FAREHAM BOROUGH COUNCIL

TOWN AND COUNTRY PLANNING ACT 1990
SECTION 174 APPEAL

APPEAL by **Mr K Fraser** of Titchfield Festival Theatre against the decision of **Fareham Borough Council** to issue an enforcement notice alleging, without planning permission: (a) the material change of use of the Land to theatre use (sui generis); and (b) an engineering operation to excavate and create an underground area beneath the Land; **on Land at 71-73 St Margarets Lane, Fareham, Hants, PO14**

Planning Inspectorate Reference: APP/A1720/C/23/3336046

Local Authority's Reference: ENF/26/23

PROOF OF EVIDENCE OF STEPHEN JUPP MRTPI
ON BEHALF OF
FAREHAM BOROUGH COUNCIL

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1.0 INTRODUCTION

1.1 I am a member of the Royal Town Planning Institute. I hold an Upper Second Bachelor of Arts (Honours) Degree in Town and Country Planning and a Master of Laws with Merit in Environmental Law.

1.2 I have been employed for some 31 years in town and country planning. I have been a self-employed planning consultant since April 2000. Previously, I was employed at Chichester District Council and Havant Borough Council.

1.3 I handle planning policy, development control and enforcement issues on a daily basis. I have extensive experience in dealing with such issues at planning application stage. I have also given planning policy, development control and enforcement evidence in the High Court and at public inquiries and hearings.

1.4 I have been appointed by Fareham Borough Council to act on their behalf in connection with appeal proceedings relating to this land. I have viewed the site, both internally and externally. I am therefore familiar with it and its surroundings.

1.5 Although I act on behalf of the Council, I understand my professional duty is to assist the Inspector by providing evidence which is true and has been prepared and is given in accordance with guidance produced by the Royal Town Planning Institute. In this regard I can confirm that the opinions expressed are my true and professional opinions.

1.6 The appeal is made against the decision of the Council to:

> *issue an enforcement notice alleging, without planning permission: (a) the material change of use of the Land to theatre use (sui generis); and (b) an engineering operation to excavate and create an underground area beneath the Land*

1.7 Since lodging the appeal, the appellant has withdrawn the s174 grounds (b) and (e) appeals, but has also confirmed that there is now a ground (d) appeal.

1.8 My evidence first examines the submission made by the appellant in respect of ground (d). In my evidence I set out that the incorporation of Area C into Area B[1] to create a new large 463 seater Arden theatre resulted in the creation of a new planning unit. The consequence of this is that the enforcement immunity 'clock' stopped and was restarted. As a result, there is no possibility of claiming immunity for the breach of planning control alleged.

1.9 My evidence then considers the planning merits of the development in respect of the ground (a) appeal. First, I draw on the conclusions of the Councils highway expert witness, Stuart Morton from i-Transport, who sets out in detail why he considers the new 463 seater theatre is in a location that is poorly accessible via sustainable travel options, walking, cycling and public transport. In addition, the levels of parking currently available are inadequate, resulting in an internal layout which is not compatible for all users. He also demonstrates that this shortfall in parking is resulting in an unacceptable impact on the highway network including highway safety, due to overspill queuing and indiscriminate parking. I then address the fact that the breach of planning control relates to a Town Centre use and therefore there is a need for a sequential test and impact assessment. In this regard I set out why I consider the Appellant's sequential and impact tests to be deficient and that my own search has revealed a number of properties in Fareham Town Centre that are available and of within the size required. I also set out the requirement for an impact assessment and note that one has not been undertaken. Third, I draw on the expert noise evidence of Brian scrivener of Sound Advice Acoustics Ltd. He concludes that subject to the imposition of three conditions the noise impact could be reduced to a level that would not cause harm to neighbouring residential properties. I then set out

[1] The reference to the 3 areas and their positions on a map is set out in paragraph 1.3 of the Statement of Common Ground [CDB.1] and the plan at Appendix 1 of that document.

why I consider the development undertaken to constitute Intentional Unauthorised Development [IUD]. Finally, I undertake a planning balance exercise. I conclude planning permission should not be granted. The ground (a) appeal should therefore be dismissed.

1.10 Finally, my evidence deals with the appeal under grounds (f) and (g).

2.0 SITE DESCRIPTION

2.1 This is set out in Chapter 2 of the Statement of Common Ground [CDB.1].

3.0 SUMMARY OF PLANNING HISTORY

3.1 A schedule of the relevant planning history of the appeal site is set out in Chapter 3 of the Statement of Common Ground [CDB.1].

4.0 DETAILS OF THE ENFORCEMENT NOTICE

4.1 The land to which the enforcement notice [CDD.11 & 12] relates is: 71-73 St Margarets Lane, Fareham, Hants, PO14 4BG as shown edged red on the plan attached to the Notice. The extent of the red line encompasses Areas B and C only, and is defined in the Notice (and in this proof) as 'the Land'.

4.2 The alleged breach of planning control is: (a) the material change of use of the Land to theatre use (sui generis); and (b) an engineering operation to excavate and create an underground area beneath the Land.

4.3 The reasons for issuing this notice are stated to be:

> *It appears to the Council that the material change of use of the Land to a theatre use has occurred within the last ten years.*
>
> *It appears to the Council that the engineering operation to excavate and create an underground area beneath the Land has occurred within the last four years.*
>
> *The development is contrary to Policies DS1, R2, D2, TIN1 and TIN2 of the Fareham Local Plan 2037 and is unacceptable in that:*
> *a) The theatre is a main town centre use located outside the urban area in an unsustainable and poorly accessible location. The development fails to promote sustainable and active travel modes, offer a genuine choice of mode of travel and reduce the need to travel by motorised vehicle;*
> *b) It has not been demonstrated that the development meets a demonstrable need for the use in this location and that there are no alternative sites in the centres or parades that are available, suitable or viable that could be considered sequentially preferable to the development site. It has not been demonstrated that the development would not cause significant harm to, or have a significant adverse effect on the vitality or viability of, the Borough's centres or parades;*
> *c) The development would result in a significant increase in noise from patrons arriving and leaving the building which would have an unacceptable adverse environmental impact on*

neighbouring occupants. Furthermore, in the absence of details of acoustic insulation measures for the building, the noise emanating from the building would have an unacceptable adverse environmental impact on neighbouring occupants; and
d) Parking provision at the site is not acceptable which would have an unacceptable impact on highway safety.

The engineering operation to excavate and create an underground area beneath the Land is not in itself harmful but is associated with and necessary to the material change of use of the Land to use as a theatre. Its continued presence undermines the ability of the Land to be restored to a lawful use.

The Council do not consider that planning permission should be given, because planning conditions could not overcome these objections to the development.

4.4 The requirements of the Notice are:

(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.

4.5 The periods for compliance with the Notice are:

Step (i): two months after this Notice takes effect; and
Steps (ii) – (vi): three months after this Notice takes effect.

4.6 The grounds of appeal, as confirmed in PINS letter of 16th January 2024, were grounds (a), (b), (e), (f) and (g) as set out at Section 174(2) of the 1990 Act. In the CMC agenda note of 6 February 2024 the inspector also makes reference to a possible hidden ground (d) appeal. It has since been confirmed by the appellants agent that grounds (b) and (e) have now been withdrawn but that there is now a ground (d) appeal.

4.7 As set out at Chapter 3 of the LPAs Statement of Case [CDD.3] it is requested that a minor change is made to the requirements of the Notice.

4.8 Following a detailed consideration of the various grounds of appeal and upon re-reading the precise wording of the Enforcement Notice it is considered that clarity could be better provided in respect of requirement (iv) in that the word 'Remove' should be replaced with 'Dismantle' in order to reflect the wording used in requirements (iii) and (v). This is because reference to 'remove' the items listed in requirements (iii) to (v) is already set out in requirement (vi).

4.9 In my professional judgement this minor change can be done without causing injustice to the appellant.

5.0 RELEVANT PLANNING HISTORY AND ENFORCEMENT INVESTIGATIONS

5.1 Before considering the issues pertinent to the ground (d) appeal I consider it necessary to provide a summary of the relevant parts of the site's complex planning history.

5.2 Before Areas A and B were occupied by Titchfield Festival Theatre on 1st October 2010, the site had an established industrial use.

5.3 Prior to the alleged unauthorised use of the site in 2023, the subject of this appeal, the site was divided into three permitted uses:

- Area A (also known, along with Area B, as 73 St Margaret's Lane) has planning permission for Theatre use (Sui Generis) which 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 Theatre use with no temporary conditions (P/12/0050/CU) [CDA.9].
- Area B has planning permission for office and storage use falling within the then Use Classes B1 and B8. This use was permitted at the same time as that for Area A in 2012 (P/12/0050/CU) [CDA.9] but is not subject to any limitation or restriction requiring it to be used in connection with the theatre use in Unit A.
- Area C (also known as 71 St Margaret's Lane) has permission for the erection of a building to provide workshop and storage accommodation, which was permitted in 1963 (FBC.3312/1). Prior to the unauthorised change of use subject of this report, Area C was most recently used as a warehouse by a company called Welbro.

5.4 In 2012, a retrospective application, P/12/00050/CU [CDA.9], was submitted for the change of use of Area A to Use Class D2 and theatre purposes and Area B for storage use. The application forms indicating that the 'building, work or change of use' had started on 1st October 2010. The former open warehouse was to be subdivided, creating Areas A and B. Area A had undergone internal and external

alterations to create an auditorium, rehearsal rooms, offices and ancillary theatre functions, and Area B had been retained for storage purposes. There were no connecting doors shown on the proposed floor plans between Areas A and B, with the plans showing 'New Compartment Wall' between the two areas. The Committee Report for this application notes under the heading 'Description of Proposal' that the application is made retrospectively for continued use of a former industrial/warehouse building (Unit A) for D2 (assembly and leisure) and theatre purposes and Unit B for continued storage use. Unit A had been used for approximately 17 months for the purpose applied for. Just over half of the unit would be used as a theatre, comprising 648 sq.m of stage, stalls (210 seats) and other facilities at ground floor level and 159 sq.m of ancillary accommodation at first floor level. The remaining 649 sq.m (Unit B) would be retained as a B1/B8 unit. In this regard the Supporting Planning Statement, states, under the heading, Planning Framework:

> *By dividing the unit into two it is felt by local Estate Agents that the unit 2B (which will be kept as a B1/B8 unit) is more likely to be occupied by a small to medium sized business looking to expand at a reasonable cost and they have several looking for a 4-7,000sg ft units who may be interested in the new unit to be created.*

5.5 It is therefore, in my professional judgement, reasonable to conclude that at the time of the determination of this application, on 2 May 2012, Area B was not being used by the Appellants.

5.6 Condition 7 of the planning permission limited public performances to Areas A and a maximum of 140 per annum. Condition 8 restricted the use of Area B to Classes B1 or B8.

5.7 In 2019 two planning applications were submitted.

5.8 The first, P/19/0510/FP, [CDA.6] was submitted for *"Rear, side & roof extensions, change of use of storage area to 567 seated theatre and industrial unit to ancillary backstage & changing rooms."* This was is respect of Areas A, B and C and was refused on 5 March 2020. The

supporting statement stated *"At present Unit A comprises 2 theatres one accommodating 200 seats and the other 100 seats together with ancillary areas. To the rear is a commercial unit currently in B1/B8 use (office/light industrial/storage). Beyond that is a further commercial unit in separate ownership and in B8 use."*

5.9 The second, P/19/1053/FP, [CDA.5] was submitted after the refusal of P/19/0510/FP and was for *"Change of use of Unit B to a mixed use of storage and theatre rehearsal space, with ground floor workshop (sui generis use). Extended hours of use."* In answer to question 5 on the application forms it is indicated that the work or change of use started on 1st September 2012 and it would appear that the stated use of Unit B matched that which is relied upon in the ground (d) appeal. This application was refused.

5.10 At this time, Area C remained an independent detached building in use as a warehouse.

5.11 Planning permission was then granted on 17 March 2022 under reference P/22/0255/FP [CDA.4] for *"Extensions to warehouse building and raising of the existing roof to provide additional and improved accommodation"* in respect of Area C. It is important to note that historically the rear warehouse building was detached from Areas A and B by a small gap of approximately 1m. The permitted drawings show the western external wall of building Area C to be removed and the building to be physically attached to the eastern external wall of building Area B (which was to remain).

