally set threshold, the default threshold is 2,500 sq.m (para. 89). This should include an assessment of:

a the impact of the proposal on existing, committed and planned public and private investment in a centre or centres in the catchment area of the proposal; and

b the impact of the proposal on town centre vitality and viability, including local consumer choice and trade in the town centre and the wider retail catchment (as applicable to the scale and nature of the scheme).

10.31 Where an application fails to satisfy the sequential test or is likely to have a significant adverse impact on one of more of the above factors, it should be refused (para. 90).

10.32 The designation of primary shopping areas or centre boundaries is important when applying the sequential approach, to direct retail and town centre uses to sustainable locations and determine whether a retail impact assessment is required. The NPPF continues to indicate that the first preference for retail uses should be the primary shopping area (PSA). The first preference for leisure uses is normally the wider defined town centre, which usually includes the PSA and other parts of the town centre.

10.33 The wording of draft Policy R2: Out-of-Town Proposals for Town Centre Uses implies the town and district centre boundaries and parades are relevant areas where retail and main town centre uses will be focused, when applying the sequential approach.

10.34 The draft policy indicates a full sequential test assessment is required for main town centre uses outside designated centres and parades, unless a need for the use in the proposed location can be demonstrated. In these circumstances robust justification must be provided, as recommended by the NPPG. The wording of the draft policy could be amended/strengthened to reflect this recommendation.

10.35 The revised NPPF states that, when assessing applications for retail and leisure development outside of town centres, which are not in accordance with an up to date local plan, local planning authorities should require an impact assessment if the development is over a proportionate, locally set threshold.

10.36 Consistent with the revised NPPF, Draft Policy R2 indicates retail and leisure development outside centres and over 500 sq.m gross local threshold will be required to provide an impact assessment. The FRCLS 2017 indicated that the NPPF threshold of 2,500 sq.m gross was inappropriate as a blanket threshold across Fareham Borough, because this scale of development would represent a significant proportion of the overall retail projections in the authority area and development smaller than 2,500 sq.m gross could have a significant adverse impact particularly on smaller centres. The locally set threshold of 500 sq.m gross was considered appropriate for retail and leisure development in Fareham Borough.

10.37 No further amendments to Draft Policy R2 are considered necessary based on new evidence and the revised NPPF.

11.0 Conclusions and recommendations

11.1 The revised NPPF states that local planning authorities should assess the quantitative and qualitative needs for land or floorspace for retail and leisure development over the plan period. The needs for retail and other main town centre uses should be met for at least 10 years and not compromised by limited site availability.

Future retail and leisure need

11.2 The updated quantitative assessment of the potential capacity for retail floorspace suggests that there is more limited scope for new retail and leisure floorspace within Fareham Borough, over and above commitments. The Draft Fareham Local Plan sets out the Borough wide floorspace projections in a table. The findings of this update suggest this table should be amended as shown in Table 11.1 below.

Table 11.1 Fareham Borough retail floorspace projections (sq.m gross)

	2017 - 2026	2026-2031	2031 - 2036	**Total 2017 - 2036**
Convenience	100	1,000	1,000	**2,100**
Comparison	0	0	0	**0**
Food and beverage	400	900	900	**2,200**
Total	**500**	**1,900**	**1,900**	**4,300**

Development plan/strategy implications

11.3 The analysis of centres in this report confirms the hierarchy of centres as set out in Draft Fareham Local Plan Strategic Policy R1 is appropriate, and no changes to the designations or policy approach is considered necessary.

11.4 Draft Strategic Policy R1 is flexible and consistent with the revised NPPF. The flexible approach is also consistent with the revised floorspace (lower) projections and the need to reduce vacant properties. The criteria in Draft Policy R1 and the GPDO provide considerable flexibility for diversity within the town centre.

11.5 Draft Policy R2: Out-of-Town Proposals for Town Centre Uses indicates a full sequential test assessment is required for main town centre uses outside designated centres and parades, unless a need for the use in the proposed location can be demonstrated. In these circumstances robust justification must be provided, as recommended by the NPPG. The wording of the draft policy could be amended/strengthened to reflect this recommendation.

11.6 The revised NPPF still states that, when assessing applications for retail, leisure and office development outside of town centres, which are not in accordance with an up to date local plan, local planning authorities should require an impact assessment if the development is over a proportionate, locally set threshold.

11.7 The FRCLS 2017 indicated that the NPPF threshold of 2,500 sq.m gross was inappropriate as a blanket threshold across Fareham Borough, because this scale of development would represent a significant proportion of the overall retail projections in the authority area and development smaller than 2,500 sq.m gross could have a significant adverse impact particularly on smaller centres. The locally set threshold of 500 sq.m gross was considered appropriate for retail and leisure development in Fareham Borough.

11.8 Draft Fareham Local Plan Policy R2 also adopts this reduced impact threshold of 500 sq.m. gross. The reduced retail floorspace projections set out in Table 11.1 endorse this lower threshold.

Appendix 1 Methodology

Floorspace capacity assessment – Methodology and data

Price base

All monetary values expressed in this update report are at 2017 prices. The FRCLS 2017 adopts figures at 2015 prices, and therefore is not directly comparable.

Retail and food/beverage expenditure

The level of available expenditure to support retailers is based on first establishing per capita levels of spending for the study area population. Experian's local consumer expenditure estimates for comparison, convenience goods and food/beverage for each of the study area zones for the year 2017 have been obtained.

Experian's EBS national expenditure information (Experian Retail Planner Briefing Note 17) has been used to forecast expenditure within the study area. Experian's forecasts are based on an econometric model of disaggregated consumer spending. This model takes several macro-economic forecasts (chiefly consumer spending, incomes and inflation) and uses them to produce forecasts of consumer spending volumes, prices and value, broken down into separate categories of goods. The model incorporates assumptions about income and price elasticities.

Experian's EBS growth forecast rates for 2018 to 2021 reflect the post Brexit economic circumstances and provide an appropriate growth rate for the short term, as follows:

- for convenience goods: -0.4% for 2018 to 2019, 0% for 2019 to 2020 and 0.5% from 2020 to 2021;
- for comparison goods: 3.9% for 2018 to 2019, 3% for 2019 to 2020 and 3.2% from 2020 to 2021;
- for food/beverage: -0.5% for 2018 to 2019, 0.9% for 2019 to 2020 and 1% from 2020 to 2021.

In the longer term it is more difficult to forecast year on year changes in expenditure. Experian's longer-term growth average forecasts have been adopted, as follows:

- 0.1% per annum for convenience goods after 2021;
- 3% to 3.2% per annum growth for comparison goods after 2021; and
- 1.1% to 1.2% per annum for food/beverage after 2021.

These growth rates represent a realistic forecast annual average for future expenditure growth. These growth figures relate to real growth and exclude inflation.

Special Forms of Trading (SFT) or non-store activity is included within Experian's Goods Based Expenditure (GBE) estimates. SFT includes other forms of retail expenditure not spent in shops e.g. mail order sales, some internet sales, vending machines, party plan selling, market stalls and door to door selling. SFT needs to be excluded from retail assessments because it relates to expenditure not spent in shops and does not have a direct relationship with the demand for retail floorspace. The growth in home computing, internet connections and interactive TV may lead to a growth in home shopping and may have effects on retailing in the high street. Experian provides projections for special forms of trading and e-tailing. This Experian information suggests that non-store retail sales in 2017 was:

- 11.6% of convenience goods expenditure; and
- 20.8% of comparison goods expenditure.

Experian predicts that these figures will increase in the future. However, Experian recognises that not all non-store expenditure should be excluded from a retail capacity analysis, because

some of it relates to internet sales through traditional retail businesses, rather than internet companies. The turnover attributable to e-tail through retail businesses is included in the company average turnovers, and therefore expenditure figures should not exclude this expenditure. Experian provides adjusted deductions for SFT and projections. These projections have been used to exclude only e-tail expenditure attributed to non-retail businesses, which will not directly impact on the demand for retail floorspace. The adjusted figures suggest that SFT sales in 2017 were:

- 3.5% of convenience goods expenditure; and
- 15.6% of comparison goods expenditure.

The projections provided by Experian suggest that these percentages could increase to 6.6% and 25% by 2033 respectively. These latest figures have been adopted in this updated assessment.

Home/electronic shopping has also emerged with the increasing growth in the use of personal computers and the internet. This study makes an allowance for future growth in e-tailing based on Experian projections. It will be necessary to monitor the amount of sales attributed to home shopping in the future to review future policies and development allocations.

On-line shopping has experienced rapid growth since the late 1990s but in proportional terms the latest available data suggests it remains a relatively low percentage of total retail expenditure. The growth in SFT will have an impact on the demand for retail space, but some retailers operate on-line sales from their traditional retail premises e.g. food store operators and growth in on-line sales may not always mean there is a reduction in the need for retail floorspace. Given the likely continued growth in internet shopping and the likelihood that it will increase in proportional terms, this assessment has adopted relatively cautious growth projections for retail expenditure.

Market shares/penetration Rates

To assess the capacity for new retail floorspace, penetration rates were estimated in the FRCLS 2017 for shopping and food/beverage facilities in the study area. The assessment of penetration rates was based on a range of factors but primarily information gathered through the May 2016 household survey. The main change since May 2016 is the development of a new Lidl food store near Portchester, but no other changes are likely to have discernibly affected shopping and leisure patterns.

The total turnover of shops and food/beverage outlets within Fareham Borough was estimated based on penetration rates. These turnover estimates have been updated based on revised population and expenditure information.

For convenience goods shopping actual turnover estimates are compared with average company benchmark or average sales floorspace densities derived from Global Data 2018 information, which provide an indication of how individual retail stores and centres are performing against expected turnover averages. This allows the identification of potential surplus or deficit capacity for retail sales floorspace.

Benchmark turnover levels

Company average turnover to sales floorspace densities are available for major food store operators and are compiled by Global Data. Company average sales densities (adjusted to exclude petrol and comparison sales and include VAT) have been applied to the sales area of the large food stores, and a benchmark turnover for each store has been calculated. This benchmark turnover is not necessarily the actual turnover of the food store, but it does provide a useful benchmark for assessing existing shopping patterns and the adequacy of current floorspace in quantitative terms.

