

**TOWN AND COUNTRY PLANNING ACT 1990
SECTION 174 APPEALS**

APPEAL by Mr K Fraser against the decision of Fareham Borough Council to issue an enforcement notice alleging, without planning permission, for

- 1) a material change of use of the land to a theatre use has occurred within the last ten years.
- 2) an engineering operation to excavate and create an underground area beneath the Land

At 71-73 St Margarets Lane, Titchfield PO14 4BG



**SUMMARY of PROOF OF EVIDENCE OF
IAN MICHAEL DONOHUE BA MRTPI**

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

1.0 QUALIFICATIONS AND EXPERIENCE

1.1 I am Ian Michael Donohue. I hold a Bachelor of Arts Degree in Town and Country Planning from Trent Polytechnic. I am a Member of the Royal Town Planning Institute.

1.2 The evidence which I have prepared and provide for this appeal is given in accordance with the guidance of my professional institution and I confirm that the opinions expressed are my true and professional opinions.

2.0 SCOPE OF MY EVIDENCE

2.1 In my Proof I deal with the appeal in so far as the planning policy and development management issues including the enforcement notice.

3.0 INTRODUCTION

3.1 Titchfield Festival Theatre (TFT) is a well-respected community theatre company that has grown in combination with the historic strong association of the Titchfield area with William Shakespeare.

4.0 DESCRIPTION OF THE SITE AND SURROUNDING AREA

4.1 This has been agreed in the Statement of Common Ground

5.0 PLANNING HISTORY

5.1 This has been agreed as part of the statement of common ground.

5.2 One point to consider is the appeal decision because it has potential implications for the use of unit B. Retrospective permission was granted in 2012 for use of Unit A as Theatre and unit B for B1 or B8 with a temporary permission. TFT appealed the temporary condition.

5.3 The appeal was upheld, and permanent permission was granted however there is no mention of BI in the decision. In my view this is an error as the only condition being appealed was condition I, the time limit, therefore all other conditions should be carried forward. This is important because there is a theoretical fallback to unit BI (now EI) which can be a town centre use.

Use of the units

5.4 The sworn statement from Kevin Fraser covers the history of unit A and B

5.5 The site of Areas A, B & C now comprise one building. There are the two pre-existing theatres, the Oak Theatre with a capacity of 188 seats and the Acorn Theatre with a capacity of 96 seats within Area A, which as permitted under the 2012 appeal. Area B has at all material times since 2012 been in use for scenery storage for plays in the Acorn and Oak theatre, performance rehearsals and for performances in the Oberon (a large studio space with seating for 66 people) together with other storage and community uses.

5.6 The limited extension of Area B into Area C has facilitated the creation of a third theatre “the Arden Theatre”. Together with a basement area (used as an orchestra pit). The number of seats in the new theatre is 463 with ‘backstage’ facilities provided in Area C. The main access to the Theatre is via an existing doorway on the eastern side of the building, however there is also internal access from units A/B.

5.7 The remainder of Unit C is used for ancillary purposes related to the theatre including rehearsal space and changing rooms together with limited external storage and community use.

6.0 PLANNING POLICY CONTEXT

6.1 This is covered in the statement of common ground.

7.0 **GROUNDINGS OF APPEAL**

Ground A

7.1 The main issues are:

- whether the site is a suitable location
- the effect of the development on vitality or viability
- the effect of the development on the living conditions of neighbouring occupiers
- whether the development makes adequate provision for car parking
- Whether there is a fallback with regard to the historical use of unit B

Planning Policy assessment

7.2 Consideration has been given to the following caveats of policy DSI: -

b) It is considered that the development has taken place on previously developed land.

c) the theatre could be considered a community and leisure facility policy DSI. Apart from Fareham Live there are no other nearby theatres.

The effect of the development on the vitality or viability of the Borough's centres or parades,

7.3 Theatres are recognised in the Fareham Local Plan (hereinafter referred to as the local plan) and the National Planning Policy Framework 2023 as a main town centre use. This is covered by policy R2.

7.4 However, before considering the sequential test, it is important to consider the following:

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- Is the site a small site in accordance paragraph 93 of the NPPF. If so, no sequential test is required.
- On the 2012 application the officers considered a sequential test in the Titchfield area only was appropriate.
- An application for a 500 seat auditorium has been granted for the Waypoint Church on the basis it was a local facility however no restrictive conditions and the web site shows it being available for hire.
- The inspector is asked to have regard to two appeal decisions which are pertinent in relation to the sequential test.

Tesco Stores Ltd v. Dundee City Council

Relates to suitable sites that might accommodated the use.

Rushden Lakes– appeal ref APP/G2815/V/12/2190175

The key point is that sites must be available now and disaggregation of uses is not required.