5.12 On 4th April 2023 an application [P/23/0538/FP] [CDA.1] was submitted for *"Extension to Existing Loading Bay to Provide Additional Theatre Storage".* The planning statement contains a photograph of the existing loading bay to Area B open with storage behind. The dividing wall between Area A and B is visible, as is an access door between to the two areas.

5.13 In early May 2023 Officers received correspondence from an external theatre company, who were planning to use Titchfield Festival Theatre, requesting assistance with the parking of patrons for the

new 463 capacity theatre, the Arden Theatre, when it opens.

5.14 On 12th May 2023, a site visit was arranged. During the visit the external and internal building operations were observed. It was noted that window and door openings of Area C had not been built in accordance with the approved plans of P/22/0255/FP; some of the openings have been omitted, and the roof line had not been completed.

5.15 Officers entered Areas B and C, which had now been combined as a result of the removal of a large section of the former external wall of Area B. It was noted that the building in Area C had been extended to adjoin the building in Area B (which was permitted by application P/22/0255/FP). However, both the eastern external wall of Area B and the western external wall of Area C had been removed to create one large internal space. An extensive engineering operation had been undertaken to form a large pit, spanning over Areas B and C, these excavations have created an under-stage area for an orchestra and storage.

5.16 Area B was no longer being used for the permitted storage use. It appeared preparations were underway to create a new theatre, to include seating in Area B, along with part of the stage and stage pit.

5.17 Area C was no longer in use as a warehouse. It was being prepared to site part of a new theatre stage. The northern end of Area C had been developed to comprise of a backstage area, changing rooms, a rehearsal area, with toilets and kitchenette facilities to be used by theatre staff and performers.

5.18 The site of Areas A, B & C is now comprised of one building. There are the two pre-existing theatres, the Oak Theatre with a capacity of 200 seats and the Acorn Theatre with a capacity of 100 seats within Area A. The works undertaken have resulted in Areas B and C becoming the new "Arden Theatre". The number of seats in the new theatre is agreed as being 463.

5.19 Checks with Fareham Building Control indicate that they were notified

of the building regulations application for the works on 27th February 2022, from an approved inspector, London Building Control. However, the application has since been withdrawn and the Council has no record of any commencement date.

5.20 There is limited on-site parking available. A parking plan approved with application P/12/0050/CU demonstrated 30no on-site parking spaces within the parts of the car park associated with Areas A & B. The current arrangement of on-site parking follows a similar format, however the marked spaces on site are not consistent with the previously approved parking plan. There is also additional space where cars may be able to park where no markings are currently, and additional space associated with Area C which was previously used by Welbro. It is the Council's position – as set out in the Proof of Evidence of Stuart Morton at 4.5.9 that there is space for just 24 cars to park on the site, as illustrated on his Drawing ITB19829-GA-002A attached to his Proof.

6.0 S174 - GROUND (d) APPEAL

6.1 This ground of appeal is that, at the time the enforcement notice was issued, it was too late to take in enforcement action against the matters stated in the notice. In other words, It is claimed that what is alleged is immune from enforcement action, having subsisted continuously for the 10 year period set down by section 171B(3). Accordingly, any ground (d) appeal must be based on the breach of control alleged in the notice which in this case is the use of areas B and C for theatre use (sui generis). Thus, the Appellants cannot succeed by showing that Area B alone has been in theatre use for 10 years - they also need to show that the alleged use of Area C has continued for that length of time as well. They have never suggested this is part of their case. Even if they could provide evidence to the inquiry that Area B had been so used, for reasons I go on to discuss this would only be relevant had they applied for [and obtained] a Certificate of Lawfulness prior to the incorporation of Area B into the new wider planning unit. They did not do this.

6.2 In this regard, a comparison must be made between the use as existed on the date that the enforcement notice was issued, and as it existed 10 years before that date. Consideration must be given to the relevant planning unit; its primary uses; and whether it has expanded over the relevant period.

The Planning Unit

6.3 In order to determine whether a material change of land has occurred, it is first necessary to identify the relevant planning unit. The leading case for the determination of the planning unit is *Burdle*[2] [CDG.1]. This case indicates that the planning unit is usually the unit of occupation, unless a smaller area can be identified which, as a matter of fact and degree, is physically and/or functionally separate

[2] *Burdle & Williams vSSE & New Forest DC* [1972] 1 WLR 1207 [CDG.1]

and distinct, and/or occupied for different and unrelated purposes. In *Burdle*, Bridge J suggested three broad categories of distinction:

> *a) A single planning unit where the unit of occupation has one primary use and any other activities are incidental or ancillary;*
> *b) A single planning unit that is in a mixed use because the land is put to two or more activities and it is not possible to say that one is incidental to another;*
> *c) The unit of occupation comprises two or more physically separate areas which are occupied for different and unrelated purposes. Each area that has a different primary use ought to be considered as a separate planning unit.*

6.4 In these respects, the area to be looked at is the whole of that used for a particular purpose. However, it is settled case law that an enforcement notice does not have to be directed at the whole of the planning unit or indeed to identify it[3]. In this case, the enforcement notice is directed solely at that part of the land previously comprising Units B and C, which were previously detached from each other with Unit C being in use as a warehouse and occupied by a company called Welbo.

6.5 That said, the Statement of Common Ground now records it as common ground that Unit C was previously a separate planning unit, and that the whole building (A, B and C) is now a single planning unit. Accordingly, it is common ground that there has been a change in the planning unit. With this agreement there is no need to go into further detail as to what the uses of various buildings, especially that of Area B, may have been on the led up to the works, the subject of this Notice. However, due to the body of information provided by the appellants I consider it necessary to examine their case in more detail.

<u>The Previous Planning Units</u>

6.6 Based upon my analysis of the planning history in Chapter 5, it would appear that upon the grant of planning permission P/12/0050/CU on

[3] *Hawkey v SSE* [1971] 22 P&CR 610 & Richmond on Thames LBC v SSE [1988] JPL 396 – see CDG.6

2 May 2012 there were 3 planning Units, namely:

- Area A with permitted use as a Theatre [condition 4 of planning permission P/12/0050/CU];
- Area B with permitted use as for B1 and B8 [condition 8 of planning permission P/12/0050/CU];
- Area C, a detached building to the rear in use for B8.

6.7 The Planning Statement accompanying planning application P/19/1053/CU indicates that Area B had been in a mixed use of storage and theatre rehearsal space, with ground floor workshop (sui generis use) since 1st September 2012. That application was Refused and an application for a Certificate of Lawfulness of Existing Use was not applied for.

6.8 In the 2022 application for the works to the rear unit to create what is now Area C, the covering letter dated 27th January 2022 indicates that *"The building is currently used by Welbro who are cladding and roofing contractors and is used as their operational base, which includes both a storage (B8 use element) and offices and other ancillary accommodation which is an assumed Class E use. The building is therefore considered to be in B8 use with ancillary offices and other accommodation."*

6.9 On this basis, prior to the matters covered by the Notice commencing, and despite the contradictory evidence, there may well have been a planning unit comprising Areas A and B with a primary theatre use with ancillary storage, rehearsal space and workshop. and a separate planning unit comprising a detached building in use for B8 purposes [Area C].

6.10 However, as a matter of fact, no certificate of lawfulness was either sought or obtained for the use of Area B for purposes ancillary to the use of Area A as a theatre in breach of condition 8 of planning permission P/12/0050/CU.

The New Planning Unit

6.11 As set out in Chapter 5 above, the detached warehouse building at the rear of the site was subject to various extensions and alterations in 2022 with the result that it was physically connected to Area B – this was permitted under planning permission P/22/0255/FP [see CDA.4] and achieved by the removal of the former side wall of Unit C and the extension of that unit onto Unit B. Under the terms of the 2022 permission they were to remain as separate Units by virtue of the retained 'outside' wall of Unit B. However, when Council Officers visited the site on 12th May 2023 it was apparent that a large part of the side wall of Area B had also been removed to create one large internal space. In addition, an extensive engineering operation had been undertaken to form a large pit, spanning over Areas B and C. These excavations have created an under-stage area for an orchestra and storage.

6.12 Area B was no longer being used for the permitted storage use. It appeared preparations were underway to create a new theatre, to include seating in Area B, along with part of the stage and stage pit.

6.13 Area C was no longer in use as a warehouse. It was being prepared to site part of a new theatre stage and part of the orchestra pit. The northern end of Area C had been developed to comprise of a backstage area, changing rooms, a rehearsal area, with toilets and kitchenette facilities to be used by theatre staff and performers. The photographs attached at Appendix 1 were taken on 21 February 2024 and the red painted steel beam that is visible at the top of the photograph supports the structure where the dividing wall between Areas B and C was removed. In addition, the orchestra pit is accessed from Area C but extends to the front of the stage, into Area B. In my view it is plain beyond peradventure that the stage area and the orchestra pit beneath of the Arden Theatre extend into Area C. I have marked the division between Areas B and C with a red line on the plans that I have attached at Appendix 1.

6.14 The site of Areas A, B & C now comprised one building, all of which was and is intended to be used by Titchfield Festival Theatre. In my professional judgement the works undertaken by TFT to Units B and C had resulted in the creation of a new [enlarged] planning unit, as confirmed in the appellants latest statement at paragraph 12.

6.15 As the appellants accept in paragraphs 14 and 15 the incorporation of Unit C has resulted in Area C being used as part of the new Arden theatre and part as ancillary theatre purposes. The previous, lawful use, of Unit C for B8 purposes has ceased and it now forms part of a wider planning unit comprising Areas A, B and C in use for theatre purposes [a sui generis use]. It is areas A, B and C which are now the single unit of occupation by TFT, whereas previously it was just Areas A and B, with areas B not having a certificate of lawfulness. No part of the building can be identified as physically or functionally distinct. Accordingly, having regard to *Burdle*, there is a 'new unit' compared to that which previously existed.

6.16 The result of these changes and the creation of a new planning unit comprising areas A, B and C, this represents the commencement a new chapter in the planning history and a fresh breach of planning control. The clock stopped on any previous uses and restarted with the enlarged planning unit. On this basis the ten-year period for immunity will commence from either the substantial completion of the works or the commencement of the Arden theatre use.

6.17 Whether this change occurred at the time the intervening wall was demolished or when the works to incorporate Units B and C and to create the new Arden theatre were substantially completed does not, in my professional judgement, matter. Taking at its earliest it would have to be later than 17th March 2022 when planning permission P/22/0255/FP was granted. This is substantially less than the required 10 years to demonstrate the necessary immunity period under ground (d). It is for these reasons that I do not consider that the appeal under ground (d) has any chance of success.

Statutory Declaration of Mr K Fraser

6.18 With regard to his paragraphs 3 to 5, and drawing at KF2 it is clear from a close examination of the permitted drawings and evidence provided for the 2012 planning application, that the eastern half of the original front building, which was to become Area B as part of the 2012 application was shown to be a warehouse and that the two rehearsal spaces and the wardrobe storage area were all shown to be within Area A. Moreover, no door link between Areas A and B were shown. I consider the evidence to be contradictory for what was happening at this time. Indeed, if Areas A and B were both in use as stated by Mr Fraser at this time what was presented in the 2012 planning application does not make any sense – since that application shows a clear subdivision of the unit to create a theatre use at the front [west] and a separate unit to the rear. In this regard I refer back to my comments at 5.4 with regard to TFT's Planning Statement on page 4.

6.19 In addition, in the appeal against the imposition of the temporary planning permission time limit for the 2012 consent there was a hearing and an appeal site visit on 7 February 2013. In the appeal decision letter at paragraph 4 the inspector provides a description and ends by stating:

> *"Whilst the exterior of the building has not been altered, the factory space has been subdivided to provide an auditorium, rehearsal rooms, and ancillary theatrical functions. The rear part of the building (Unit B) is used for warehousing."*

6.20 I cannot see how the inspector would have provided an incorrect description of the various uses at that time. Indeed, he refers to 'ancillary theatrical functions' by reference to what is now Area A.

6.21 Moreover, the photograph at KF4 is said to be [at paragraph 8] the curtain, with prop and wardrobe storage during 2013, which he states in paragraph 5 were inserted in Unit B. However, the Plan at

KF3 shows this to be within Area A and this would make sense due to the position of the [new] dividing wall visible to the left of the curtained area.