Recent changes in convenience goods sales areas since May 2016 have been derived from the Institute of Oxford Retail Consultants (ORC) StorePoint database, including the new Lidl near Portchester. Estimates for comparison sales floorspace within large food stores has been deducted, for consistency with the use of goods based expenditure figures.

Average sales densities are not widely available for small convenience shops, particularly independent retailers. Based on the mix of shops present in each centre within Fareham and Lichfields' experience of trading levels of small independent shops informed by household shopper surveys elsewhere, an average sales density of £6,000 per sq.m net for convenience shops/stores has been adopted.

Increases in turnover densities

Experian's Retail Planner Briefing Note 17 (February 2020) indicates comparison goods retail sales floorspace is expected to increase its sales density by 3% during in 2018 to 2019; 3.6% in 2019 to 2020 and also in 21% in 2020 to 2021; 3.2% per annum between 2022 and 2026; and 2.7% beyond 2026. These increases have been adopted and will absorb a significant element of the future expenditure growth.

For convenience goods, Experian indicates limited change in sales densities.

Experian does not provide projections for food and beverage sales densities. An average growth rate of 1% per annum has been adopted, consistent with the FRCLS 2017.

Appendix 2 Convenience goods assessment

Table 1 Study Area Population

Zone	2011	2017	2019	2021	2026	2031	2036
Zone 1 - Fareham East	32,572	33,872	34,294	34,716	35,764	36,724	37,597
Zone 2 - Gosport South	47,757	49,104	49,421	49,739	50,606	51,472	52,339
Zone 3 - Gosport North	34,978	35,966	36,199	36,432	37,069	37,705	38,340
Zone 4 - Fareham Central	39,469	41,045	41,556	42,067	43,337	44,501	45,558
Zone 5 - Fareham West	27,118	28,202	28,553	28,904	29,777	30,577	31,304
Zone 6 - Rural South	22,044	22,993	23,298	23,602	24,364	25,060	25,648
Zone 7 - Portsmouth	43,916	45,606	46,078	46,550	47,871	49,224	50,327
Zone 8 - Rural North	43,796	45,886	46,607	47,327	49,084	50,640	51,931
Total	**291,650**	**302,674**	**306,007**	**309,340**	**317,872**	**325,902**	**333,045**

Sources: *Experian 2011 Census of Population*
Office of National Statistics 2014 SNPP projections

Table 2 Convenience Goods Expenditure per person (£)

Zone	2017	2019	2021	2026	2031	2036
Zone 1 - Fareham East	2,285	2,282	2,282	2,264	2,263	2,267
Zone 2 - Gosport South	2,218	2,215	2,214	2,197	2,196	2,200
Zone 3 - Gosport North	2,215	2,212	2,211	2,194	2,194	2,197
Zone 4 - Fareham Central	2,299	2,296	2,295	2,277	2,277	2,281
Zone 5 - Fareham West	2,430	2,427	2,426	2,407	2,407	2,411
Zone 6 - Rural South	2,183	2,180	2,179	2,163	2,162	2,166
Zone 7 - Portsmouth	2,145	2,142	2,142	2,125	2,125	2,129
Zone 8 - Rural North	2,418	2,415	2,414	2,396	2,395	2,399

Sources:
Experian Local Expenditure 2017 (2017 prices)
Experian growth rates - Retail Planner Briefing Note 17 (February 2020)

Table 3 Total Convenience Goods Expenditure (£m)

Zone	2017	2019	2021	2026	2031	2036
Zone 1 - Fareham East	77.40	78.26	79.21	80.97	83.12	85.25
Zone 2 - Gosport South	108.89	109.45	110.13	111.19	113.05	115.16
Zone 3 - Gosport North	79.65	80.06	80.56	81.34	82.71	84.25
Zone 4 - Fareham Central	94.35	95.39	96.54	98.70	101.31	103.91
Zone 5 - Fareham West	68.53	69.29	70.12	71.69	73.59	75.47
Zone 6 - Rural South	50.19	50.79	51.44	52.69	54.18	55.55
Zone 7 - Portsmouth	97.83	98.72	99.70	101.75	104.59	107.12
Zone 8 - Rural North	110.97	112.56	114.27	117.61	121.29	124.61
Total	**687.81**	**694.51**	**701.97**	**715.93**	**733.84**	**751.32**

Source: Tables 1 and 2

Table 4 Base Year Convenience Goods Market Shares (%)

	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5	Zone 6	Zone 7	Zone 8
Fareham Borough Central								
Fareham town centre	26.6%	1.9%	12.1%	21.6%	9.0%	19.8%	2.5%	10.0%
Asda, Speedfields Park	11.5%	5.3%	30.2%	19.2%	4.0%	9.8%	2.1%	1.5%
Sainsbury's, Broadcut, Wallington	17.3%	1.5%	3.6%	13.8%	0.9%	21.9%	1.1%	7.4%
Other Zone 1	1.1%	0.0%	2.5%	1.7%	0.0%	0.2%	0.2%	0.2%
Other Zone 4	3.1%	0.6%	3.1%	20.4%	1.3%	2.4%	0.3%	1.6%
Other Zone 6	0.7%	0.0%	0.5%	0.0%	0.0%	7.1%	0.0%	0.0%
Portchester								
Portchester District Centre	17.4%	0.1%	0.4%	0.0%	0.0%	0.0%	1.8%	0.0%
Fareham Borough West								
Locks Heath	0.2%	0.0%	0.6%	5.4%	32.5%	2.5%	0.0%	1.2%
Other Fareham Borough West	1.9%	0.3%	0.8%	4.0%	15.5%	1.0%	0.7%	2.7%
Fareham Borough Total	**79.8%**	**9.7%**	**53.8%**	**86.1%**	**63.2%**	**64.7%**	**8.7%**	**24.6%**
Bishops Waltham	0.0%	0.0%	0.0%	0.0%	0.0%	0.2%	0.0%	15.7%
Eastleigh	0.0%	0.0%	0.3%	0.1%	0.0%	1.9%	0.6%	2.5%
Gosport	2.2%	82.9%	33.4%	3.8%	0.2%	2.8%	0.0%	0.0%
Havant	1.6%	2.2%	0.2%	0.6%	0.0%	0.0%	5.3%	0.8%
Hedge End / Burlesdon	1.4%	0.8%	0.5%	2.0%	19.1%	3.8%	0.5%	28.4%
Portsmouth	11.6%	1.3%	2.3%	1.1%	0.0%	1.3%	15.8%	0.5%
Southampton	0.0%	0.0%	0.0%	0.0%	1.8%	0.3%	1.9%	3.1%
Waterlooville	0.4%	1.4%	0.2%	0.0%	0.2%	0.0%	16.8%	9.2%
Whiteley	0.0%	0.0%	0.0%	6.0%	14.3%	16.1%	0.8%	0.0%
Wickham	0.0%	0.0%	0.4%	0.0%	0.0%	5.6%	0.0%	4.1%
Other Outside Fareham Borough	3.0%	1.7%	8.9%	0.3%	1.2%	3.3%	49.6%	11.1%
Other Sub-Total	**20.2%**	**90.3%**	**46.2%**	**13.9%**	**36.8%**	**35.3%**	**91.3%**	**75.4%**
TOTAL	**100.0%**	**100.0%**	**100.0%**	**100.0%**	**100.0%**	**100.0%**	**100.0%**	**100.0%**

Source: NEMS Household Survey May 2016

Table 5 Base Year 2017 Convenience Goods Expenditure (£m)

	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5	Zone 6	Zone 7	Zone 8	Total
Expenditure 2017	**77.40**	**108.89**	**79.65**	**94.35**	**68.53**	**50.19**	**97.83**	**110.97**	**687.81**
Fareham Borough Central									
Fareham town centre	20.59	2.07	9.64	20.38	6.17	9.94	2.45	11.10	82.32
Asda, Speedfields Park	8.90	5.77	24.05	18.11	2.74	4.92	2.05	1.66	68.22
Sainsbury's, Broadcut, Wallington	13.39	1.63	2.87	13.02	0.62	10.99	1.08	8.21	51.81
Other Zone 1	0.85	0.00	1.99	1.60	0.00	0.10	0.20	0.22	4.96
Other Zone 4	2.40	0.65	2.47	19.25	0.89	1.20	0.29	1.78	28.93
Other Zone 6	0.54	0.00	0.40	0.00	0.00	3.56	0.00	0.00	4.50
Portchester									
Portchester District Centre	13.47	0.11	0.32	0.00	0.00	0.00	1.76	0.00	15.66
Fareham Borough West									
Locks Heath District Centre	0.15	0.00	0.48	5.09	22.27	1.25	0.00	1.33	30.59
Other Fareham Borough West	1.47	0.33	0.64	3.77	10.62	0.50	0.68	3.00	21.01
Fareham Borough Total	**61.77**	**10.56**	**42.85**	**81.23**	**43.31**	**32.47**	**8.51**	**27.30**	**308.01**
Bishops Waltham	0.00	0.00	0.00	0.00	0.00	0.10	0.00	17.42	17.52
Eastleigh	0.00	0.00	0.24	0.09	0.00	0.95	0.59	2.77	4.65
Gosport	1.70	90.27	26.60	3.59	0.14	1.41	0.00	0.00	123.70
Havant	1.24	2.40	0.16	0.57	0.00	0.00	5.19	0.89	10.43
Hedge End / Burlesdon	1.08	0.87	0.40	1.89	13.09	1.91	0.49	31.51	51.24
Portsmouth	8.98	1.42	1.83	1.04	0.00	0.65	15.46	0.55	29.93
Southampton	0.00	0.00	0.00	0.00	1.23	0.15	1.86	3.44	6.68
Waterlooville	0.31	1.52	0.16	0.00	0.14	0.00	16.44	10.21	28.78
Whiteley	0.00	0.00	0.00	5.66	9.80	8.08	0.78	0.00	24.32
Wickham	0.00	0.00	0.32	0.00	0.00	2.81	0.00	4.55	7.68
Other Outside Fareham Borough	2.32	1.85	7.09	0.28	0.82	1.66	48.53	12.32	74.87
Other Sub-Total	**15.64**	**98.33**	**36.80**	**13.11**	**25.22**	**17.72**	**89.32**	**83.67**	**297.26**
TOTAL	**77.40**	**108.89**	**79.65**	**94.35**	**68.53**	**50.19**	**97.83**	**110.97**	**605.26**