- 7.5 Paragraph 7.23 of the local plan states that - *The Council will be pragmatic as to the level of evidence required in support of such proposals as this should be proportionate to the nature of the proposal under consideration.* The council have not provided any steer in relation to the sequential test.

Sequential test

- 7.6 A sequential test has been undertaken in accordance policy R2.
- 7.7 Policy R2 is specific with the wording - **centres or parades**. As such areas outside of the these identified areas have not been considered in the sequential test.

Town Centre

- 7.8 The only possible vacant unit is the former post office on West Street however this is only 349 sq. mts. in size. Which is only half the size required.

District Centres

- 7.9 The key issue is the blue line is shown tightly drawn around the buildings offering little space for development. Certainly not for a warehouse type size.

Local Centres and Small Parades

- 7.10 As with district centres the local centres and parades would be too small to facilitate a theatre of the size required.
- 7.11 Notwithstanding this Titchfield is considered a local centre though there is no space within the defined centre it is possible to walk to the centre from the site.

Conclusion

- 7.12 There are no sites available for a theatre of this size within local centres and parades.

Vitality Or Viability

- 7.13 The Local plan requires a vitality or viability assessment. It should be noted that the figure of 500m² in the local plan is lower than within NPPF paragraph 94 which is 2,500m².
- 7.14 In terms of the assessment the key element to consider is that there has to be competition. There is none and t This view is supported by the Theatres Trust.

- 7.15 The sequential test has identified that there are no suitable, available or viable alternatives nor would there be an impact on vitality and viability.
- 7.16 As two theatres and associated community activities already exist on the site it would not make commercial sense to split the theatres across two sites.

Other matters

Fallback

- 7.17 For fallback development to be a material consideration there has to be a lawful development that a developer is likely to carry out anyway.
- 7.18 Case law is cited from *Gambone v SSCLG (2013)* and *Mansell v Tonbridge and Malling Borough Council [2017] EWCA Civ 1314*
- 7.19 If the area formerly known as unit B could be fire-curtained off from unit C (where unit B's wall used to be) then a smaller Arden theatre could be operated in that unit B space.
- 7.20 In terms of performances, unit A would still operate under the 2012/2013 permission/appeal which allows for 140 performances per year. However, unit B's (the Arden theatre) performances would not be limited.
- 7.21 The fallback scenario could result in matinees in the Oak and Acorn Theatres at the same time and then in the evening a performance in the Arden.

Other policies

- 7.22 The development would comply with the following policies and the framework.
- DS2 in relation to the Meon Gap

- Strategic policy R4 in relation to Community and Leisure Facilities (includes cultural) in that: -
 - There is a need for the facility.
 - The site is accessible to the local community it serves.
- Para 96. Of the NPPF
- Para 97 d) of the NPPF

Conclusion to ground A

- 7.23 The sequential test has demonstrated that there are no alternative sites in the existing centres or parades. Nor is there any competition.
- 7.24 The increase in theatre capacity and the noise from within the building would not be detrimental to neighbours.
- 7.25 Adequate provision of accessible and available parking spaces is available.
- 7.26 Regard has to be had to the fallback situation as detailed under the ground D appeal. A ground (a) planning permission could bring the advantage of a condition which limits performances occurring in units B and C.
- 7.27 It is argued that the development would comply with policies of the Fareham Local Plan 2037 and the NPPF and as such conditional planning permission should be granted for the development as it exists.

Ground D

- 7.28 The sworn statement demonstrates that over the past 13 years or so, Area B of 73 St Margaret's Lane has been continuously in a use ancillary to the lawful permitted use of unit A.

- 7.29 Unit A/B was operating as one planning unit up until the creation of the Arden theatre. As such the Arden could have been created in unit B without the need for planning permission
- 7.30 If the ground D is accepted, then the encroachment into unit C in terms of the theatre use is materially small, both physically and in terms of increased use.
- 7.31 The creation of the Arden Theatre has not resulted in an intensification of the use. Reference is made to the judgement in **Brooks and Burton (Brooks and Burton Ltd v Secretary of State for the Environment [1978] 35 P&CR 27)**.
- 7.32 It is argued that the addition of the Arden Theatre has not resulted in a '**marked change in the character of the use**'.

Ground F

- 7.33 There are various scenarios to consider under this ground. For example: -
- Mothballing the theatre subject to additional parking
 - A reduction in seating capacity to match the current usage
 - The retention of the Arden and unit C for rehearsals.
 - The storage of theatre related equipment
- 7.34 It also interesting to note what the council has not asked for in terms of the enforcement notice in particular the re-instatement of the wall between units B and C

Ground G

- 7.35 9 months is requests to complete the works.