6.22 The photograph at KF5 from 2013 is said to be the rehearsal space shown on the plan at KF3 for performances at the Acorn theatre. This would mean the area beneath the mezzanine [visible in the selling particulars submitted with the 2012 application]. I find it very difficult to work out where they were taken but I do not consider them to be beneath a mezzanine area otherwise the ceiling would be visible. There is a structure in the background of the lower of the two photographs with a blue painted column and it appears as though profiled steel cladding is being added to its sides but I do not know where this is. In the estate agent's particulars, the posts supporting the mezzanine are painted blue but the floor edge at the top is much deeper than that shown in this photograph, as shown in the extract I have reproduced below.

6.23 It is possible that the lower of the two photographs was taken to the north side of the mezzanine looking towards the wall inserted to divide areas A and B as the wall in the background has the same appearance as the wall as the other side of it in the photograph at KF4. However, it that is the case then the balustrade for the first floor of the mezzanine would have been removed.

6.24 At 12 Mr Fraser indicates that the buildings had the floor layout as at KF7 as a result of works between December 2016 and May 2018 and that in July 2019 the uses were as shown at KF8.

6.25 However, the existing floor plans for the first refused application in 2019, which indicate that an actual survey was undertaken, are dated December 2018 and they do not reflect a similar floor arrangement for Area B at all. The wall divisions beneath the mezzanine are much more limited.

6.26 It would appear to be common ground, from Mr Fraser's paragraphs 16 and 17 that the extension of Unit C onto Unit B; the demolition of the former external wall of Unit C; and, then the removal of a large section of the original external wall of Unit B, created a single property comprising Areas A, B and C. However, whilst a commencement date of August 2022 is provided there is no completion date.

6.27 At paragraph 18 Mr Fraser says as result of the works was the creation of a third theatre (the Arden Theatre) principally within property A/B. In my judgement this is factually incorrect. No part of the Arden theatre appears to be within Area A. Indeed, he contradicts his plan at KF10 which clear shows that no part of the Arden theatre is within Area A. It seems to be only a bar area that serves all theatres and this bar is within Area A.

6.28 In addition, in should be noted that where the Plan at KF10 shows an area not edged by any colour but annotated as 'Former Gap' – is, under the terms of planning permission P/22/0255/FP, part of Unit C.

6.29 Mr Fraser concludes his declaration by stating that the situation in terms of the use by TFT at the site has not changed since 2010 'Other than the Theatre use together with external storage and community uses now incorporates one large property A/B and C'.

6.30 In conclusion I find Mr Fraser's Declaration to be inconsistent with the evidence and in particular to the description of the appeal inspector from a site inspection on 7 February 2013 and also with what is said and what is shown on the various plans submitted to the council over the years.

6.31 I do accept that at some stage a door was inserted in the dividing wall between Areas A and B and that for some time area B was used for theatrical functions ancillary to the use of Area A, but I consider that was more than likely carried out after 7th February 2013.

6.32 For these reasons I treat Mr Fraser Declaration with some caution.

Statement in Support of Ground D Appeal dated 2nd April 2024.

6.33 I broadly agree with the Introduction section with the exception of the final part. In my judgement they miss the critical issue – namely whether in the ten years preceding the date of the issuing of the Notice there has been an enlargement of the overall planning unit, to include Unit C, within which a new theatre has been constructed.

6.34 I disagree with the comments made about the use of Area B in paragraph 9 for the reasons stated above in respect of Mr Fraser's Declaration and the 2013 appeal inspectors site visit.

6.35 I agree that paragraph 12 provides an accurate description of the current situation.

6.36 With regard to paragraph 16, even if everything in Mr Fraser's Declaration were to be accepted, it is a matter of fact that no Certificate of Lawfulness of Existing Use was ever sought nor permitted for the use of Area B for either purposes ancillary to, or as part of, Area A.

6.37 With regard to the key points set out in paragraph 17 I would comment:

- The lawful use of Area B was for either B1[4] or B8 and it had previously been in use as a warehouse forming part of a larger unit with Area A.
- Area B has been used in association with Unit A but the time frame is not clear but in my view was clearly post 7 February 2013.
- That the use of Area B by TFT has been for theatrical purposes ancillary to Area A.
- There is no evidence provided to state when the opening was created between Areas A and B. Had there been one at the inspectors site visit on 7 February 2013 I would have expected that to have been commented on when referring to the two areas.
- It is agreed that whilst a large part of the Arden theatre is within Area B it extends into Area C and that the remainder of Area C is used for purposes ancillary to the wider theatrical use of Areas A and B.
- I would agree that the evidence would indicate that for some period of time Areas A and B were incorporated into an enlarged planning unit, under the *Burdle* tests.
- I would also agree that Areas A and B now incorporate Area C to create a larger planning unit under *Burdle*.
- I would also agree that the new planning unit is used for Theatre purposes (sui generis).
- The appellants accept in the Statement of Common Ground that until the recent works to Unit C to combine it with Unit B, it formed its own planning unit.
- I also consider that the appellants exhibit a lack of focus on Area C. Their position is based on Area B having a lawful theatre use. If you are going to start from analysing the current planning unit and look back 10 years, then what is clear is that two previously separate (physically and functionally) planning units have been combined, the primary

[4] Note my comments under 'Fall-back' at 8.57 as to whether a condition can impose something that is not on the description of the proposed development

use of the planning unit that was Area C has been lost. There clearly cannot have been continuous use of the current planning unit for the requisite 10 years

6.38 At 18-23 the Appellant refers to the *Jennings*[5] case and the line of authorities that Mr Lockhart Mummery QC summarised and seek to argue 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 if the land so fundamental as to open a new chapter in the planning unit". In my professional judgement the key point which they have not appreciated here is that cases like *Jennings* and *Panton* are concerned with the situation where existing use rights may be lost. This is particularly clear from *Jennings* at p476c-f and the quote they have included at para 18 from *Panton* which speaks of "an accrued planning use right". There is no accrued right in respect of Area B as no Certificate of Lawful Use was sought, therefore there can be no question abandonment as there is nothing to abandon. I accept that they could potentially have established a right by applying for a CLU if they could show 10 years for unit B, but any such rights never crystallised. I therefore do not consider the issue of abandonment to be relevant.

6.39 I also consider the case of *Swale*[6] [CDG.5] where Sedley L.J. set out [at 34] the distinction between a lawful use continuing and what is required to make a use lawful by the passage of time. Once a use is established as lawful, it can be lost only by a material change of use or in an extreme situation, such as abandonment or "a new chapter in the planning history" arising from, for example, the demolition of the building in which the use takes place.

6.40 At paragraph 24 I would state that the use of Area B was for some period of time, but not before 7 February 2012, likely to have been put to a use that was ancillary to the theatre use in Area A. That, as I have previously mentioned, would have been in breach of condition

[5] *Jennings Motors Ltd v SoS for the Environment* [1982] QB 541 [CDG.2]
[6] *Swale v First Secretary of State*, J.P.L. 2006, 886-896 [CDG.5]

8 of planning permission P/12/0050/CU.

6.41 Had the lawfulness of Area B for purposes ancillary to, and forming part of a wider planning unit comprising Area A as well, then under some circumstances an additional theatre – wholly contained within Areas A and B - could have been provided without the need for planning permission. However, that would have been subject to the issue of 'intensification' something I deal with next in this Chapter of my proof.

Conclusions on 'New Planning Unit'

6.42 It would appear to be common ground – through clear statements by the Appellant – that Areas A, B and C are now all one building in use by TFT and this commenced somewhen in 2023.

6.43 As a matter of fact, Areas A and B never obtained a certificate of lawfulness for use as a combined area for theatrical purposes. The consequence of this is that any use rights accruing in respect of Area B never crystallised before the unauthorised works which created a new expanded planning unit. The new expanded planning unit resulted in the start of a new planning chapter and reset the clock in terms of the ten year period for immunity.

6.44 Accordingly, the LAWFUL use of the wider site, comprising the new planning unit now occupied wholly by TFT is as follows; Area 1 – theatre [sui generis]; Area B – B8[7]; and Area C – B8.

6.45 Therefore, in my professional experience it is plain beyond peradventure that there is a new planning unit, comprising sui generis use in Areas A, B and C. That was created in 2023, when the new planning chapter commenced. For these reasons, in my professional judgement there is absolutely no chance of successfully arguing a ground (d) appeal.

[7] See 8.57 comment

Intensification

6.46 It is important to note that this is not the LPA's primary case or the basis on which the Notice was issued but that I have referred to it due to its use in the quoted passage from the *Brooks*[8] case referred to at 27 of the Appellant's 'Statement in support of ground (d)'.

6.47 The intensification of a use may amount to a material change use if and where that causes the character of the uses to change in a fundamental way. It applies when the form and present uses can only be distinguished in terms of scale and effects related scale.

6.48 Accordingly, it applies in cases where there has not been a change in the planning unit, nor in its overall use but, as set out In *Herefordshire CC*[9], the Court of Appeal held that the inspector applied the correct test, namely: *"What must be determined is whether the increase in the scale of the use has reached a point where it gives rise to such materially different planning circumstances that, as a matter of fact and degree, it has resulted in an such a change in the definable character of the use that it amounts to a material change of use".*

6.49 However, as I have made clear it is common ground that any possible historical planning unit combining Units A and B has been increased to now include Unit C. Therefore, as a matter of fact, there is a different planning unit and a new planning chapter has started. Intensification is therefore not a relevant matter in this case.

6.50 Accordingly, for the detailed reasons that I have set out above, the breach of planning control alleged in the Notice occurred in 2022/3. This a period less than ten years and as such the ground (d) appeal must fail.

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[8] *Brooks and Burton Ltd v Secretary of State for the Environment [*1978] 35 P&CR 27 [CDG.8]
[9] *Herefordshire CC v SSCLG and Metal and Waste Recycling Ltd* [2012] EWCA Civ 1473 [CDG.3]

7.0 PLANNING POLICY CONTEXT

7.1 I now turn to the planning merits of the alleged breach of planning control, first dealing with planning policy.

Government policy and guidance

7.2 By Sections 70(2) and 79(4) of the TCPA and Section 38(6) of the Planning and Compulsory Purchase Act 2004 local planning authorities and Inspectors must determine applications for planning permission and appeals in accordance with the development plan (here, so far as relevant, the Local Plan) unless material considerations indicate otherwise. This section of my proof sets out the relevant planning policy framework for the consideration of this appeal.

7.3 The relevant planning policy is set out in section 6.0 of the LPA's Statement of Case [CDC.3] and addressed in Section 3 of the Planning SoCG [CDB.1].

7.4 The following policies are particularly relevant to the issues at this inquiry and in this regard, I consider that further elaboration is required in order to explain the Council's case.

Fareham Local Plan 2037

7.5 The 2037 Local Plan was adopted on 5th April 2023. It is an up-to-date LP and should be afforded FULL weight in the decision-making process of this appeal.

7.6 Strategic Policy DS1: Development in the Countryside [CDC.13] states, inter alia:

Proposals for development in the countryside, which is defined as land outside the Urban Area boundary as shown on the Policies map, will be supported where the proposal:
b) Is proposed on previously developed land and appropriate for the proposed use, or
c) Is for retail, community and leisure facilities, tourism or specialist housing where it can be demonstrated that there is a local need for the facility that cannot be met by existing facilities elsewhere; or
i) Can demonstrate a requirement for a location outside of the urban area.

7.7 Policy R2: Out-of-Town Proposals for Town Centre Uses [CDC.14] states:

Proposals for main town centres uses outside of the Borough's centres or parades will be permitted where they can demonstrate there is no significant harm, to the centres and parades where:
a) the proposal meets a demonstrable need for the use in the proposed location, a full sequential test has been carried out demonstrating that there are no sites in the centres or parades that are available, suitable or viable; and
b) appropriate levels of parking are provided; and
c) the site is located inside the defined urban area and is accessible, particularly by public transport; and
d) the scale and design of the buildings are appropriate to their surroundings in line with Policy D1; and
e) the proposal would not have any unacceptable environment, amenity or traffic implications in line with Policy D2.
Where a proposal for main town centre use over 500 sq.m (gross), or an extension which increases overall floorspace beyond 500 sq.m (gross) is proposed outside of the defined retail centres, an impact assessment shall be carried out in accordance with the NPPF in order to demonstrate that there is no significant adverse effect on the vitality or viability of existing or proposed retail centres and parades.

7.8 The Glossary to the LP defines Main Town Centre Uses as:

Retail development (including warehouse clubs and factory outlet centres); leisure, entertainment and more intensive sport and recreation uses (including cinemas, restaurants,

drive-through restaurants, bars and pubs, nightclubs, casinos, health and fitness centres, indoor bowling centres and bingo halls); offices; and arts, culture and tourism development (including theatres, museums, galleries and concert halls, hotels and conference facilities).