Source: Table 3 and 4

Table 6 Current 2019 Convenience Goods Market Shares (%)

	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5	Zone 6	Zone 7	Zone 8
Fareham Borough Central	56.9%	9.3%	51.4%	76.7%	15.2%	60.2%	5.0%	20.7%
Portchester District Centre	23.0%	0.1%	1.0%	0.0%	0.0%	1.0%	3.0%	0.0%
Locks Heath	0.2%	0.0%	0.6%	5.4%	32.5%	2.5%	0.0%	1.2%
Fareham Borough West	1.9%	0.3%	0.8%	4.0%	15.5%	1.0%	0.7%	2.7%
Fareham Borough Total	**82.0%**	**9.7%**	**53.8%**	**86.1%**	**63.2%**	**64.7%**	**8.7%**	**24.6%**
Outside Fareham Borough	18.0%	90.3%	46.2%	13.9%	36.8%	35.3%	91.3%	75.4%
TOTAL	**100.0%**	**100.0%**	**100.0%**	**100.0%**	**100.0%**	**100.0%**	**100.0%**	**100.0%**

Source: NEMS Household Survey May 2016 with adjusments to reflect changes since 2017

Table 7 Current Convenience Goods Expenditure Patterns 2019 (£m)

Centre/Facility	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5	Zone 6	Zone 7	Zone 8	Total
Expenditure 2019	**78.26**	**109.45**	**80.06**	**95.39**	**69.29**	**50.79**	**98.72**	**112.56**	**694.51**
Fareham Borough Central	44.53	10.18	41.15	73.17	10.53	30.57	4.94	23.30	238.37
Portchester	18.00	0.11	0.80	0.00	0.00	0.51	2.96	0.00	22.38
Locks Heath District Centre	0.16	0.00	0.48	5.15	22.52	1.27	0.00	1.35	30.93
Fareham Borough West	1.49	0.33	0.64	3.82	10.74	0.51	0.69	3.04	21.25
Fareham Borough Total	**64.17**	**10.62**	**43.07**	**82.13**	**43.79**	**32.86**	**8.59**	**27.69**	**312.93**
Outside Fareham Borough	14.09	98.83	36.99	13.26	25.50	17.93	90.13	84.87	381.59
TOTAL	**78.26**	**109.45**	**80.06**	**95.39**	**69.29**	**50.79**	**98.72**	**112.56**	**694.51**

Source: Table 3 and 6

Table 8 Future Convenience Goods Expenditure Patterns 2021 (£m)

Centre/Facility	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5	Zone 6	Zone 7	Zone 8	Total
Expenditure 2021	**79.21**	**110.13**	**80.56**	**96.54**	**70.12**	**51.44**	**99.70**	**114.27**	**701.97**
Fareham Borough Central	45.07	10.24	41.41	74.05	10.66	30.97	4.99	23.65	241.03
Portchester	18.22	0.11	0.81	0.00	0.00	0.51	2.99	0.00	22.64
Locks Heath District Centre	0.16	0.00	0.48	5.21	22.79	1.29	0.00	1.37	31.30
Fareham Borough West	1.50	0.33	0.64	3.86	10.87	0.51	0.70	3.09	21.51
Fareham Borough Total	**64.95**	**10.68**	**43.34**	**83.12**	**44.32**	**33.28**	**8.67**	**28.11**	**316.48**
Outside Fareham Borough	14.26	99.44	37.22	13.42	25.81	18.16	91.03	86.16	385.49
TOTAL	**79.21**	**110.13**	**80.56**	**96.54**	**70.12**	**51.44**	**99.70**	**114.27**	**701.97**

Source: Table 3 and 6

Table 9 Future Convenience Goods Expenditure Patterns 2026 (£m)

Centre/Facility	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5	Zone 6	Zone 7	Zone 8	Total
Expenditure 2026	**80.97**	**111.19**	**81.34**	**98.70**	**71.69**	**52.69**	**101.75**	**117.61**	**715.93**
Fareham Borough Central	46.07	10.34	41.81	75.70	10.90	31.72	5.09	24.34	245.97
Portchester	18.62	0.11	0.81	0.00	0.00	0.53	3.05	0.00	23.13
Locks Heath District Centre	0.16	0.00	0.49	5.33	23.30	1.32	0.00	1.41	32.01
Fareham Borough West	1.54	0.33	0.65	3.95	11.11	0.53	0.71	3.18	22.00
Fareham Borough Total	**66.40**	**10.79**	**43.76**	**84.98**	**45.31**	**34.09**	**8.85**	**28.93**	**323.10**
Outside Fareham Borough	14.57	100.40	37.58	13.72	26.38	18.60	92.89	88.68	392.83
TOTAL	**80.97**	**111.19**	**81.34**	**98.70**	**71.69**	**52.69**	**101.75**	**117.61**	**715.93**

Source: Table 3 and 6

Table 10 Future Convenience Goods Expenditure Patterns 2031 (£m)

Centre/Facility	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5	Zone 6	Zone 7	Zone 8	Total
Expenditure 2031	**83.12**	**113.05**	**82.71**	**101.31**	**73.59**	**54.18**	**104.59**	**121.29**	**733.84**
Fareham Borough Central	47.29	10.51	42.51	77.71	11.19	32.62	5.23	25.11	252.17
Portchester	19.12	0.11	0.83	0.00	0.00	0.54	3.14	0.00	23.74
Locks Heath District Centre	0.17	0.00	0.50	5.47	23.92	1.35	0.00	1.46	32.86
Fareham Borough West	1.58	0.34	0.66	4.05	11.41	0.54	0.73	3.27	22.59
Fareham Borough Total	**68.16**	**10.97**	**44.50**	**87.23**	**46.51**	**35.05**	**9.10**	**29.84**	**331.35**
Outside Fareham Borough	14.96	102.09	38.21	14.08	27.08	19.13	95.49	91.46	402.49
TOTAL	**83.12**	**113.05**	**82.71**	**101.31**	**73.59**	**54.18**	**104.59**	**121.29**	**733.84**

Source: Table 3 and 6

Table 11 Future Convenience Goods Expenditure Patterns 2036 (£m)

Centre/Facility	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5	Zone 6	Zone 7	Zone 8	Total
Expenditure 2036	**85.25**	**115.16**	**84.25**	**103.91**	**75.47**	**55.55**	**107.12**	**124.61**	**751.32**
Fareham Borough Central	48.51	10.71	43.31	79.70	11.47	33.44	5.36	25.79	258.28
Portchester	19.61	0.12	0.84	0.00	0.00	0.56	3.21	0.00	24.33
Locks Heath District Centre	0.17	0.00	0.51	5.61	24.53	1.39	0.00	1.50	33.70
Fareham Borough West	1.62	0.35	0.67	4.16	11.70	0.56	0.75	3.36	23.16
Fareham Borough Total	**69.90**	**11.17**	**45.33**	**89.46**	**47.70**	**35.94**	**9.32**	**30.65**	**339.48**
Outside Fareham Borough	15.34	103.99	38.92	14.44	27.77	19.61	97.80	93.95	411.84
TOTAL	**85.25**	**115.16**	**84.25**	**103.91**	**75.47**	**55.55**	**107.12**	**124.61**	**751.32**

Source: Table 3 and 6

Table 12 Existing Convenience Goods Floorspace and Benchmark Turnover

Area	Store	Gross Floorspace (sq.m)	Sales Floorspace (sq.m net)	Convenience Goods Floorspace (%)	Convenience Goods Floorspace (sq.m net)	Turnover (£ per sq.m)	Total Turnover (£m)
Fareham Borough	Aldi 208-228 West Street, Fareham	1,627	884	85%	751	£10,827	£8.14
Central	Iceland, 38-40 West Street, Fareham	821	374	98%	367	£6,859	£2.51
	B&M Bargains, Fareham Shopping Centre	1,882	1,008	20%	202	£4,031	£0.81
	Tesco Quay Street, Fareham	8,200	4,620	75%	3,465	£13,797	£47.81
	Other Fareham Town Centre	1,524	1,067	100%	1,067	£6,000	£6.40
	Sainsburys, Broadcut, Wallington	7,953	5,611	75%	4,208	£11,691	£49.20
	Co-op, 242 White Hart Lane	325	187	95%	178	£10,824	£1.92
	Co-op, 82-90 Arundel Drive	342	248	95%	236	£10,824	£2.55
	Iceland, 12 Stubbington Green	555	321	98%	315	£6,859	£2.16
	Co-op, 42 Stubbington Green	125	81	95%	77	£10,824	£0.83
	Other Stubbington	473	331	100%	331	£6,000	£1.99
	Co-op, 139 Highlands Road	772	499	95%	474	£10,824	£5.13
	Co-op, Highlands Road (PFS)	130	84	95%	80	£10,824	£0.86
	Other Highlands	173	121	100%	121	£6,000	£0.73
	Co-op, 44 The Square, Titchfield	235	120	95%	114	£10,824	£1.23
	Other Titchfield	311	218	100%	218	£6,000	£1.31
	Co-op, Gudge Heath Lane	413	267	95%	254	£10,824	£2.75
	Asda Superstore, Speedfields Park	10,561	6,360	70%	4,452	£13,659	£60.81
	Lidl, Speedfields Park	1,160	819	85%	696	£10,103	£7.03
	B&M Homestore, Speedfields	3,886	2,937	20%	587	£4,031	£2.37
	Co-op, 47 Fairfield Avenue	196	127	95%	121	£10,824	£1.31
	Other Zone 1 and 4	1,444	1,011	100%	1,011	£6,000	£6.06
	Other Sub Total	**43,108**	**27,295**		**19,323**		**£213.91**
Portchester	Iceland 34-36 West Street, Portchester	681	384	98%	376	£6,859	£2.58
	Co-op, 12 West Street, Portchester	1,589	1,028	90%	925	£10,824	£10.01
	Other Portchester	367	257	100%	257	£6,000	£1.54
	M&S Simply Food (BP), West Street	130	84	95%	80	£10,476	£0.84
	Lidl, Castle Trading Estate	1,475	1,041	85%	885	£10,103	£8.94
	Sub-Total	**4,242**	**2,794**		**2,523**		**£23.91**
Fareham Borough	Waitrose, 83 Locks Road	4,231	2,420	90%	2,178	£12,940	£28.18
West	Iceland, Locks Heath	597	399	98%	391	£6,859	£2.68
	Other Locks Heath	971	680	100%	680	£6,000	£4.08
	Sainsburys Local, Bridge Rd, Park Gate	418	251	95%	238	£11,690	£2.79
	Co-op, 26 Bridge Road, Park Gate	371	240	95%	228	£10,824	£2.47
	M&S Simply Food (BP), Bridge Road	130	84	95%	80	£10,476	£0.84
	Co-op, 3 Warsash Road	409	239	95%	227	£10,824	£2.46
	Tesco Express, 252 Warsash Road	229	148	95%	141	£13,797	£1.94
	Co-op, Unit 1 Yew Tree Drive	529	342	95%	325	£10,824	£3.52
	B&M Bargains, Southampton Road	1,502	976	20%	195	£4,031	£0.79
	Other	1,028	720	100%	720	£6,000	£4.32
	Sub-Total	**10,415**	**6,498**		**5,402**		**£54.05**
	TOTAL	**57,765**	**36,587**		**27,248**		**£291.87**

Source: *Fareham Borough Council Health check data 2018, ORC StorePoint 2019 and Global Data 2018*

Table 13 Convenience Goods Commitments

Location	Sales Floorspace (sqm net)	Convenience Goods Floorspace (%)	Convenience Goods Floorspace (sq.m net)	Turnover (£ per sq.m)	Total Turnover (£m)
Welborne District Centre (1)	1,960	100%	1,960	£12,000	£23.52
Welborne Local Centres (2)	280	100%	280	£6,000	£1.68
Replacement Lidl, Speedfields (3)	638	80%	510	£10,103	£5.16
Total	**2,878**		**2,750**		**£30.36**

Source: *Fareham Borough Council*

(1) - 2,800 sq.m gross - 70% net
(2) - 400 sq.m gross - 70% net
(3) - net increase in sales floorspace

Table 14 Summary of Convenience Goods Expenditure 2017 to 2036 (£M)

Area	2017	2019	2021	2026	2031	2036
Available Expenditure						
Fareham Borough Central	240.75	238.37	241.03	245.97	252.17	258.28
Portchester	15.66	22.38	22.64	23.13	23.74	24.33
Locks Heath	30.59	30.93	31.30	32.01	32.86	33.70
Fareham Borough West	21.01	21.25	21.51	22.00	22.59	23.16
Total	**308.01**	**312.93**	**316.48**	**323.10**	**331.35**	**339.48**
Benchmark Turnover of Existing Facilities						
Fareham Borough Central	213.91	213.91	213.91	213.91	213.91	213.91
Portchester	23.91	23.91	23.91	23.91	23.91	23.91
Locks Heath	34.94	34.94	34.94	34.94	34.94	34.94
Fareham Borough West	19.11	19.11	19.11	19.11	19.11	19.11
Total	**0.00**	**291.87**	**291.87**	**291.87**	**291.87**	**291.87**
Benchmark Turnover of Commitments						
Fareham Borough Central	0.00	0.00	30.36	30.36	30.36	30.36
Portchester	0.00	0.00	0.00	0.00	0.00	0.00
Locks Heath	0.00	0.00	0.00	0.00	0.00	0.00
Fareham Borough West	0.00	0.00	0.00	0.00	0.00	0.00
Total	**0.00**	**0.00**	**30.36**	**30.36**	**30.36**	**30.36**
Surplus/Deficit Expenditure (£m)						
Fareham Borough Central	26.84	24.46	-3.23	1.71	7.90	14.02
Portchester	-8.26	-1.53	-1.27	-0.79	-0.18	0.42
Locks Heath	-4.36	-4.02	-3.64	-2.94	-2.08	-1.24
Fareham Borough West	1.90	2.14	2.40	2.89	3.48	4.05
Total	**16.13**	**21.05**	**-5.75**	**0.87**	**9.12**	**17.25**

Source: Tables 7 to 13

Table 15 Convenience Goods Floorspace Capacity 2017 to 2036

Area	2017	2019	2021	2026	2031	2036
Turnover Density New Floorspace (£ per sq.m)	£12,000	£12,000	£12,000	£12,000	£12,000	£12,000
Floorspace Requirement (sq.m net)						
Fareham Borough Central	2,237	2,039	-269	142	659	1,168
Portchester	-688	-128	-106	-65	-15	35
Locks Heath	-363	-335	-303	-245	-174	-104
Fareham Borough West	159	178	200	241	290	338
Total	**1,344**	**1,754**	**-479**	**73**	**760**	**1,437**
Floorspace Requirement (sq.m gross)						
Fareham Borough Central	3,196	2,912	-385	203	941	1,669
Portchester	-983	-182	-152	-93	-21	50
Locks Heath	-519	-478	-433	-350	-248	-148
Fareham Borough West	227	255	286	344	414	483
Total	**1,921**	**2,506**	**-685**	**104**	**1,086**	**2,053**

Appendix 3 Comparison goods assessment

Table 1 Study Area Population

Zone	2011	2017	2019	2021	2026	2031	2036
Zone 1 - Fareham East	32,572	33,872	34,294	34,716	35,764	36,724	37,597
Zone 2 - Gosport South	47,757	49,104	49,421	49,739	50,606	51,472	52,339
Zone 3 - Gosport North	34,978	35,966	36,199	36,432	37,069	37,705	38,340
Zone 4 - Fareham Central	39,469	41,045	41,556	42,067	43,337	44,501	45,558
Zone 5 - Fareham West	27,118	28,202	28,553	28,904	29,777	30,577	31,304
Zone 6 - Rural South	22,044	22,993	23,298	23,602	24,364	25,060	25,648
Zone 7 - Portsmouth	43,916	45,606	46,078	46,550	47,871	49,224	50,327
Zone 8 - Rural North	43,796	45,886	46,607	47,327	49,084	50,640	51,931
Total	**291,650**	**302,674**	**306,007**	**309,340**	**317,872**	**325,902**	**333,045**

Sources: *Experian 2011 Census of Population*
Office of National Statistics 2014 SNPP projections

Table 2 Comparison Goods Expenditure per person (£)

Zone	2017	2019	2021	2026	2031	2036
Zone 1 - Fareham East	3,611	3,787	3,952	4,426	5,005	5,726
Zone 2 - Gosport South	3,195	3,352	3,498	3,917	4,430	5,067
Zone 3 - Gosport North	3,246	3,405	3,553	3,979	4,500	5,147
Zone 4 - Fareham Central	3,795	3,981	4,155	4,653	5,261	6,019
Zone 5 - Fareham West	4,271	4,479	4,675	5,235	5,920	6,772
Zone 6 - Rural South	3,765	3,949	4,121	4,616	5,219	5,971
Zone 7 - Portsmouth	3,129	3,282	3,425	3,835	4,337	4,961
Zone 8 - Rural North	4,158	4,361	4,551	5,097	5,763	6,593

Sources:
Experian Local Expenditure 2017 (2017 prices)
Experian growth rates - Retail Planner Briefing Note 17 (February 2020)
Excludes Special Forms of Trading

Table 3 Total Comparison Goods Expenditure (£m)

Zone	2017	2019	2021	2026	2031	2036
Zone 1 - Fareham East	122.30	129.88	137.21	158.30	183.81	215.27
Zone 2 - Gosport South	156.90	165.64	173.97	198.23	228.00	265.21
Zone 3 - Gosport North	116.75	123.24	129.45	147.51	169.66	197.35
Zone 4 - Fareham Central	155.78	165.43	174.77	201.64	234.14	274.20
Zone 5 - Fareham West	120.44	127.90	135.12	155.89	181.02	212.00
Zone 6 - Rural South	86.57	92.00	97.27	112.45	130.79	153.13
Zone 7 - Portsmouth	142.69	151.21	159.42	183.61	213.49	249.69
Zone 8 - Rural North	190.77	203.24	215.38	250.17	291.86	342.37
Total	**1,092.21**	**1,158.54**	**1,222.60**	**1,407.79**	**1,632.78**	**1,909.22**

Source: Tables 1 and 2

Table 4 Base Year Comparison Goods Market Shares (%)

Centre	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5	Zone 6	Zone 7	Zone 8
Fareham Borough Central								
Fareham Town Centre	39.0%	18.5%	34.3%	31.2%	12.0%	28.6%	7.9%	12.9%
Retail Warehouses/Parks	2.8%	4.2%	5.2%	3.7%	0.1%	2.4%	0.0%	0.1%
Other Zone 1 and 4	2.5%	1.0%	0.7%	7.1%	2.4%	1.8%	0.1%	1.0%
Portchester	4.9%	0.0%	0.2%	0.0%	0.0%	0.0%	0.7%	0.3%
Fareham Borough West								
Locks Heath	0.2%	0.1%	0.0%	0.3%	3.9%	0.3%	0.0%	0.0%
Centres Zone 5	7.0%	4.0%	4.6%	3.1%	13.8%	3.1%	1.1%	0.6%
Southampton Road Retail Park	5.4%	7.3%	8.4%	17.9%	4.6%	17.2%	1.6%	1.7%
Fareham Total	**61.8%**	**35.1%**	**53.4%**	**63.3%**	**36.8%**	**53.4%**	**11.4%**	**16.6%**
Bishops Waltham	0.0%	0.0%	0.0%	0.0%	0.0%	0.6%	0.0%	7.4%
Eastleigh/ Chandlers Ford	0.2%	0.1%	0.1%	0.3%	0.1%	0.5%	0.1%	3.2%
Gosport	0.6%	28.4%	10.1%	0.5%	0.2%	0.5%	0.0%	0.6%
Havant	3.2%	0.7%	0.3%	0.2%	0.0%	0.0%	6.5%	0.6%
Hedge End / Burlesdon	4.3%	6.4%	7.6%	7.3%	11.8%	13.2%	2.1%	26.8%
Portsmouth	15.4%	15.8%	13.2%	4.9%	2.1%	4.8%	36.6%	4.4%
Southampton	6.4%	6.1%	9.6%	11.3%	23.5%	8.1%	10.5%	17.4%
Waterlooville	3.0%	3.3%	0.2%	0.0%	0.0%	0.2%	12.5%	6.7%
Whiteley	2.2%	2.1%	3.0%	10.7%	22.5%	15.8%	1.1%	4.8%
Wickham	0.2%	0.0%	0.1%	0.1%	0.0%	0.5%	0.0%	0.9%
Other Outside Fareham Borough	2.7%	2.0%	2.4%	1.4%	3.0%	2.4%	19.2%	10.6%
Other Sub-Total	**38.2%**	**64.9%**	**46.6%**	**36.7%**	**63.2%**	**46.6%**	**88.6%**	**83.4%**
TOTAL	**100.0%**	**100.0%**	**100.0%**	**100.0%**	**100.0%**	**100.0%**	**100.0%**	**100.0%**