7.9 The supporting text at 7.20 makes clear:

The Fareham Retail and Commercial Leisure Study (2019) recommends that an impact assessment is required for any development (over 500 sq.m.) to demonstrate that the proposal will not have a negative impact on any relevant centre.

7.10 This threshold was a matter specifically considered by the LP Inspector in his Report of 23 March 2023 [CDC.18] in respect of Issue 8 and at paragraph 249 he concluded:

Policy R2 sets out a threshold of 500 sqm. The Retail Study outlines that the threshold has been identified taking account of the scale of proposals relative to the borough centres in line with the guidance in the PPG. Fareham Town Centre has relatively small retail units with an average size of 242 sqm. New retail floorspace of up to 2,500 sqm in out of centre and edge of centre locations could therefore have a significant impact on the health of Fareham Town Centre and other smaller centres in the borough. For these reasons, the threshold proposed in Policy R2 is appropriate and justified.

7.11 Strategic Policy R4: Community and Leisure Facilities [CDC.15] states:

Development proposals for new or extended community and leisure facilities will be supported where they meet the following criteria:

a) It is demonstrated that there is a need for the facility that cannot be met by existing facilities elsewhere; and

b) Appropriate consideration has been given to the shared use, re-use and/or redevelopment of existing buildings in the local community; and

c) The proposals represent the provision of facilities that are of equal or better quality and function to existing facilities being replaced; and

d) The site is accessible and inclusive to the local communities it serves.

Where proposals for community and leisure facilities are considered to be main town centre uses[10], and are proposed outside of the identified centres, Policy R2 shall apply.

Development proposals that would result in the loss of community or publicly owned or managed facilities will be permitted where:

i. The facility is no longer needed and no alternative community use of the facility is practical or viable; or

ii. Any proposed replacement or improved facilities will be appropriate to meet the communities' needs or better in terms of quality, function and accessibility.

7.12 Paragraph 7.31 of the Plan sets out an introduction to how this policy works, and states:

A key strategic priority of the Plan is to create places that encourage healthy lifestyles through the provision of leisure and cultural facilities, recreation, and open space and the opportunity to walk and cycle to destinations. Therefore, in assessing the location of new or replacement facilities, safe and easy accessibility by foot, cycle and public transport will be important considerations.

7.13 Policy D2: Ensuring Good Environmental Conditions [CDC.12] states:

Development must ensure good environmental conditions for all new and existing users of buildings and external space. Development proposals, including changes of use, will be permitted where they:

a) Do not have an unacceptable adverse impact on the environmental conditions of future occupiers and users or on adjacent/nearby occupants and users through ensuring appropriate outlook and ventilation and providing adequate daylight, sunlight and privacy; and
b) Do not, individually, or cumulatively, have an unacceptable adverse environmental impact, either on neighbouring occupants, adjoining land, or the wider environment; and

[10] As defined in the NPPF

c) Can demonstrate that the future occupants and users of the development site will not be unacceptably adversely impacted from existing activities in the surrounding area.

7.14 Strategic Policy TIN1: Sustainable Transport [CDC.16] states that:

New development should reduce the need to travel by motorised vehicle through the promotion of sustainable and active travel modes, offering a genuine choice of mode of travel.
Development will be permitted where it:
a) Contributes to the delivery of identified cycle, pedestrian and other non- road user routes and connects with existing and future public transport networks (including Rapid Transit), giving priority to non-motorised user movement; and
b) Facilitates access to public transport services, through the provision of connections to the existing infrastructure, or provision of new infrastructure through physical works or funding contributions; and
c) Provides an internal layout which is compatible for all users, including those with disabilities and reduced mobility, with acceptable parking and servicing provision, ensuring access to the development and highway network is safe, attractive in character, functional and accessible.

7.15 Policy TIN2: Highway Safety and Road Network [CDC.17] states:

Development will be permitted where:
a) There is no unacceptable impact on highway safety, and the residual cumulative impact on the road networks is not severe; and
b) The impacts on the local and strategic highway network arising from the development itself or the cumulative effects of development on the network are mitigated through a sequential approach consisting of measures that would avoid/reduce the need to travel, active travel, public transport, and provision of improvements and enhancements to the local network or contributions towards necessary or relevant off-site transport improvement schemes.

National Planning Policy Framework (December 2023) [CDC.9]

7.16 The National Planning Policy Framework (NPPF) is a material consideration in planning decisions (see paragraph 2) but also

emphasises that the planning system should be genuinely plan-led (paragraph 15).

7.17 Paragraph 90 of the Framework makes clear that planning decisions should support the role that town centres play at the heart of local communities, by taking a positive approach to their growth, management and adaptation.

7.18 Paragraph 91 continues:

> *Local planning authorities should apply a sequential test to planning applications for main town centre uses which are neither in an existing centre nor in accordance with an up-to-date plan. Main town centre uses should be located 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.*

7.19 This is reinforced by paragraph 92 which makes clear that *"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".*

7.20 Paragraph 94 sets out clear criteria for when assessing applications for leisure development which are not in accordance with an up-to-date plan, and states:

> *When assessing applications for retail and leisure development outside town centres, which are not in accordance with an up-to-date plan, local planning authorities should require an impact assessment if the development is over a proportionate, locally set floorspace threshold (if there is no locally set threshold, the default threshold is 2,500m2 of gross floorspace). This should include 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).*

7.21 As I have made clear in the section above on Local Plan policies, the LP has a "locally set threshold" of 500m^2 of gross floorspace and therefore the 2,500m^2 "default threshold" does not apply.

7.22 Finally, on this issue, the NPPF makes clear [at 95] *"Where an application fails to satisfy the sequential test or is likely to have significant adverse impact or one or more of the considerations in paragraph 94, it should be refused".*

7.23 NPPF Paragraph 114 requires that new development ensures appropriate opportunities to promote sustainable transport modes can be provided. A safe and suitable access for users and any significant impacts from the development on the transport network or on highway safety can be cost effectively mitigated to an acceptable degree. Paragraph 115 makes clear that:

> *"Development should only be prevented or refused on highways grounds if there would be an unacceptable impact on highway safety, or the residual cumulative impacts on the road network would be severe".*

7.24 Paragraph 180 seeks to prevent existing development being adversely affected by unacceptable levels of noise. This is reinforced by paragraph 191 that seeks to ensure that new development is appropriate for its location, including potential adverse impacts on the wider area arising from, inter alia, noise.

The DCLG letter of 31 August 2015 – Intentional Unauthorised Development

7.25 The letter introduces a planning policy to make intentional unauthorised development a material consideration that would be weighed in the determination of planning applications and appeals. This policy applies to all new planning applications and appeals received from 31 August 2015.

7.26 Following the publication of the July 2018 Framework and subsequent versions there was some confusion as to the status of this letter. However, two recent documents have made clear, in my professional opinion, that it remains government policy.

7.27 First, on 19 October 2018 Sir Oliver Heald [MP for North East Hertfordshire] asked the Secretary of State for Housing, Communities and Local Government, whether it remains Government policy that intentional unauthorised development should be a material planning consideration under the new National Planning Policy Framework. The recorded reply by Kit Malthouse [Minister of State (Housing, Communities and Local Government)] of 29 October 2018 is as follows:

> *"The Written Ministerial Statement (HCWS423) regarding Green Belt protection and intentional unauthorised development, made by my Right Hon Friend the Member for Great Yarmouth on 17 December 2015, is still a potential material consideration in a planning case."*

7.28 Secondly, the February 2019 publication 'Government response to the consultation on powers for dealing with unauthorised development and encampments' makes the following comments on page 10, under the heading 'Intentional unauthorised development':

> *"The Government introduced a policy in 2015 to make intentional unauthorised development a material consideration in the determination of planning applications and appeals. The Written Ministerial Statement explained that the Government is concerned about the harm that is caused where the development of land has been undertaken in advance of obtaining planning permission. In such cases, there is no opportunity to appropriately limit or mitigate the harm that has already taken place. Such cases can involve local planning authorities having to take expensive and time-consuming enforcement action.*
>
> *The Government will consult on options for strengthening this policy, as part of ensuring that local authorities have the tools to address the effects of unauthorised development, helping to maintain confidence and fairness in the planning system."*

Relevant extracts from the recent documents are attached at Appendix 7.

7.29 It is therefore clear to me that intentional unauthorised development remains a material planning consideration.

8.0 S174 – Ground (a) – whether planning permission ought to be granted

8.1 As outline in the CMC Agenda, the inspector set out that in considering whether planning permission ought to be granted for the deemed planning application, the main issues in this case to be:

- whether the site is a suitable location for the use, having regard to its accessibility by sustainable modes of transport,
- the effect of the development on the vitality or viability of the Borough's centres or parades,
- the effect of the development on the living conditions of neighbouring occupiers with regard to noise and disturbance, and
- whether the development makes adequate provision for parking provision in terms of highway safety.

8.2 In addition, the LPA raised the matter of Intentional Unauthorised Development [IUD] and I will deal with this as the final issue.

8.3 I deal with issues 2 and 5 and part of 1. For the main part of issue 1 and issue 4 I draw on the expert opinion of Stuart Morton. For issue 3 I draw on the expert opinion of Brian Scrivener.

<u>Issue 1 – whether the site is a suitable location for the use, having regard to its accessibility by sustainable modes of transport</u>

8.4 This issue is dealt with in section 4.2 of the Proof of Evidence of Stuart Morton and at 4.2.1 he expresses his clear professional judgement that:

> *"….the Appeal Site is located in an unsustainable location which cannot be reasonably accessed via non-car modes, including pedestrians, cyclist and public transport users. The resulting inaccessibility of the Appeal Site places undue reliance on the private car, contrary to Policy R2 and TIN1 of*

FBC's Local Plan 2037."

8.5 At paragraphs 4.2.3 to 4.2.14 Mr Morton considers the accessibility of the site for pedestrians. Here he considers the guidance in CIHT 'Planning for Walking' and considers their 800m and 1600m walking distances, assuming that the majority of trips to the theatre within this distance would be undertaken on foot. His figure 3 shows the 800m and 1600m walking catchment areas and considers that for both there would be a limited walking catchment.

8.6 Mr Morton also notes at 4.2.10 and 4.2.11 that St Margarets Lane to the south of the Appeal Site does not provide an attractive route for pedestrians due to its narrow width, lack of pavement and immediately abutted by vegetation and therefore would not be utilised significantly by theatre visitors. To the north, crossing of the A27 Margarets Roundabout is time consuming and inconvenient which is unattractive to pedestrians and discourages walking trips to the Appeal Site from the north. In support of these conclusions, he draws upon the first-hand experience of theatre visitors [who have commented on Planning Application P/24/0304/FP for a car park on the opposite side of St Margarets Lane] who have cited highway operation and safety concerns on St Margarets Lane.

8.7 For these reasons Mr Morton concludes on the issue of pedestrian accessibility at 4.2.14, stating:

> *"Given the location of the Appeal Site against existing residential areas, I am of the view that the Appeal Site is only accessible by foot for a very small number of local residents. Within the context of the DfT, Manual for Streets and CIHT guidance, the Appeal Site is not within a reasonable walking distance, providing poor accessibility for pedestrians. This is contrary to NPPF paragraph 114 (safe and suitable access), and FBC Local Plan 2037 Policies R2 and TIN1. On this basis, there will be an over reliance on the private car for journeys to the Appeal Site, even from the surrounding local area."*

8.8 Mr Morton then considers the accessibility of the site for cyclists at paragraphs 4.2.15-7 having regard to LTN 01/20 'Cycle

Infrastructure Design, July 2020'. He concludes on the issue of accessibility for cyclists at 4.2.17, stating:

> *"In my opinion the Appeal Site is not accessible by bicycle for the majority of visitors, within the context of LTN 01/20 (CDC.13). This is contrary to NPPF paragraph 114 both in terms of appropriate opportunities to promote sustainable transport modes and safe and suitable access. This is also contrary to FBC Local Plan 2037 Policies R2, TIN1 and TIN2. On this basis, there will be an over reliance on the private car for journeys to the Appeal Site."*

8.9 The final aspect of accessibility that Mr Morton considers is that of accessibility by way of public transport which he deals with at paragraphs 4.2.18 to 4.2.23. The bus stops are shown on his Image 3.1 with the nearest bus stops to the Appeal Site are located on Warsash Road to the north. Those on Common Lane are not served by continuous footway to the Appeal Site and are beyond 400m, a distance that would not be considered convenient. He considers the bus stops at Warsash to be within an acceptable walking distance but indiscriminate parking on St Margarets Lane, in his opinion, reduces the availability and attractiveness of this link. Moreover, he notes that the X5 bus service runs every 40 minutes Monday to Friday with the last bus at 18:49. At weekends the service reduces to once an hour with the last east bound service at 18:43 and westbound at 18:16 on Sundays but at 18:39 eastbound and 17:32 westbound on Saturdays.