Source: NEMS Household Survey May 2016

Table 5 Base Year 2017 Comparison Goods Expenditure (£m)

Centre/Location	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5	Zone 6	Zone 7	Zone 8	Total
Expenditure 2017	**122.30**	**156.90**	**116.75**	**155.78**	**120.44**	**86.57**	**142.69**	**190.77**	**1,092.21**
Fareham Borough Central									
Fareham Town Centre	47.70	29.03	40.04	48.60	14.45	24.76	11.27	24.61	240.47
Retail Warehouses/Parks	3.42	6.59	6.07	5.76	0.12	2.08	0.00	0.19	24.24
Other Zone 1 and 4	3.06	1.57	0.82	11.06	2.89	1.56	0.14	1.91	23.00
Portchester	5.99	0.00	0.23	0.00	0.00	0.00	1.00	0.57	7.80
Fareham Borough West									
Locks Heath	0.24	0.16	0.00	0.47	4.70	0.26	0.00	0.00	5.83
Centres Zone 5	8.56	6.28	5.37	4.83	16.62	2.68	1.57	1.14	47.06
Southampton Road RP	6.60	11.45	9.81	27.89	5.54	14.89	2.28	3.24	81.71
Fareham Borough Total	**75.58**	**55.07**	**62.34**	**98.61**	**44.32**	**46.23**	**16.27**	**31.67**	**430.09**
Bishops Waltham	0.00	0.00	0.00	0.00	0.00	0.52	0.00	14.12	14.64
Eastleigh/ Chandlers Ford	0.24	0.16	0.12	0.47	0.12	0.43	0.14	6.10	7.79
Gosport	0.73	44.56	11.79	0.78	0.24	0.43	0.00	1.14	59.68
Havant	3.91	1.10	0.35	0.31	0.00	0.00	9.27	1.14	16.09
Hedge End / Burlesdon	5.26	10.04	8.87	11.37	14.21	11.43	3.00	51.13	115.31
Portsmouth	18.83	24.79	15.41	7.63	2.53	4.16	52.22	8.39	133.97
Southampton	7.83	9.57	11.21	17.60	28.30	7.01	14.98	33.19	129.70
Waterlooville	3.67	5.18	0.23	0.00	0.00	0.17	17.84	12.78	39.87
Whiteley	2.69	3.30	3.50	16.67	27.10	13.68	1.57	9.16	77.66
Wickham	0.24	0.00	0.12	0.16	0.00	0.43	0.00	1.72	2.67
Other Outside Fareham Borough	3.30	3.14	2.80	2.18	3.61	2.08	27.40	20.22	64.73
Other Sub-Total	**46.72**	**101.83**	**54.40**	**57.17**	**76.12**	**40.34**	**126.42**	**159.11**	662.11
TOTAL	**122.30**	**156.90**	**116.75**	**155.78**	**120.44**	**86.57**	**142.69**	**190.77**	**1,092.21**

Source: Table 3 and 4

Table 6 Current 2019 Comparison Goods Market Shares (%)

Centre	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5	Zone 6	Zone 7	Zone 8
Fareham Borough Central	44.1%	23.7%	40.0%	42.0%	14.5%	32.7%	8.0%	14.0%
Portchester	5.0%	0.0%	0.2%	0.0%	0.0%	0.0%	0.7%	0.3%
Locks Heath	0.2%	0.1%	0.0%	0.3%	3.9%	0.3%	0.0%	0.0%
Fareham Borough West	12.4%	11.3%	13.0%	21.0%	18.4%	20.3%	2.7%	2.3%
Fareham Total	**61.7%**	**35.1%**	**53.2%**	**63.3%**	**36.8%**	**53.3%**	**11.4%**	**16.6%**
Outside Fareham Borough	38.3%	64.9%	46.8%	36.7%	63.2%	46.7%	88.6%	83.4%
TOTAL	**100.0%**	**100.0%**	**100.0%**	**100.0%**	**100.0%**	**100.0%**	**100.0%**	**100.0%**

Source: NEMS Household Survey and Lichfields' adjsutments to reflect changes since 2017

Table 7 Current Comparison Goods Expenditure 2019 (£m)

Centre/Location	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5	Zone 6	Zone 7	Zone 8	Total
Expenditure 2019	**129.88**	**165.64**	**123.24**	**165.43**	**127.90**	**92.00**	**151.21**	**203.24**	**1,158.54**
Fareham Borough Central	57.28	39.26	49.30	69.48	18.55	30.09	12.10	28.45	304.49
Portchester	6.49	0.00	0.25	0.00	0.00	0.00	1.06	0.61	8.41
Locks Heath	0.26	0.17	0.00	0.50	4.99	0.28	0.00	0.00	6.19
Fareham Borough West	16.10	18.72	16.02	34.74	23.53	18.68	4.08	4.67	136.55
Fareham Borough Total	**80.13**	**58.14**	**65.57**	**104.72**	**47.07**	**49.04**	**17.24**	**33.74**	**455.64**
Outside Fareham Borough	49.74	107.50	57.68	60.71	80.83	42.97	133.97	169.50	702.91
TOTAL	**129.88**	**165.64**	**123.24**	**165.43**	**127.90**	**92.00**	**151.21**	**203.24**	**1,158.54**

Source: Table 3 and 6

Table 8 Future Comparison Goods Expenditure 2021 (£m)

Centre/Location	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5	Zone 6	Zone 7	Zone 8	Total
Expenditure 2021	**137.21**	**173.97**	**129.45**	**174.77**	**135.12**	**97.27**	**159.42**	**215.38**	**1,222.60**
Fareham Borough Central	60.51	41.23	51.78	73.40	19.59	31.81	12.75	30.15	321.23
Portchester	6.86	0.00	0.26	0.00	0.00	0.00	1.12	0.65	8.88
Locks Heath	0.27	0.17	0.00	0.52	5.27	0.29	0.00	0.00	6.53
Fareham Borough West	17.01	19.66	16.83	36.70	24.86	19.75	4.30	4.95	144.07
Fareham Borough Total	**84.66**	**61.06**	**68.87**	**110.63**	**49.72**	**51.85**	**18.17**	**35.75**	**480.72**
Outside Fareham Borough	52.55	112.91	60.58	64.14	85.40	45.43	141.25	179.63	741.88
TOTAL	**137.21**	**173.97**	**129.45**	**174.77**	**135.12**	**97.27**	**159.42**	**215.38**	**1,222.60**

Source: Table 3 and 6

Table 9 Future Comparison Goods Expenditure 2026 (£m)

Centre/Location	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5	Zone 6	Zone 7	Zone 8	Total
Expenditure 2026	**158.30**	**198.23**	**147.51**	**201.64**	**155.89**	**112.45**	**183.61**	**250.17**	**1,407.79**
Fareham Borough Central	69.81	46.98	59.00	84.69	22.60	36.77	14.69	35.02	369.57
Portchester	7.91	0.00	0.30	0.00	0.00	0.00	1.29	0.75	10.25
Locks Heath	0.32	0.20	0.00	0.60	6.08	0.34	0.00	0.00	7.54
Fareham Borough West	19.63	22.40	19.18	42.34	28.68	22.83	4.96	5.75	165.77
Fareham Borough Total	**97.67**	**69.58**	**78.47**	**127.64**	**57.37**	**59.94**	**20.93**	**41.53**	**553.12**
Outside Fareham Borough	60.63	128.65	69.03	74.00	98.52	52.52	162.68	208.64	854.67
TOTAL	**158.30**	**198.23**	**147.51**	**201.64**	**155.89**	**112.45**	**183.61**	**250.17**	**1,407.79**

Source: Table 3 and 6

Table 10 Future Comparison Goods Expenditure 2031 (£m)

Centre/Location	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5	Zone 6	Zone 7	Zone 8	Total
Expenditure 2031	**183.81**	**228.00**	**169.66**	**234.14**	**181.02**	**130.79**	**213.49**	**291.86**	**1,632.78**
Fareham Borough Central	81.06	54.04	67.87	98.34	26.25	42.77	17.08	40.86	428.26
Portchester	9.19	0.00	0.34	0.00	0.00	0.00	1.49	0.88	11.90
Locks Heath	0.37	0.23	0.00	0.70	7.06	0.39	0.00	0.00	8.75
Fareham Borough West	22.79	25.76	22.06	49.17	33.31	26.55	5.76	6.71	192.12
Fareham Borough Total	**113.41**	**80.03**	**90.26**	**148.21**	**66.62**	**69.71**	**24.34**	**48.45**	**641.03**
Outside Fareham Borough	70.40	147.97	79.40	85.93	114.41	61.08	189.15	243.41	991.75
TOTAL	**183.81**	**228.00**	**169.66**	**234.14**	**181.02**	**130.79**	**213.49**	**291.86**	**1,632.78**

Source: Table 3 and 6

Table 11 Future Comparison Goods Expenditure 2036 (£m)