8.10 At 4.2.22 Mr Morton states that he has looked at the TFT show calendar and notes that evening performances are shown to start at 19:30, which he notes is later than buses operate so a return journey by bus is not possible.

8.11 On this basis he concludes at 4.2.23:

> *"The Appeal Site is not reasonably accessible by public transport due to the limited service level beyond typical evening show performance times. Travel by public transport to the Appeal Site is therefore an unattractive option for the majority of theatre visitors which is understood to attract*

visitors from across Fareham Borough and beyond. This is contrary to NPPF paragraph 114, and FBC Local Plan 2037 Policies R2, TIN1 and TIN2."

8.12 I also refer to Policy DS1: Development in the Countryside at this stage as it seems the most logical place to deal with it.

8.13 Policy DS1 is set out at 7.5 above. Criteria (a), (d), (e), (f), (g), (h) of DS1 are not considered to be relevant to the appeal development. I deal with criteria (b), (c) and (i) individually below.

Criteria (b) – PDL and appropriate for the proposed use

8.14 Whilst I accept that the appeal site comprises PDL I do not consider that the location is appropriate. This is primarily due to the findings of Stuart Morton under Issue 1, in that it is considered that the appeal site is not located in a sustainable location. There is clear evidence that attendees to the Arden theatre arrive by car primarily because there are no bus services in the evening and the catchment area for walking is very limited. In addition, the use is a 'Town Centre' use so a countryside location is not appropriate.

Criteria c) – Leisure facilities that can demonstrate a local need which cannot be met by existing facilities

8.15 The supporting text to this policy at 3.33 makes clear that:

"many existing employment, educational, community and leisure uses are already located in the countryside. A policy is needed to allow the continuation of these uses where they perform a function to the community and/or provide jobs. The focus will be on retaining, maintaining and improving existing facilities outside of the urban area, which are valued by the community so they can meet changing needs as necessary and where possible and appropriate, locating any new community facilities inside the urban area."

8.16 The enforcement notice red line plan covers an area of approximately

1,000 sq.m, more than double the Policy R2 impact assessment threshold. This comparison supports the counter argument that the use cannot be considered to be small scale rural development. The Appellant appears to argue (SoC paragraph 10.17 – last bullet point) that this 500 sq.m threshold does not apply to leisure development. However, the wording of Policy R2 clearly refers to "main town centre uses over 500 sq.m" and the Fareham Retail and Commercial Leisure Study: Update Report 2020 (paragraph 10.36) indicates Draft Policy R2 was consistent with the NPPF and the 500 sq.m threshold was considered appropriate for both retail and leisure development in the report.

8.17 The new Arden Theatre (463 seats) is about two and half times larger than the Oak Theatre (188 seat) and nearly five times larger than the Acorn Theatre (96 seat). The Appellant suggests the two smaller venues can already accommodate about 300 people, and therefore the increase is "only 165 people". From my examination of the appellants booking site and brochure it does not appear that the two smaller theatres operated at the same time in the past but there are instances when it is planned to operate the Arden Theatre at the same time as one or other of the smaller facilities. In my opinion, the most relevant way to consider the significance of this development is the increase from 284 seats in two auditoria [since there is no planning condition prohibiting both of the smaller theatres from operating together] to an enlarged venue with 747 seats in three auditoria, which should be considered to be significant and certainly not small scale. The 2024 theatre brochure suggest events on 150 days during 2024, which also appears significant. This includes 68 events in the new Arden Theatre, assuming an average occupancy rate of 70% these 68 events would attract over 22,000 additional people during 2024 (463 x 68 x 0.7). Adopting the same assumptions the Oak (46 events) and Acorn (37 events) would attract about 8,500 people. The potential increase in people from 8,500 to 30,500 people is clearly significant and suggests visitors would be attracted from beyond the local area.

8.18 The FRCLS 2020 [CDC.19] provides some helpful commentary that demonstrates an auditorium of 463 seats cannot be considered to serve a local need, i.e. which can only be met in the Titchfield area. FRCLS paragraph 8.8 refers to information from the UK Theatre and Society of London Theatres (SOLT). The average attendance for the 223 member organisations was 545 people, only 18% higher than the 463 seat capacity. The average annual ticket revenue per venue was £5.7 million, and on that basis, the Fareham study area (about 300,000 people generating £10.65 million) was estimated to support only 1.9 [10.65/5.7] theatre venues, based upon the average attendance of 545. The Appellant refers to 800 members and 8,000 patrons. These members/patrons are likely to live across a wide area. Whilst the appellants indicated that they serve a local need there is no evidence provided to support this. From personal knowledge the parents of one of my best friends have been patrons of TFT for a number of years and they live in south Gosport. This is an example of the catchment of TFT being much more than just serving a local need – even prior to the development of the much larger Arden Theatre.

8.19 I note that both the Appellant (and more clearly the Theatre Trust) make the point that there is a lawful theatre use on the site already (Unit A) and therefore in principle this establishes that the use can be appropriate for this location. However, the original use is significantly smaller than that which would be generated by the new theatre. I consider the Arden theatre does not serve a local need and generates a level of activity that is not appropriate in this location. In any event this scheme must be considered against current policy and my proof and those of the other council witnesses, particular that of the highways witness, Mr Morton, clearly set out why this is not an appropriate location for the Arden theatre.

8.20 The Appellants map in Appendix 12 seeks to demonstrate a gap in provision between Fareham town centre and Hedge End. However, the FRCLS 2017 [CDC.18] demonstrates that Fareham town centre attracts customers from all 8 study area zones [which include

Gosport South and North as well as Portsmouth – see map at Figure 2.1], therefore Fareham town centre adequately serves this claimed 'gap': see the comparison goods retail and food/beverage market shares in Table 6 in Appendix 3 and Table 4 in Appendix 4. For ease of reference, I provide these specific references at Appendix 7 of my Proof.

8.21 This evidence indicates a theatre with 463 seats will attract visitors from across Fareham Borough and beyond to be viable.

8.22 I consider that a theatre use can serve this need from any accessible location in the Borough and beyond. It does not have to be at the appeal site and in this regard, I note that TFT operations are not restricted solely to the appeal site. In addition, I see no reason why such a use should not be carried out within the urban boundary – there is, in my professional judgement, no requirement for countryside location. On this analysis it is clear to me that the Arden theatre does not serve a local need. Accordingly, criteria (c) of DS1 is not satisfied.

Criteria (i) – Demonstrate a requirement for a location outside the urban area

8.23 The supporting text to DS1 at 3.38 makes clear in respect of this criteria, that:

> *"Where proposals fall outside of criterion a-h in the policy, evidence of the need for the proposal to be located outside of the urban area will be required. This should include justification of the need for a countryside location for the proposed use of the land, and an assessment of alternative options that have been considered."*

8.24 For reasons I have set out above, I do not consider the appeal development to comprise 'small scale' development, and in any event, the development is a main town centre use which by definition

should not be located in the countryside unless the applicant can demonstrate that there are no sequentially preferable sites. It has not been demonstrated that there is a requirement for a location outside of the urban area. Accordingly, criteria (i) is not satisfied/relevant.

8.25 For these reasons the appeal development is also in breach of Policy DS1.

8.26 To conclude in this first issue, it is considered that the development to be contrary Policies DS1, R2, TIN1, and TIN2 of the Fareham Local Plan 2037, in that:

- the Appeal Site is located in an unsustainable location which cannot be reasonably accessed via non-car modes, including pedestrians, cyclist and public transport users.
- the unauthorised theatre is a main town centre use located outside the urban area and the need for the development in this unsustainable countryside location has not been demonstrated
- It has not been demonstrated that the appeal development serves a local need and it is not an appropriate use of PDL

<u>Issue 2 - The effect of the development on the vitality or viability of the Borough's centres or parades</u>

8.27 The Appellant does not dispute the fact that the new theatre is a main town centre uses located outside of the urban settlement boundary. Accordingly, Policy R2 and NPPF paragraphs 91 to 95 come into play. Paragraph 7.20 of the LP notes that the Fareham Retail and Commercial Leisure Study (2019) recommended that an impact assessment is required for any retail and leisure development (over 500 sq m) to demonstrate that the proposal will not have a negative impact on any relevant centre. and on this basis both a sequential test and impact assessment are required. The NPPF Annex 2:

Glossary also specifically includes theatres in the list of main town centre uses.

8.28 The Appellant argues the use is a small-scale rural development, which is exempt from the sequential test (NPPF paragraph 73). I acknowledge that policy R2 does not make a direct relevance to the exclusion of small-scale rural development]. However, the policy does make a direct to the NPPF sequential test at paragraph 7.21. There is no definition in the LP, PPG or the Framework of 'small scale rural development'. However, the PPG refers to suitability of sites and a given proposal.

8.29 In my judgement and reading of Policy R2 and the PPG, the assessment of whether a proposal would be small-scale rural development should logically account for more than just the floor space, but for the sum of its parts, including the number of visitors and whether it is serving a local or wider need. The Arden theatre is not small like the Oak (188 seats) and Acorn (96 seats). The Arden can accommodate up to 463 people and would attract in the region of 93 vehicles for each capacity performance, but is there were concurrent shows in the Oak and Arden there would be a need for 133 spaces. The theatre and all of the backstage area occupies in the region of 1,000 sq m of floor area and then there is the need to provide parking, which, in the three areas proposed by the appellants on their latest parking drawing would occupy at least 0.5 hectare. Moreover, even if one were limited to only considering the floorspace, I consider that the size at close to 1000 sq m is not small scale development. In addition, as I indicated under the considerations relating to DS1, even with just 68 events and assuming an average occupancy rate of 70% the events held at the Arden theatre would attract over 22,000 additional people. Therefore, taking all of this into account, I do not consider the appeal scheme would constitute small-scale rural development for the purposes of the Framework and the sequential test that would operate within Policy R2. Instead, the evidence suggests that visitors would be attracted from beyond the local area.

8.30 At 7.7 I have set out the wording of Policy R2 and at 7.8 I have provided the Glossary definition of 'Main Town Centre Uses' which includes theatres. In view of the important of the status of an up-to-date LP and s38(6), the wording of Policy R2 is critical. It states:

> *"Where a proposal for main town centre use over 500 sq.m (gross), or an extension which increases overall floorspace beyond 500 sq.m (gross) is proposed outside of the defined retail centres, an impact assessment shall be carried out in accordance with the NPPF in order to demonstrate that there is no significant adverse effect on the vitality or viability of existing or proposed retail centres and parades."*

8.31 Paragraph 7.22 of the LP makes clear that where an application fails to satisfy the sequential test or is likely to have significant adverse impact on the viability or vitality of the defined centre(s), then proposals will not be supported. This is reinforced by 7.23 with reference to the need for impact assessments for main town centre uses, with the threshold being considered to be important.

The Sequential Test

8.32 As set out in the PPG it is for the applicant to demonstrate compliance with the sequential test, although the LPA is expected to support the applicant in undertaking the sequential test, including sharing any relevant information. However, in this case there has been no engagement from the applicant as the development is unauthorised.

8.33 In terms of locational requirements, the PPG paragraph: 012 Reference ID: 2b-012-20190722 indicates "the sequential test should recognise that certain main town centre uses have particular market and locational requirements which mean that they may only be accommodated in specific locations. Robust justification will need to be provided where this is the case, and land ownership does not provide such a justification." The Appellant has not provided robust justification that the theatre use has a specific requirement to be located on the appeal site.

8.34 The LP at 7.21 refers back to the NPPF sequential test. NPPF paragraph 92 indicates when considering out of centre proposals, "preference should be given to accessible sites which are well connected to the town centre." This does not mean all out of centre sites that are more central or closer to the town centre should be considered. However, it is the Council's case that the appeal site is not accessible and not well connected to the town centre or any district or local centre. Accordingly, therefore regardless of any findings on the sustainability or otherwise of the appeal site under Issue 1, the inspector is required to consider the sequential test in terms of what is more sequentially preferable. Accordingly, even if the appeal site were considered to be well connected, it would still be sequentially less preferable than a well-connected centre or edge of centre site.