Centre/Location	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5	Zone 6	Zone 7	Zone 8	Total
Expenditure 2036	**215.27**	**265.21**	**197.35**	**274.20**	**212.00**	**153.13**	**249.69**	**342.37**	**1,909.22**
Fareham Borough Central	94.93	62.85	78.94	115.16	30.74	50.07	19.98	47.93	500.61
Portchester	10.76	0.00	0.39	0.00	0.00	0.00	1.75	1.03	13.93
Locks Heath	0.43	0.27	0.00	0.82	8.27	0.46	0.00	0.00	10.25
Fareham Borough West	26.69	29.97	25.66	57.58	39.01	31.09	6.74	7.87	224.61
Fareham Borough Total	**132.82**	**93.09**	**104.99**	**173.57**	**78.01**	**81.62**	**28.47**	**56.83**	**749.40**
Outside Fareham Borough	82.45	172.12	92.36	100.63	133.98	71.51	221.23	285.54	1159.82
TOTAL	**215.27**	**265.21**	**197.35**	**274.20**	**212.00**	**153.13**	**249.69**	**342.37**	**1,909.22**

Source: Table 3 and 6

Table 12 Existing Comparison Goods Floorspace within Centres

Centre	Gross Floorspace (sq.m)	Sales Floorspace (sq.m net)
Fareham Town Centre	29,073	20,351
Comparison sales within food stores *	n/a	2,699
Portchester District Centre	2,741	1,919
Locks Heath District Centre	1,093	972
Comparison sales withinLocks Heath food stores	n/a	250
Highlands Road Local Centre	562	393
Park Gate Local Centre	698	489
Stubbington Local Centre	1,517	1,062
Titchfield Local Centre	392	274
Warsash Local Centre	746	522
Other Local Centres/Parades	1,795	1,257
In-Centre Total	**38,617**	**30,188**

Source: *Fareham Borough Council Heath Check Data 2018*

* incl. Tesco and Sainsbury's superstores

Table 13 Eixtsing Comparison Goods Floorspace Out of Centre

Location	Store	Gross Floorspace (sq.m)	Sales Floorspace (sq.m net)
Broadcut Retail Park	Dreams	480	408
Speedfields Park, Fareham	Wickes	2,360	2,006
	Carpets for Less	439	373
	Topps Tiles	420	357
	B&M Home Stores (comparison goods)	3,401	2,313
	Asda (Comparison goods)	n/a	1,908
	Lidl (Comparison goods)	n/a	123
	Screwfix	536	456
	Watercraft World	212	180
Collingwood Retail Park, Fareham	Homebase	3,357	3,021
	Pets at Home	706	600
	Poundstretcher	727	618
	Matalan	2,318	1,970
Southampton Road, Fareham	B&Q	3,726	3,353
	Harveys	640	544
	Currys/Pc World	1,650	1,403
	Carpetright	1,623	1,380
	Pets at Home	720	612
	Argos Extra	1,859	1,580
	Dunelm Mill	2,841	2,415
	Smyths Toys Superstores	1,235	1,050
	Paul Simon	1,260	1,071
	Abbey Gardens	729	620
	Carpet Barn and Bed Services	1,931	1,641
	Sharps	305	259
	Bensons for Beds	559	475
Other	Brewers DIY, Fielder Drive	311	264
Out of Centre Total		**34,345**	**31,000**

Source: *Fareham Borough Council Health Check data 2018*

Table 14 Comparison Goods Commitments

Location	Comparison Goods Floorspace (sq.m net)	Turnover (£ per sq.m)	Total Turnover (£m)
Welborne comparison shops (1)	2,625	£6,500	£17.06
Total	**2,625**		**£17.06**

Source: Fareham Borough Council

(1) 3,500 sq.m gross (2,625 sq.m net) amended outline application

Table 15 Summary of Comparison Goods Expenditure 2017 to 2036 (£M)

Location	2017	2019	2021	2026	2031	2036
Available Expenditure in Fareham Borough						
Fareham Borough Central	287.71	304.49	321.23	369.57	428.26	500.61
Portchester	7.80	8.41	8.88	10.25	11.90	13.93
Locks Heath	5.83	6.19	6.53	7.54	8.75	10.25
Fareham Borough West	128.76	136.55	144.07	165.77	192.12	224.61
Total	**430.09**	**455.64**	**480.72**	**553.12**	**641.03**	**749.40**
Turnover of Existing Facilities (£m)						
Fareham Borough Central	287.71	296.34	318.06	373.76	427.01	487.86
Portchester	7.80	8.03	8.62	10.13	11.57	13.22
Locks Heath	5.83	6.00	6.44	7.57	8.65	9.88
Fareham Borough West	128.76	132.62	142.35	167.27	191.11	218.34
Total	**430.09**	**443.00**	**475.47**	**558.73**	**638.34**	**729.29**
Turnover of Commitments (£m)						
Fareham Borough Central	0.00	0.00	17.06	20.05	22.91	26.17
Portchester	0.00	0.00	0.00	0.00	0.00	0.00
Locks Heath	0.00	0.00	0.00	0.00	0.00	0.00
Fareham Borough West	0.00	0.00	0.00	0.00	0.00	0.00
Total	**0.00**	**0.00**	**17.06**	**20.05**	**22.91**	**26.17**
Surplus/Deficit Expenditure (£m)						
Fareham Borough Central	n/a	8.15	-13.89	-24.24	-21.66	-13.41
Portchester	n/a	0.38	0.26	0.12	0.33	0.71
Locks Heath	n/a	0.19	0.09	-0.03	0.10	0.37
Fareham Borough West	n/a	3.93	1.72	-1.50	1.01	6.27
Total	**n/a**	**12.64**	**-11.81**	**-25.65**	**-20.22**	**-6.06**

Source: Tables 5 to 14

Table 16 Comparison Goods Floorspace Capacity 2017 to 2036

Location	2017	2019	2021	2026	2031	2036
Turnover Density New Floorspace (£ per sq.m)	£6,500	£6,695	£7,186	£8,444	£9,647	£11,022
Floorspace Requirement (sq.m net)						
Fareham Borough Central	n/a	1,218	-1,933	-2,870	-2,245	-1,217
Portchester	n/a	56	36	14	34	65
Locks Heath	n/a	28	13	-4	11	33
Fareham Borough West	n/a	587	240	-178	105	569
Total	**n/a**	**1,888**	**-1,644**	**-3,038**	**-2,096**	**-550**
Floorspace Requirement (sq.m gross)						
Fareham Borough Central	n/a	1,623	-2,578	-3,827	-2,994	-1,623
Portchester	n/a	75	49	18	45	86
Locks Heath	n/a	37	17	-5	14	44
Fareham Borough West	n/a	782	320	-237	140	759
Total	**n/a**	**2,518**	**-2,192**	**-4,050**	**-2,794**	**-733**

Appendix 4 Food/beverage assessment

Table 1 Study Area Population

Zone	2011	2017	2019	2021	2026	2031	2036
Zone 1 - Fareham East	32,572	33,872	34,294	34,716	35,764	36,724	37,597
Zone 2 - Gosport South	47,757	49,104	49,421	49,739	50,606	51,472	52,339
Zone 3 - Gosport North	34,978	35,966	36,199	36,432	37,069	37,705	38,340
Zone 4 - Fareham Central	39,469	41,045	41,556	42,067	43,337	44,501	45,558
Zone 5 - Fareham West	27,118	28,202	28,553	28,904	29,777	30,577	31,304
Zone 6 - Rural South	22,044	22,993	23,298	23,602	24,364	25,060	25,648
Zone 7 - Portsmouth	43,916	45,606	46,078	46,550	47,871	49,224	50,327
Zone 8 - Rural North	43,796	45,886	46,607	47,327	49,084	50,640	51,931
Total	**291,650**	**302,674**	**306,007**	**309,340**	**317,872**	**325,902**	**333,045**

Sources: *Experian 2011 Census of Population and ONS - SNPP 2014 projections*

Table 2 Food & Beverage Expenditure per person (£)

Zone	2017	2019	2021	2026	2031	2036
Zone 1 - Fareham East	1,261	1,258	1,286	1,365	1,449	1,538
Zone 2 - Gosport South	1,175	1,172	1,198	1,272	1,350	1,433
Zone 3 - Gosport North	1,094	1,092	1,116	1,184	1,257	1,334
Zone 4 - Fareham Central	1,266	1,263	1,291	1,371	1,455	1,544
Zone 5 - Fareham West	1,418	1,415	1,446	1,535	1,629	1,730
Zone 6 - Rural South	1,208	1,205	1,232	1,308	1,388	1,473
Zone 7 - Portsmouth	1,075	1,073	1,096	1,164	1,235	1,311
Zone 8 - Rural North	1,338	1,335	1,365	1,448	1,537	1,632

Sources: *Experian Local Expenditure 2017 (2017 prices)*
Experian growth rates - Retail Planner Briefing Note 17 (February 2020)

Table 3 Total Food & Beverage Expenditure (£m)

Zone	2017	2019	2021	2026	2031	2036
Zone 1 - Fareham East	42.71	43.15	44.65	48.82	53.21	57.83
Zone 2 - Gosport South	57.70	57.94	59.61	64.37	69.50	75.01
Zone 3 - Gosport North	39.35	39.51	40.65	43.90	47.40	51.16
Zone 4 - Fareham Central	51.96	52.49	54.32	59.39	64.74	70.35
Zone 5 - Fareham West	39.99	40.40	41.80	45.71	49.82	54.14
Zone 6 - Rural South	27.78	28.08	29.08	31.86	34.79	37.79
Zone 7 - Portsmouth	49.03	49.43	51.04	55.71	60.80	65.99
Zone 8 - Rural North	61.40	62.22	64.58	71.10	77.86	84.75
Total	**369.91**	**373.23**	**385.72**	**420.86**	**458.11**	**497.01**

Source: Tables 1 and 2

Table 4 Base Year Food and Beverage Market Shares 2017 (%)