Area of Search

8.35 Criteria (a) of R2 sets out the appropriate area of search for sequential sites- it should be in the Borough's centres or parades set out in Policy R1. These are set out at Table 7.1 'The Retail Hierarchy' which I have reproduced below as it indicates that the primary shopping area in Fareham is the "main focus for leisure, entertainment and cultural activities" and therefore theatres. It also suggests that district and local centres would not be expected to perform this role.

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 (Hunts Pond Road) and Warsash (Warsash Road/Dibles Road)	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.

8.36 I do not consider that the search should be limited only to Titchfield – as was the case in 2012. As I have set out earlier, in my DS1 analysis under Issue 1 I do not consider that the need / demand for a 463 seater theatre is local or location specific but is coming from a wider area, and as the appellants argue, by reference to their plan at Appendix 12, in their view it is filling a market gap between Fareham Town Centre and Hedge End.

8.37 On this basis there is no justification to limit the area of search to just Titchfield.

8.38 The likely catchment area of the development indicates sequential sites should be considered in and edge of centre opportunities at primarily Fareham town centre as Table 7.1 indicates this to be the main focus for leisure, entertainment and cultural activities. Then the Appellant should next consider Portchester, Locks Heath, Stubbington and Welborne district centres. It is only if searches within all of those areas have not revealed any possible sites should local centres across Fareham Borough be considered. Finally, if all other options have been considered and discounted would one would examine out of centre locations and concentrate first, on those that are sustainably located.

8.39 The Appellant's SoC (paragraph 10.21) suggests the appeal development [main auditorium, rehearsal space and storage space] will require about 700 to 1,000 sq.m gross space, with sufficient nearby car parking. A site or premises capable of providing a minimum of 700 sq.m appears to be a reasonable assumption, although there may be no reason why a larger unit could not be subdivided.

Availability

8.40 The *Rushden Lakes* decision [attached at Appendix 19 of the Appellants SoC] is nearly 10 years old and not to be considered of relevance in terms of when a site is 'available' in the context of current government policy on the sequential test. In that appeal the Inspector stated: "In terms of availability, NPPF [24] simply asks whether town centre or edge of centre sites are "available". It does not ask whether such sites are likely to become available during the remainder of the plan period or over a period of some years." In this regard, para 24 of the then 2012 NPPF stated that "only if suitable sites are not available should out of centre sites be considered". Whereas current para 91 states "only if suitable sites are not available (or expected to become available within a reasonable

period) should out of centre sites be considered" (emphasis added). It is therefore clear that materially different policy wording now to what there was at the time of the Rushden Lakes decision. For this reason, I do not consider the Rushden Lakes decision to be of any relevance.

Sequential opportunities

8.41 The Appellants sequential test at Appendix 16 of their SoC is wholly insufficient and limits its area of search to primarily the existing facilities of Fareham Live [Ferneham Hall] and The Ashcroft Centre. I accept that neither are suitable as TFT is aimed at a different theatre market. Moreover, to my knowledge neither are available. That said, this does not preclude a detailed search of the town centre, and indeed finding a site which could accommodate all of their facilities which are currently at St Margarets Lane or just the Arden Theatre. Whilst they do make reference to other district centres, they appear only to have considered whether there are any local plan allocations for community use (in Fareham) and whether there could be any available land to build a warehouse (in other centres). I do not consider this to be an assessment of sites as required by Policy R2 and paragraph 91 NPPF.

8.42 Moreover, I do not understand how TFT's stated objectives set out in their 'sequential test' would prevent them being located anywhere other than in Titchfield. The stated relationship to William Shakespeare is that he lived and worked in Southern Hampshire. Southern Hampshire is a very wide search area and not limited to Titchfield. It would include the whole of Fareham Borough and also neighbouring areas. In addition, in their 2012 sequential test they stated under the heading 'planning proposal' "TFT are currently homeless and need to secure a new home preferably in the Borough of Fareham and in particular Titchfield" (emphasis added).

8.43 A quick analysis of vacant premises around Fareham Town Centre – details attached at Appendix 8 the first area of search has revealed

7 possible sites. Whilst 2 of these are no longer available, they were available if one considers the time frame from when TFT were first seeking a new larger theatre as evident in the 2019 planning application.

8.44 Of these sites, a number are owned by Fareham Borough Council which has acquired the Fareham Shopping Centre. This purchase followed the closure of some major stores including M&S [site 1 at Appendix 8] and Debenhams [site 2 at Appendix 8]. The £14.25M acquisition forms part of the Council's broader regeneration programme, which includes £16.7M for Fareham Live and £2.5M to replace Osborn Road multi storey car park, which has reached the end of its useful life, with a modern surface car park. The shopping centre has a key role to play both now and, in the future, and ownership will enable the Council to provide stability and reassurance to its tenants as it works with them and other key partners to develop a new all-encompassing strategy leading to a more vibrant town centre. Specialist shopping centre advisors, RivingtonHark, have been appointed by the Council to advise on strategic direction and improvements to the shopping centre that will benefit both shoppers and businesses.

8.45 It is considered that the provision of an additional theatre within Fareham Borough – one which is considered to be aimed at a different market than Fareham Live - will be complementary to the Town Centre.

8.46 On the basis of this very brief analysis, I have undertaken – and solely within Fareham Town Centre – I am satisfied that suitable sites are available.

8.47 Accordingly, Policy R2 and paragraph 91 NPPF are breached. I would add at this stage that R2(c) and (e) are dealt with separately under Issues 1, 2 and 4, as is parking.

Impact on Centres

8.48 NPPF paragraph 95 indicates leisure development can be refused where there is likely to be a significant adverse impact on a centre's vitality and viability, including local consumer choice and/or impact in existing or planned investment. As with the sequential test the PPG makes it clear that it is for the applicant to demonstrate compliance with the impact test[11] and that it should be assessed in relation to all town centres that may be affected, which are not necessarily just those closest to the proposal and may be in neighbouring authority areas[12].

8.49 As well as requiring a sequential test, Policy R2 makes it clear that an impact assessment is also required for development over the locally set threshold of 500 sq.m gross.

8.50 Recent written evidence by the Theatres Trust [Appendix 9] highlights the importance of culture in reanimating our public spaces and shopping streets. They emphasised that:

> *"With struggles of high street retail, the cultural offer is one of the key drivers of foot fall to town centres, enabling local hospitality businesses to continue to operate and diversify the night time economy. When the new arts centre, Chester Storyhouse opened in 2017, city centre footfall increased 15%."*

8.51 It is therefore clear that the provision of a theatre within centres and parades identified through Policy R1 would make a positive contribution to the economy of that area.

8.52 Conversely, by locating a theatre in the countryside, away from hospitality businesses means that the opportunity for additional foot-fall which could be provided in a town, district or local centre has been lost.

[11] Paragraph: 017 Reference ID: 2b-017-20190722
[12] Paragraph: 014 Reference ID: 2b-014-20190722

8.53 I note that in the Appellants SoC they say that a local landlord will give evidence about takings increasing by 10-15% on show weeks. Without knowing what this actual figure is in financial terms it is difficult to quantify but all I would say at this stage is that this could be an example of trade being taken away from Fareham Town Centre and District Shopping Centres, areas which take priority when considering more sequentially preferable sites.

8.54 It is for these reasons that I do not consider that robust justification has been provided by the Appellant in this case to demonstrate that there is no significant adverse effect on the vitality or viability of existing or proposed retail centres and parades.

8.55 I am aware that the Theatres Trust make an argument that the unauthorised development should be regarded as an extension of an existing theatre rather than a new theatre. I disagree – the Arden is a new theatre with a significant capacity.

A 'Fall Back' Position?

8.56 At 2.17 of the Appellants Final Comments, they make reference to a 'fall-back' position which they consider is relevant to the sequential test. They contend that if the requirements of the Notice were complied with, the land would revert to its permitted use which they consider is B1 or B8. They then argue if the fall-back use was B1 [now Class E] then this would include "main town centre uses such as shops, cafes, offices, gyms, restaurants, workshops and other types of commercial buildings".

8.57 However, condition 8 of the 2012 permission makes it clear that the use of Unit B "shall only be used for purposes defined as falling within Classes B1 or B8. Having regard to the Court of Appeal judgement in *Dunnett Investments*[13] [CDG.7] I consider that such wording would

[13] *Dunnett Investments Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 192

preclude the operation of section 55(2)(f) of the 1990 Act and Article 3(1) of the Use Classes Order and/or Article 3(1) and Part 3 of the Second Schedule to the General Permitted Development Order. Moreover, the reference in condition 8 to B1 needs to be ignored as there is no reference to B1 within the description of the proposed development and a condition cannot grant permission for something that is outside the scope of the permission.

8.58 Even if I were to be wrong on these matters, and accepted that there are various uses that operate within Class E, this does not include a B8 use, which is the only use that Unit C could revert back to. Accordingly, any possible fallback would not be relevant to Area C. In any event the ground (a) appeal covers BOTH Areas B and C.

8.59 Even if it were considered that a fall-back position did exist, in order for it to be a material consideration it needs to be demonstrated that there is a real prospect of it occurring. The Appellant's argument is wholly speculative – there is nothing concrete and no detail at all of what could go in there and that it might happen. I do not consider there to be any prospect of a town centre use being carried out within Area B for the simple reasons is that the evidence indicates that Area B would continue to be used by TFT in connection with the lawful theatre use of Area A.

Strategic Policy R4: Community and Leisure Facilities

8.60 Whilst this policy supports the provision of new or extended community and leisure facilities, the second element of the policy makes it clear that:

> *"Where proposals for community and leisure facilities are considered to be main town centre uses[49], and are proposed outside of the identified centres, Policy R2 shall apply."*

8.61 It is therefore clear that compliance with R2 is necessary to achieve compliance with R4. Accordingly, Policy R4 is also breached.

Conclusions

8.62 To conclude in this third issue, it is considered that the development is contrary Policies R2, R4 for the following two reasons:

- the absence of alternative sequentially preferable sites in centres and parades has not been demonstrated; and
- it has not been demonstrated the development would not cause significant adverse harm/impact on the vitality and viability of centres or parades.

Issue 3 – the effect of the development on the living conditions of neighbouring occupiers with regard to noise and disturbance

8.63 Issue 2 – Will the Activity Arising from the Appeal Development Adversely Affect the Amenities of Neighbouring Residential Properties?

8.64 Expert evidence on this issue is provided by Brian Scrivener and at 2.8.1 he refers to BS 8233: 2014 and the need to ensure that the internal ambient noise level does not exceed L_{Aeq} 30dB when patrons leave the premises at the end of an evening show.

8.65 At 4.3 he assesses the impact of vehicle noise and concludes that this does not result in any real increase in noise.

8.66 In 4.4 he considers noise breakout from the building itself and considers this to be minimal with only a few crescendos during the observed show being audible at the boundary with St Margarets Cottage. To him this noise appeared to be emanating from the roof section of the building, and when I visited the theatre, the roof did not appear to be insulated from inside.

8.67 The final noise source he considers is that of patron noise, in 4.5 of his Proof. On this matter he concludes that section by stating:

8.68 "Between 22:00hrs and 23:00hrs I witnessed loud speaking, some shouting, group singing of the musical numbers just seen on stage. Children were also witnessed adding to the noise levels with excitement from the show. Generally, there is a noticeable and audible increase in noise levels emanating from Patrons leaving the venue from the main side entrance."

8.69 At 4.6 he notes that the roller shutter and other doors and windows remained closed during his period of observation but states that local residents have raised their concerns relating to the summer months when there have been possible times when performances or rehearsals have occurred with some or all of these aforementioned opened. This he could not confirm during his assessments.

8.70 In section 5 he sets out his assessment of the impact of the noise on St Margarets Cottage and at 5.8 concludes that his tables at 5.6 and 5.7 demonstrate that with regards to Friday & Saturday, patrons leaving the site have seen the background noise level exceeded the background noise level between +5 dB and +10 dB above background resulting in a conclusion of 'Adverse Impact' and LOAEL, which coincides with the visual and audible observations made on site. The Sunday performance is less intrusive as the more central daytime background noise levels are masking the isolated noise levels associated with patrons leaving. These results also confirm his professional opinion that the noise associated with patrons leaving the venue have the potential to constitute a noise nuisance during the 30-minute period they were witnessed leaving the venue.