Centre	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5	Zone 6	Zone 7	Zone 8
Fareham	43.0%	11.6%	30.0%	46.1%	7.0%	54.0%	3.8%	4.6%
Portchester	21.6%	1.5%	1.0%	0.5%	0.0%	0.6%	4.3%	0.0%
Locks Heath	0.0%	0.0%	0.0%	1.6%	23.9%	1.5%	0.0%	0.9%
Stubbington	0.0%	0.8%	0.7%	12.7%	0.0%	1.1%	0.0%	0.0%
Park Gate	0.0%	0.3%	0.0%	0.0%	3.5%	0.0%	0.0%	0.2%
Titchfield	0.5%	1.2%	1.0%	4.0%	2.1%	0.6%	0.0%	0.2%
Fareham Total	**65.1%**	**15.4%**	**32.7%**	**64.9%**	**36.5%**	**57.8%**	**8.1%**	**5.9%**
Bishops Waltham	0.0%	0.0%	0.0%	0.0%	0.0%	0.3%	0.0%	30.0%
Eastleigh	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	2.5%
Gosport	1.1%	46.9%	33.6%	1.9%	0.3%	3.9%	0.0%	0.0%
Havant	0.0%	0.0%	0.3%	0.0%	0.0%	0.0%	1.4%	0.0%
Hedge End	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	9.2%
Portsmouth	14.1%	21.2%	16.3%	4.9%	0.5%	4.7%	32.2%	8.5%
Southampton	2.8%	0.9%	0.5%	0.0%	4.1%	0.0%	0.0%	6.0%
Waterlooville	0.0%	1.6%	0.0%	0.0%	0.0%	0.6%	8.4%	2.6%
Whiteley	0.0%	9.5%	4.4%	20.5%	45.8%	23.4%	0.0%	8.7%
Wickham	0.7%	0.0%	0.0%	0.5%	0.0%	3.9%	2.1%	1.8%
Outside Fareham	16.2%	4.5%	12.2%	7.3%	12.8%	5.4%	47.8%	24.8%
Other Sub-Total	**34.9%**	**84.6%**	**67.3%**	**35.1%**	**63.5%**	**42.2%**	**91.9%**	**94.1%**
TOTAL	**100.0%**	**100.0%**	**100.0%**	**100.0%**	**100.0%**	**100.0%**	**100.0%**	**100.0%**

Source: NEMS Household Survey May 2016

Table 5 Base Year Food & Beverage Expenditure 2017 (£m)

Location	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5	Zone 6	Zone 7	Zone 8	Total
Expenditure 2017	**42.71**	**57.70**	**39.35**	**51.96**	**39.99**	**27.78**	**49.03**	**61.40**	**369.91**
Fareham	18.37	6.69	11.80	23.95	2.80	15.00	1.86	2.82	83.30
Portchester	9.23	0.87	0.39	0.26	0.00	0.17	2.11	0.00	13.02
Locks Heath	0.00	0.00	0.00	0.83	9.56	0.42	0.00	0.55	11.36
Stubbington	0.00	0.46	0.28	6.60	0.00	0.31	0.00	0.00	7.64
Park Gate	0.00	0.17	0.00	0.00	1.40	0.00	0.00	0.12	1.70
Titchfield	0.21	0.69	0.39	2.08	0.84	0.17	0.00	0.12	4.51
Fareham Borough Total	**27.81**	**8.89**	**12.87**	**33.72**	**14.60**	**16.05**	**3.97**	**3.62**	**121.53**
Bishops Waltham	0.00	0.00	0.00	0.00	0.00	0.08	0.00	18.42	18.50
Eastleigh	0.00	0.00	0.00	0.00	0.00	0.00	0.00	1.53	1.53
Gosport	0.47	27.06	13.22	0.99	0.12	1.08	0.00	0.00	42.94
Havant	0.00	0.00	0.12	0.00	0.00	0.00	0.69	0.00	0.80
Hedge End	0.00	0.00	0.00	0.00	0.00	0.00	0.00	5.65	5.65
Portsmouth	6.02	12.23	6.41	2.55	0.20	1.31	15.79	5.22	49.72
Southampton	1.20	0.52	0.20	0.00	1.64	0.00	0.00	3.68	7.24
Waterlooville	0.00	0.92	0.00	0.00	0.00	0.17	4.12	1.60	6.80
Whiteley	0.00	5.48	1.73	10.65	18.32	6.50	0.00	5.34	48.02
Wickham	0.30	0.00	0.00	0.26	0.00	1.08	1.03	1.11	3.78
Other Outside Fareham	6.92	2.60	4.80	3.79	5.12	1.50	23.43	15.23	63.39
Other Sub-Total	**14.91**	**48.81**	**26.48**	**18.24**	**25.39**	**11.72**	**45.06**	**57.77**	**248.38**
TOTAL	**42.71**	**57.70**	**39.35**	**51.96**	**39.99**	**27.78**	**49.03**	**61.40**	**369.91**

Source: Table 3 and 4

Table 6 Current Food and Beverage Market Shares 2019 (%)

Centre	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5	Zone 6	Zone 7	Zone 8
Fareham Borough Central	43.5%	13.6%	31.7%	62.8%	9.1%	65.0%	3.8%	4.8%
Portchester	21.6%	1.5%	1.0%	0.5%	0.0%	0.6%	4.3%	0.0%
Locks Heath	0.0%	0.0%	0.0%	1.6%	23.9%	1.5%	0.0%	0.9%
Fareham Borough West	0.0%	0.3%	0.0%	0.0%	3.5%	0.0%	0.0%	0.2%
Fareham Borough Total	**65.1%**	**15.4%**	**32.7%**	**64.9%**	**36.5%**	**67.1%**	**8.1%**	**5.9%**
Outside Fareham	34.9%	84.6%	67.3%	35.1%	63.5%	32.9%	91.9%	94.1%
TOTAL	**100.0%**	**100.0%**	**100.0%**	**100.0%**	**100.0%**	**100.0%**	**100.0%**	**100.0%**

Source: NEMS Household Survey May 2016 and Lichfields adjustments

Table 7 **Current 2019 Food & Beverage Expenditure (£m)**

Location	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5	Zone 6	Zone 7	Zone 8	Total
Expenditure 2019	**43.15**	**57.94**	**39.51**	**52.49**	**40.40**	**28.08**	**49.43**	**62.22**	**373.23**
Fareham Borough Central	18.77	7.88	12.53	32.97	3.68	18.25	1.88	2.99	98.94
Portchester	9.32	0.87	0.40	0.26	0.00	0.17	2.13	0.00	13.14
Locks Heath	0.00	0.00	0.00	0.84	9.66	0.42	0.00	0.56	11.48
Fareham Borough West	0.00	0.17	0.00	0.00	1.41	0.00	0.00	0.12	1.71
Fareham Borough Total	**28.09**	**8.92**	**12.92**	**34.07**	**14.75**	**18.84**	**4.00**	**3.67**	**125.27**
Outside Fareham	15.06	49.02	26.59	18.43	25.65	9.24	45.42	58.55	247.96
TOTAL	**43.15**	**57.94**	**39.51**	**52.49**	**40.40**	**28.08**	**49.43**	**62.22**	**373.23**

Source: Table 3 and 6

Table 8 **Future 2021 Food & Beverage Expenditure (£m)**

Location	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5	Zone 6	Zone 7	Zone 8	Total
Expenditure 2021	**44.65**	**59.61**	**40.65**	**54.32**	**41.80**	**29.08**	**51.04**	**64.58**	**385.72**
Fareham Borough Central	19.42	8.11	12.89	34.11	3.80	18.90	1.94	3.10	102.27
Portchester	9.64	0.89	0.41	0.27	0.00	0.17	2.19	0.00	13.59
Locks Heath	0.00	0.00	0.00	0.87	9.99	0.44	0.00	0.58	11.88
Fareham Borough West	0.00	0.18	0.00	0.00	1.46	0.00	0.00	0.13	1.77
Fareham Borough Total	**29.07**	**9.18**	**13.29**	**35.25**	**15.26**	**19.51**	**4.13**	**3.81**	**129.50**
Outside Fareham	15.58	50.43	27.36	19.06	26.54	9.57	46.90	60.77	256.22
TOTAL	**44.65**	**59.61**	**40.65**	**54.32**	**41.80**	**29.08**	**51.04**	**64.58**	**385.72**

Source: Table 3 and 6

Table 9 **Future 2026 Food & Beverage Expenditure (£m)**

Location	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5	Zone 6	Zone 7	Zone 8	Total
Expenditure 2026	**48.82**	**64.37**	**43.90**	**59.39**	**45.71**	**31.86**	**55.71**	**71.10**	**420.86**
Fareham Borough Central	21.24	8.75	13.92	37.30	4.16	20.71	2.12	3.41	111.61
Portchester	10.55	0.97	0.44	0.30	0.00	0.19	2.40	0.00	14.83
Locks Heath	0.00	0.00	0.00	0.95	10.92	0.48	0.00	0.64	12.99
Fareham Borough West	0.00	0.19	0.00	0.00	1.60	0.00	0.00	0.14	1.94
Fareham Borough Total	**31.78**	**9.91**	**14.36**	**38.55**	**16.68**	**21.38**	**4.51**	**4.19**	**141.37**
Outside Fareham	17.04	54.46	29.55	20.85	29.03	10.48	51.20	66.90	279.50
TOTAL	**48.82**	**64.37**	**43.90**	**59.39**	**45.71**	**31.86**	**55.71**	**71.10**	**420.86**

Source: Table 3 and 6

Table 10 **Future 2031 Food & Beverage Expenditure (£m)**

Location	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5	Zone 6	Zone 7	Zone 8	Total
Expenditure 2031	**53.21**	**69.50**	**47.40**	**64.74**	**49.82**	**34.79**	**60.80**	**77.86**	**458.11**
Fareham Borough Central	23.15	9.45	15.03	40.65	4.53	22.61	2.31	3.74	121.47
Portchester	11.49	1.04	0.47	0.32	0.00	0.21	2.61	0.00	16.16
Locks Heath	0.00	0.00	0.00	1.04	11.91	0.52	0.00	0.70	14.17
Fareham Borough West	0.00	0.21	0.00	0.00	1.74	0.00	0.00	0.16	2.11
Fareham Borough Total	**34.64**	**10.70**	**15.50**	**42.01**	**18.19**	**23.34**	**4.93**	**4.59**	**153.90**
Outside Fareham	18.57	58.79	31.90	22.72	31.64	11.44	55.88	73.26	304.21
TOTAL	**53.21**	**69.50**	**47.40**	**64.74**	**49.82**	**34.79**	**60.80**	**77.86**	**458.11**

Source: Table 3 and 6

Table 11 **Future 2036 Food & Beverage Expenditure (£m)**

Location	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5	Zone 6	Zone 7	Zone 8	Total
Expenditure 2036	**57.83**	**75.01**	**51.16**	**70.35**	**54.14**	**37.79**	**65.99**	**84.75**	**497.01**
Fareham Borough Central	25.15	10.20	16.22	44.18	4.93	24.56	2.51	4.07	131.82
Portchester	12.49	1.13	0.51	0.35	0.00	0.23	2.84	0.00	17.54
Locks Heath	0.00	0.00	0.00	1.13	12.94	0.57	0.00	0.76	15.39
Fareham Borough West	0.00	0.23	0.00	0.00	1.89	0.00	0.00	0.17	2.29
Fareham Borough Total	**37.65**	**11.55**	**16.73**	**45.66**	**19.76**	**25.36**	**5.35**	**5.00**	**167.05**
Outside Fareham	20.18	63.46	34.43	24.69	34.38	12.43	60.64	79.75	329.97
TOTAL	**57.83**	**75.01**	**51.16**	**70.35**	**54.14**	**37.79**	**65.99**	**84.75**	**497.01**

Source: Table 3 and 6

Table 12 **Food and Beverage Outlets 2018**

Centre	Class A3		Class A4		Class A5		Total	
	Number	sq.m gross	Number	sq.m gross	Number	sq.m gross	Number	sq.m gross
Fareham Town Centre	34	6,147	8	2,932	13	1,318	55	10,397
Portchester District Centre	4	292	1	397	3	137	8	826
Locks Heath District Centre	3	490	1	300	1	326	5	1,116
Stubbington	3	303	1	487	3	187	7	977
Park Gate	2	168	0	0	2	236	4	404
Titchfield	2	125	3	738	1	112	6	975
Other	11	2,155	8	2,936	13	1,260	32	6,351
Fareham Borough Total	**59**	**9,680**	**22**	**7,790**	**36**	**3,576**	**117**	**21,046**

Source *Fareham Borough Council Centre health check data 2018*

Table 13 Food and Beverage Commitments/Proposals

Location	F&B Floorspace (sq.m gross)	Turnover (£ per sq.m)	Total Turnover (£m)
Welborne District Centre (1)	700	£5,000	£3.50
Welborne Local Centre (2)	490	£5,000	£2.45
Total	**1,190**		**£5.95**

(1) assumes 30% of total non-retail service floorspace (770 sq.m gross) from revised outline application.
(1) assumes 30% of total non-retail service floorspace (100 sq.m gross) plus public house (390 sq.m gross).

Table 14 Summary of Food and Beverage Expenditure 2017 to 2036 (£M)

Location	2017	2019	2021	2026	2031	2036
Available Expenditure						
Fareham Borough Central	95.45	98.94	102.27	111.61	121.47	131.82
Portchester	13.02	13.14	13.59	14.83	16.16	17.54
Locks Heath	11.36	11.48	11.88	12.99	14.17	15.39
Fareham Borough West	1.70	1.71	1.77	1.94	2.11	2.29
Total	**121.53**	**125.27**	**129.50**	**141.37**	**153.90**	**167.05**
Turnover of Existing Facilities						
Fareham Borough Central	95.45	97.37	99.33	104.39	109.72	115.32
Portchester	13.02	13.28	13.55	14.24	14.97	15.73
Locks Heath	11.36	11.59	11.82	12.42	13.06	13.72
Fareham Borough West	1.70	1.73	1.76	1.85	1.95	2.05
Total	**121.53**	**123.97**	**126.46**	**132.91**	**139.69**	**146.82**
Turnover of Commitments						
Fareham Borough Central	0.00	0.00	5.95	6.25	6.57	6.91
Portchester	0.00	0.00	0.00	0.00	0.00	0.00
Locks Heath	0.00	0.00	0.00	0.00	0.00	0.00
Fareham Borough West	0.00	0.00	0.00	0.00	0.00	0.00
Total	**0.00**	**0.00**	**5.95**	**6.25**	**6.57**	**6.91**
Surplus/Deficit Expenditure						
Fareham Borough Central	0.00	1.57	-3.01	0.96	5.18	9.59
Portchester	0.00	-0.14	0.04	0.59	1.19	1.81
Locks Heath	0.00	-0.11	0.06	0.57	1.11	1.67
Fareham Borough West	0.00	-0.02	0.01	0.08	0.16	0.24
Total	**0.00**	**1.30**	**-2.91**	**2.20**	**7.64**	**13.32**

Source: Tables 5 to 13

Table 15 Food and Beverage Floorspace Capacity 2017 to 2036

	2017	2019	2021	2026	2031	2036
Turnover Density New Floorspace (£ per sq.m)	£5,000	£5,101	£5,203	£5,468	£5,747	£6,041
Floorspace Requirement (sq.m gross)						
Fareham Borough Central	0	307	-578	175	901	1,588
Portchester	0	-27	7	109	207	300
Locks Heath	0	-22	11	104	193	277
Fareham Borough West	0	-3	1	15	28	40
Total	**0**	**255**	**-559**	**403**	**1,329**	**2,205**

Birmingham
0121 713 1530
birmingham@lichfields.uk

Bristol
0117 403 1980
bristol@lichfields.uk

Cardiff
029 2043 5880
cardiff@lichfields.uk

Edinburgh
0131 285 0670
edinburgh@lichfields.uk

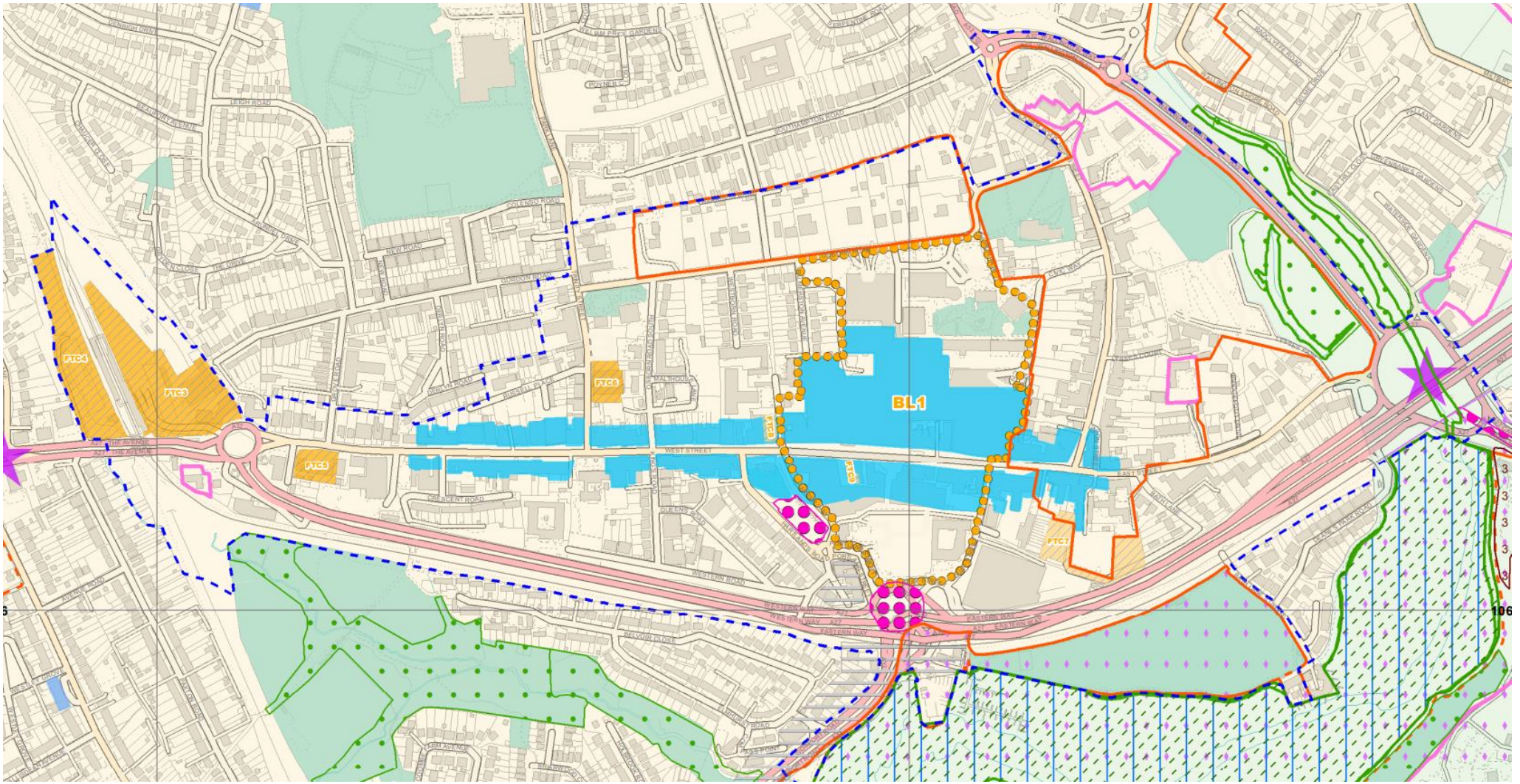
Leeds
0113 397 1397
leeds@lichfields.uk

London
020 7837 4477
london@lichfields.uk

Manchester
0161 837 6130
manchester@lichfields.uk

Newcastle
0191 261 5685
newcastle@lichfields.uk

Thames Valley
0118 334 1920
thamesvalley@lichfields.uk


BL1
PTC4
PTC5
PTC6
PTC3
PTC7
WEST STREET
EAST STREET
WESTERN WAY
EASTERN WAY
WESTERN ROAD
QUEENS ROAD
MALTHOUSE
THE AVENUE
106