8.71 On this basis he proceeds in section 6 to consider possible remedial works. With regard to noise breakout, he considers there are two options. Either to increase the acoustic transmission performance of the roof or to use a noise limiting system [also known as environmental noise control system] connected to the pa system.

8.72 Measures to reduce the impact of patron noise are considered at 6.5 and he considers this to be the biggest acoustic factor and realistically

there is only one solution that could be implemented to reduce these noise levels – namely an acoustic screen along the south eastern boundary of the venue.

8.73 At 6.5.3 he undertakes an assessment of the impact of various heights of acoustic fence and using his table at 6.5.2 notes that the higher the fence the greater its effectiveness. At 7.1 he then calculates the corrected noise levels at St Margarete's Cottage with a 2m high acoustic fence and concludes that it would reduce the internal noise level to L_{Aeq} 30min 31.0 dB. whilst he notes that this would exceed the recommended internal level of L_{Aeq} 30min 31.0 dB by +1dB he considers this increase to be marginal and unlikely to affect the residents.

8.74 I consider that a 2m high fence is the appropriate height to consider at this moment in time since it would be normally be permitted development and I am not convinced that a planning condition could require something to be done which would need planning permission in its own right – namely a means of enclosure over 2m in height.

8.75 To conclude this second issue, there is evidence that the use of the Arden theatre is causing harm to the amenities of immediate neighbours, by virtue of noise disturbance, particularly when patrons leave the premises at the end of the evening performance. Mr Scrivener considers that the imposition of a number of conditions in respect of: keeping doors and windows closed during performances and rehearsals; having a 2m noise attenuation fence along the southern boundary; and, having a noise limiting system within the building, would – in combination – reduce the level of noise to 'low impact' for those occupiers nearest to the Appeal site. I will consider his conclusions and his recommended conditions in the light of my conclusions on IUD in the planning balance section of my evidence.

Issue 4 - whether the development makes adequate provision for parking provision in terms of highway safety

8.76 This issue is dealt with in sections 4.3 to 4.6 of the Proof of Mr Morton.

8.77 The review set out in Section 4.6.4 of his Proof quantifies that there is a shortfall of parking at the Appeal Site against a range of scenarios. Inadequate levels of parking provision are identified in the Parking SPD of 2015 [CDC.10] as leading to overspill parking on the local highway network. Consequently, development which does not provide adequate levels of parking will be contrary to Policy R2 and TIN1 of Fareham Local Plan 2037.

8.78 As set out within his Proof, conditions observed on the highway clearly demonstrate there is a shortfall of parking at the Appeal Site, during show times. These are set out at 4.6.13 where he states that the impacts of the shortfall of parking provision at the Appeal Site were clearly demonstrated and evident as follows:

- Vehicles were queuing on the carriageway waiting to gain access to the Appeal Site parking area and Garden Centre parking area under the control of Parking Marshals;
- Free flow traffic conditions were impeded for non-parking vehicles, due to having to wait and give-way to opposing traffic whilst manoeuvring passed queuing vehicles;
- Indiscriminate parking was observed on the footway adjacent the Appeal Site which impeded pedestrians' ability to walk in the footway, resulting in them having to walk in the carriageway;
- Queuing vehicles not visiting the Appeal Site were observed undertaking U-turn movements in the carriageway (and adjacent driveways) to find alternative routes, conflicting with other vehicles and pedestrians on the adjacent footway;
- Pedestrians had taken to walking within the unlit carriageway from south of the Appeal Site, in [his] view to avoid having to park at the Appeal Site due to the unacceptable level of provision.

8.79 Significantly, he notes at 4.6.14 that these impacts are also widely stated within the public consultation comments on Planning Application P/24/0304/FP.

8.80 It is for these reasons that he concludes at 4.6.15 that:

> *"the above evidence demonstrates an impact on highway operation and an unacceptable impact on safety, contrary to Policy R2, TIN1 and TIN 2 of Fareham Local Plan 2037 (CDC.2) and NPPF paragraph 115"*

8.81 Finally, at 4.6.16-18 he addresses the Appellant contention that the parking layout can be maximised through parking management on site, the layout created (shown in CDB.1) provides limited or no provision within the layout to facilitate pedestrian movement to gain access to the theatre building. Additionally, no disabled parking provision is included contrary to Fareham Borough Council Non-Residential Parking Standards Supplementary Planning Document (SPD) (2015) (CDC.10).

8.82 As a result, he is of the view the Appeal Site conflicts with the accessibility and site layout elements of Policy TIN1 which sets out development will be permitted where internal layout is compatible for all user, safe, functional and accessible. Finally, he again notes that members of the public, reporting to be users of the Appeal Site also indicate the layout and provision to be unattractive and unsafe when commenting on the 97-space car park planning application P/24/0304/FP.

<u>Issue 5 – Do the Works Constitute Intentional Unauthorised Development [IUD]?</u>

8.83 I have made clear in 7.25 to 7.29 that IUD is a material consideration in this case. The reasons why the Government introduced IUD as a material consideration in determining planning applications was in

response to harm being caused where the development of land has been undertaken in advance of obtaining planning permission. In such cases, there is no opportunity to appropriately limit or mitigate the harm that has already taken place. Such cases can involve local planning authorities having to take expensive and time-consuming enforcement action.

8.84 The Appellant has previously been involved in enforcement proceedings at The Great Barn, Titchfield, a Grade I listed building where an enforcement notice was issued in respect of an unauthorised car park surface. He lost the appeal and then a Summons was issued in March 2022 and TFT eventually complied with the enforcement notice requirements prior to the court date. On this basis the prosecution on behalf of the Council no longer believed it to be in the public interest to continue with the proceedings.

8.85 TFT were also prosecuted in respect of failure to comply with a breach of condition notice after it hosted 9 more weddings than was permitted during 2022, also at The Great Barn, Titchfield. This was despite having two applications to increase the number of weddings refused and dismissed at appeal. The Press Release at Appendix 10 confirms that TFT pleaded guilty to nine breaches of the Breach of Condition Notice and that the case has been adjourned for sentencing and in order that confiscation under the Proceeds of Crime Act (POCA) 2002 could be taken into account.

8.86 More recently the Litigation Team (Southampton & Fareham Legal Partnership) have served a total of summons x 20 upon Titchfield Festival Theatre Limited for breaching the planning condition at the Tithe Barn. The breach of condition relates to the condition that restricts the number of weddings at the Tithe Barn to 14 in any one calendar year, it is the position of the Council that there were 34 weddings in the 2023 calendar year. The case against the Titchfield Festival Theatre and the Breach of Condition in respect of the number of weddings for the 2023 calendar year was adjourned for a first hearing on the afternoon of Tuesday 30th July 2024.

8.87 In the present case, TFT had twice applied for a theatre within Areas B and C before any works took place. On both occasions planning permission was refused. In neither case did they appeal.

8.88 Moreover, Council enforcement officers visited the premises during the course of the works and TFT were advised to stop. They continued regardless and are now seeking to put the Council in a bad light through press releases and YouTube videos.

8.89 TFT are very familiar with the planning process. I consider that TFT undertook the unauthorised works in full knowledge of the need to obtain planning application. I consider that it was a calculated decision by them in the hope that the Council would not take action.

8.90 I therefore consider the unauthorised works to be a blatant abuse of the planning system and a clear, and substantial example of unauthorised intentional development, I therefore consider that substantial weight should be attached to this matter in the planning balance.

9.0 THE PLANNING BALANCE

9.1 Section 38(6) of the Planning and Compulsory Purchase Act requires that applications for planning permission must be determined in accordance with the development plan, unless material considerations indicate otherwise. The Local Plan has recently been adopted and the most important policy R2 has been found to be both sound and in accordance with the NPPF. The primacy of the Development Plan should therefore be afforded full weight.

Sustainable Location?

9.2 In my professional judgement, Mr Morton has clearly demonstrated the site is located in an unsustainable location which cannot be reasonably accessed via non-car modes, including pedestrians, cyclist and public transport users. The resulting inaccessibility of the Appeal Site places undue reliance on the private car, contrary to Policy R2 and TIN1 of FBC's Local Plan 2037.

9.3 I have also set out under this issue why I consider that policy DS1 is breached.

Sequential and Impact Tests

9.4 I conclude on the second issue, of sequential and impact tests, that the development is contrary Policies R2 and R4 for the following two reasons: (1) the absence of alternative sequentially preferable sites in centres and parades has not been demonstrated; and (2) it has not been demonstrated the development would not cause significant adverse harm/impact on the vitality and viability of centres or parades.

Noise

9.5 On the issue of noise, based upon the evidence of Mr Scrivener, it is clear that noise generated within the building and outside has the potential to harm the amenities of the nearest neighbouring properties

– particularly Kites Croft and on the west side of St Margarets Lane and St Margarets Cottage and Priory Cottage on the east side, to the south of the appeal site. It is his professional judgement that with the imposition of conditions when there is either a show or rehearsal on to: limit noise within the building; close all doors and windows other than the entrance doors; and, erect a 2m high acoustic fence along the entire length of the south eastern boundary; then these measures, combined, should reduce the noise levels to 'low impact' for the occupiers of the immediate neighbours.

9.6 I have strong reservations in respect of the monitoring and enforceability of some of these conditions. As I have set out earlier, TFT have a history of ignoring planning conditions. Whilst noise limiting equipment could be installed it would need to be maintained at the required level and be running throughout all shows and rehearsals. I accept that the installation and retention of the noise attenuation fence could be enforced. However, I can see the requirement to keep all windows and doors shut, especially during hot weather, to be very difficult to enforce.

9.7 On this basis, even if the conditions suggested by the Council's noise expert were to be imposed on any permission, I am not convinced that there will not be any harm to the amenities of neighbouring properties. However, for the purpose of my planning balance I will treat this as a neutral matter.

Shortfall in Parking

9.8 I agree with the quantum of parking spaces that Mr Morton considers necessary to facilitate the Appeal site and the scale of demand associated with the three theatres (Arden, Acorn and Oak) at or adjacent the Appeal Site. I also agree with the level of car parking shortfall that he considers occurs at the Appeal Site and the resulting detrimental impacts on local highway operation and safety. Accordingly, the shortfall creates an unacceptable safety impact on the highway network and results in an unsafe arrangement for theatre

visitors, contrary to Policy R2, TIN1 and TIN2 of Fareham Local Plan 2037 and NPPF paragraph 115**.**

IUD

9.9 I attach substantial weight to my conclusions relating to the fact that this was intentional unauthorised development and that works continued despite enforcement officers requesting that works stop combined with the evidence of a blatant disregard by TFT of the planning system at their other site at The Great Barn, Titchfield, combined with the fact that previous applications had been refused for an additional [larger] theatre on this site. In addition, TFT have sought to discredit the Council through publicity when ignoring the fact that they have a history of breaching planning control.

Benefits

9.10 The appellants have not suggested any benefits arising from the scheme. I would consider that benefits would include the provision of additional jobs [although I am unable to quantity the number] and provision of increased choice of leisure facilities. I would attach moderate weight at most to these benefits.

Planning Balance Conclusions

9.11 I give full weight to the conflict with the basket of policies contained in this up-to-date LP that are particularly relevant to this appeal – namely: that development plan with particular regard to conflict with those polcies pertaining to sustainability; highway safety; and, sequential and impact tests.

9.12 Even if it were held that the imposition of conditions would ensure compliance with the relevant noise policies and that there was compliance with policy DS1, I remain of the view that the overall conflict with the DP policies and in particular policies R2, TIN1 and TIN2 are such that any benefits would still not outweigh this conflict

with an up-to-date LP. I consider that the conflict I have identified with polcies R2, TIN1 and TIN2 mean that there is conflict with the Development Plan as a whole, something that I consider should be afforded full weight on the basis that this is a recently adopted LP.

9.13 Added to this is my strong view that this is IUD to which, in the circumstances of this case should be afforded substantial weight.

9.14 It is for these reasons that I conclude that the planning balance overwhelmingly indicates that planning permission should be refused for the appeal development.

10.0 S174 GROUNDS (f) AND (g)

(f) The steps required to comply with the requirements of the notice are excessive, and lesser steps would overcome the objections.

10.1 As currently worded the rigs have to be dismantled and the seating removed. They can then be stored on the land. The Council has suggested that the word 'remove' in requirement (iv) for the seating be changed to 'dismantle' so that it can be stored in accordance with requirement (Vi).

10.2 The appellant's arguments appear to be that the requirement to remove the seating and technical rigs exceed what is necessary to remedy the breach of planning control. They the contend that if the appeal is dismissed only on lack of parking, then the site should be capable of being moth-balled until suitable parking is found.

10.3 I strongly disagree. It is clear to me that the seating and the technical rigs are integral items to allow Areas B and to be used as a theatre. It is therefore entirely acceptable and necessary to seek their dismantling.

10.4 There is no guarantee that: (1) the appeal would be dismissed solely on lack of parking; and even if that were the sole reason, that (2) alternative parking were to be become available.

10.5 The appellant made a conscious decision to undertake the works in the full knowledge that permission was required. The works were done at their own risk. The requirements are entirely reasonable and are essential part of the alleged breach. Accordingly, their dismantling is a reasonable and necessary requirement.

10.6 The requirements do not prohibit the use of Areas B and C for storage purposes and that could be ancillary to Area A as a theatre.

10.7 I do not see why filling in the orchestra pit would result in drainage issues. I understand that area has been tanked to avoid water infiltration. The pit is an essential element of the Arden theatre and its removal and backfilling are entirely reasonable.

10.8 In the Appellants Final Comments at 2.2 they argue that the proposed change to the requirements is 'non-sensical' as the dismantling of the seating which could then be stored in the same space is unreasonable. The purpose to require 'dismantling' is to remove those items which are considered to be an integral part of the breach alleged – namely the use as a theatre. If the seating could remain as it is, its sole purpose would be to sit in to watch a show. That would be non-sensical. It is therefore entirely reasonable to require the dismantling of the seating.

10.9 For the above reasons the appeal under ground (f) should be dismissed.

(g) The time given to comply with the notice is too short.

10.10 I note that there is no contention that the Appellants need more time to stop the actual use and I concur with this view. Accordingly step (i) period for compliance does not need to be changed.

10.11 The appellants seek a period of 9 months based upon a letter from EBC South Ltd at Appendix 24 to their Statement of Case. This letter indicates 2 months to remove the seating; 1 month for lighting; ½ month to backfill the pit and 1½ months to remove the stage. This gives a total of 5 months.

10.12 I accept that requirements (ii) onwards cannot start until requirement (i) has been complied with and therefore a period of 7

months [2 months + 5 months] for requirements (ii) onwards would seem necessary.

10.13 Accordingly, I can confirm that the Council would agree to the time for compliance with steps (ii) to (vi) being changed from three months to seven months.

10.14 To this limited extent the appeal under ground (g) should succeed.

11.0 CONCLUSIONS AND SUMMARY

11.1 This Appeal concerns Land at 71-73 St. Margarets Lane, Fareham PO14 4BG and an Enforcement notice alleging: "Without 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." The appeal is now proceeding on the grounds set out in section 174(2)(a), (d), (f), (g) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.

11.2 In my Proof I have set out the relevant planning history before considering the ground (d) appeal. I then set out relevant planning policy before considering each of the issues under ground (a), drawing where appropriate, on the expert opinions of the Councils two witnesses on highways and noise. I undertake the Planning Balance exercise for turning to grounds (f) and (g). I summarise each of these matters below.

Ground (d)

11.3 For the appeal to succeed on this ground, the onus is placed firmly on the appellant to show, on the balance of probabilities and as a matter of fact and degree, that the matters alleged in the notice had occurred more than ten years prior to the date of the notice, that is, by 22 November 2013.

11.4 Whilst much has been said on ground (d), in my professional judgement the issue is very simple.

11.5 As I have made clear it is common ground that any possible historical planning unit combining Units A and B has been increased to now

include Unit C. It is also agreed that Unit C was not incorporated into the other two Units until 2022/3.

11.6 Therefore, as a matter of fact, there is a different planning unit and a new planning chapter has started. The enforcement 'clock' restarted when this new breach commenced.

11.7 I have also set out why I do not consider that intensification is a relevant matter in this case.

11.8 Accordingly, for the detailed reasons that I have set out in Chapter 6, the breach of planning control alleged in the Notice occurred in 2022/3. This a period less than ten years and as such the ground (d) appeal must fail.

Ground (a)

11.9 As an introduction, the detailed evidence of the LPA shows that the balance falls decisively against permission being granted. Put simply, Policy makes clear that planning permission should not be granted.

11.10 I have set out that Section 38(6) of the Planning and Compulsory Purchase Act requires that applications for planning permission must be determined in accordance with the development plan, unless material considerations indicate otherwise. I have set out in detail the applicable policies and how they relate to the appeal development. The LP is a very recently adopted plan having been adopted on 5th April 2023 and must therefore be afforded full weight.

11.11 There are in my professional judgement 5 main issues for the ground (a) to consider, namely:

- whether the site is a suitable location for the use, having regard to its accessibility by sustainable modes of transport,
- the effect of the development on the vitality or viability of the Borough's centres or parades,

- the effect of the development on the living conditions of neighbouring occupiers with regard to noise and disturbance,
- whether the development makes adequate provision for parking provision in terms of highway safety, and
- whether the development comprises intentional unauthorised development.

Sustainability

11.12 On the first issue, sustainability, I have drawn on the expert evidence of Stuart Morton, who concludes at 4.2.23:

> *"The Appeal Site is not reasonably accessible by public transport due to the limited service level beyond typical evening show performance times. Travel by public transport to the Appeal Site is therefore an unattractive option for the majority of theatre visitors which is understood to attract visitors from across Fareham Borough and beyond. This is contrary to NPPF paragraph 114, and FBC Local Plan 2037 Policies R2, TIN1 and TIN2."*

11.13 Under this first issue I also consider Policy DS1: Development in the Countryside and that the unsustainable location of the site for the intended use [due to its unsustainability] results in conflict with DS1(b) and that the Arden theatre does not serve a local need but is instead a town centre use. I also conclude that the appeal development does not comprise 'small scale' development, and in any event, the development is a main town centre use which by definition should not be located in the countryside unless the applicant can demonstrate that there are no sequentially preferable sites. It has not been demonstrated that there is a requirement for a location outside of the urban area. Accordingly, criteria (i) is also not satisfied/relevant. For these reasons the appeal development is also in breach of Policy DS1.

Viability and Vitality Impacts

11.14 On the second issue, impact on the viability and vitality of town and district centres and parades, I set out that through Policy R2, the wording of which was supported by the Local Plan inspector, there is a lower threshold of 500 sq m for Town Centre uses and accordingly, as a matter of fact, it is necessary to demonstrate compliance with Policy R2 which contains two requirements. First, to show that sequentially there are not alternative sites; and second that the viability of town centres would not be affected. In both cases the PPG makes clear that the onus is upon the applicant/appellant to demonstrate compliance with these two tests – the sequential and impact tests.

11.15 Based on my detailed evidence I conclude on this second issue, of sequential and impact tests, that the development is contrary Policies R2 and R4 for the following two reasons: (1) the absence of alternative sequentially preferable sites in centres and parades has not been demonstrated; and (2) it has not been demonstrated the development would not cause significant adverse harm/impact on the vitality and viability of centres or parades.

Noise – Impact on Neighbours

11.16 The third issue is the matter of noise and the impact of the unauthorised use on immediate neighbours. In this regard I have considered the expert evidence of Brian Scrivener who concludes that noise generated within the building and outside has the potential to harm the amenities of the nearest neighbouring properties – particularly Kites Croft and on the west side of St Margarets Lane and St Margarets Cottage and Priory Cottage on the east side, to the south of the appeal site. This adverse impact arises with particular regard to patrons leaving the premises at the end of an evening show.

11.17 It is his professional judgement that with the imposition of conditions when there is either a show or rehearsal on to: limit noise within the building; close all doors and windows other than the entrance doors; and, erect a 2m high acoustic fence along the entire length of the south eastern boundary; then these measures, when combined, should reduce the noise levels to 'low impact' for the occupiers of the immediate neighbours.

11.18 Whilst I accept his conclusions, I have strong reservations in respect of the monitoring and enforceability of some of these conditions due to the fact that elsewhere TFT have a history of ignoring planning conditions. Whilst noise limiting equipment could be installed it would need to be maintained at the required level and be running throughout all shows and rehearsals. I accept that the installation and retention of the noise attenuation fence could be enforced. However, I can see the requirement to keep all windows and doors shut, especially during hot weather, to be very difficult to enforce.

11.19 On this basis, even if the conditions suggested by the Council's noise expert were to be imposed on any permission, I am not convinced that there will not be any harm to the amenities of neighbouring properties. However, for the purpose of my planning balance I have treated this as a neutral matter.

Adequate Parking Provision

11.20 The fourth issue is the provision of sufficient parking spaces and I agree with the quantum of parking spaces that Mr Morton considers necessary to facilitate the Appeal site and the scale of demand associated with the three theatres (Arden, Acorn and Oak) at or adjacent the Appeal Site. I also agree with the level of car parking shortfall that he considers occurs at the Appeal Site and the resulting detrimental impacts on local highway operation and safety. I also consider that it would be appropriate to take into account the current planning application which is before the council for 93 parking spaces on land to the north of Kites Cottage for the simple reason that there is no guarantee – at this moment in time – that planning permission

will be granted. Accordingly, the significant shortfall creates an unacceptable safety impact on the highway network and results in an unsafe arrangement for theatre visitors, contrary to Policy R2, TIN1 and TIN2.

Intentional Unauthorised Development

11.21 On the final issue, IUD, I attach substantial importance and weight to my conclusions relating to the fact that this was intentional unauthorised development based upon the evidence of their behaviour at The Great Barn, Titchfield.

11.22 The appellants have not suggested any benefits arising from the scheme. I would consider that benefits would include the provision of additional jobs [although I am unable to quantity the number] and provision of increased choice of leisure facilities. I would attach moderate weight at most to these benefits.

Planning Balance

11.23 As to the planning balance, I give full weight to the conflict with the basket of policies contained in this up-to-date LP that are particularly relevant to this appeal – namely: that development plan with particular regard to conflict with those polcies pertaining to sustainability; highway safety; and, sequential and impact tests.

11.24 Added to this is my strong view that this is IUD to which, in the circumstances of this case should be afforded substantial weight.

11.25 The planning balance clearly indicates that the substantial harms that have identified outweigh the appellants needs for an additional theatre.

11.26 For the above reasons, I respectfully request that the Inspector DISMISS the Ground (a) appeal.

(f) The steps required to comply with the requirements of the notice are excessive, and lesser steps would overcome the objections.

11.27 As currently worded the rigs have to be dismantled and the seating removed. They can then be stored on the land. The Council has suggested that the word 'remove' in requirement (iv) for the seating be changed to 'dismantle' so that it can be stored in accordance with requirement (Vi).

11.28 The appellant's arguments appear to be that the requirement to remove the seating and technical rigs exceed what is necessary to remedy the breach of planning control. They the contend that if the appeal is dismissed only on lack of parking, then the site should be capable of being moth-balled until suitable parking is found. I strongly disagree. It is clear to me that the seating and the technical rigs are integral items to allow Areas B and to be used as a theatre. It is therefore entirely acceptable and necessary to seek their dismantling. There is no guarantee that: (1) the appeal would be dismissed solely on lack of parking; and even if that were the sole reason, that (2) alternative parking were to be become available.

11.29 The appellant made a conscious decision to undertake the works in the full knowledge that permission was required. The works were done at their own risk. The requirements are entirely reasonable and are essential part of the alleged breach. Accordingly, their dismantling is a reasonable and necessary requirement.

11.30 Finally, I do not see why filling in the orchestra pit would result in drainage issues. I understand that area has been tanked to avoid water infiltration. The pit is an essential element of the Arden theatre and its removal and backfilling are entirely reasonable.

11.31 For the above reasons the appeal under ground (f) should be dismissed.

(g) The time given to comply with the notice is too short.

11.32 I note that there is no contention that the Appellants need more time to stop the actual use and I concur with this view. Accordingly step (i) period for compliance does not need to be changed.

11.33 The appellants seek a period of 9 months based upon a letter from EBC South Ltd at Appendix 24 to their Statement of Case. This letter indicates 2 months to remove the seating; 1 month for lighting; ½ month to backfill the pit and 1½ months to remove the stage. This gives a total of 5 months.

11.34 I accept that requirements (ii) onwards cannot start until requirement (i) has been complied with and therefore a period of 7 months [2 months + 5 months] for requirements (ii) onwards would seem necessary. Accordingly, I can confirm that the Council would agree to the time for compliance with steps (ii) to (vi) being changed from three months to seven months.

11.35 To this limited extent the appeal under ground (g) should succeed.