71 – 73 ST MARGARET'S LANE, TITCHFIELD

LPA'S OPENING STATEMENT

INTRODUCTION

1. On 22 November 2023 the LPA issued an Enforcement Notice ('EN') in respect of land at 71-73 St Margaret's Lane. 71-72 St Margarets Lane now comprises a single building, following unauthorized works by the Appellant. There are three distinct areas within the building, each of which has its own planning history, as follows:

    a. Area A contains the existing Oak and Acorn theatre and has planning permission for theatre use, granted in 2012.
    b. Area B has planning permission for storage use, also granted in 2012, with a planning condition restricting its use to B1 and B8 only.
    c. Area C has a lawful use for workshop and storage accommodation dating back to 1963. Until 2022/23 it was a separate building.

2. The EN does not relate to Area A. It was issued in respect of Areas B and C only and alleges that there has been a material change of the use of the land encompassing Areas B and C to use as a theatre, together with engineering works to excavate an underground area.

3. Since issuing the appeal, the Appellant has withdrawn grounds (b and e) but has added a new ground (d). The appeal now proceeds on grounds (a), (d), (f) and (g).

GROUND (D)

4. Ground (d) was added following the Inspector's query as to whether the Appellant's SoC contained a 'hidden' ground (d) argument. The LPA made clear at the CMC that, in so far as it understood the argument, it appeared misconceived. It remains of that view.

5. Ground (d) is that *"at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters"*: s. 174(2). This reflects the requirement in s. 173(1) for an EN to state *"the matters which appear to the local planning authority to constitute the breach of planning control"*. This makes clear that any ground (d) appeal must directly reflect what is alleged in the notice.

6. In this case, the relevant "matter" constituting the breach of planning control is *"the material change of use of the Land to theatre use (sui generis)"*. The "Land" is identified on the plan. It encompasses Areas B and C.

7. It follows that the ground (d) argument must relate to the alleged theatre use of Areas B and C together. But the Appellant does not attempt to do this. The ground (d) argument is instead based on the accrual of a lawful theatre use in Area B alone. The agreed SoCG records that *"Area C had not been used for a theatre use for a continuous period of 10 years prior to the issue of the Enforcement Notice on 22nd November 2023"*.

8. It follows that the ground (d) appeal is bound to fail. The Appellant cannot show that it was too late to take enforcement action in respect of the breach of planning control which is alleged in the EN.

9. The Appellant's arguments under ground (d) are instead relevant to the question of whether there is a fallback position whereby the Appellant can revert to a lawful theatre use in Area B. This is discussed further under ground (a).

GROUND (A)

10. The starting point for ground (a) is the development plan. This has statutory priority in accordance with s. 38(6) and the NPPF confirms that the planning system should be *"genuinely plan led"* (para 15). The Fareham Local Plan 2037 was very recently adopted, having been found sound by an Inspector after examination. It is an up to date plan and must carry full weight.

11. The LPA's case is that the unauthorized development is contrary to the recently adopted Fareham Local Plan in four key respects.

Policy R2 – failure to meet the sequential and impact tests *(Inspector's 2nd main issue)*

12. It is common ground that the unauthorized theatre development is a main town centre use, therefore policy R2 applies.

13. Contrary to the Appellant's claim, the unauthorized development is clearly not *"small scale rural development"* which, according to NPPF para 93, should not be subject to a sequential test.

14. The unauthorized development cannot comply with policy R2, because criteria (c) requires that *"the site is located inside the defined urban area and is accessible, particularly by public transport"*. The appeal site is not within the defined urban area. It is in the countryside.

15. The Appellant has failed to demonstrate that *"there are no sites in the centres or parades that are available, suitable or viable"* as required by criteria (a). The sequential test which is put forward is cursory and incomplete. It omits to consider town centre sites which Mr Jupp has identified and does not consider edge of centre sites at all. The Appellant has also failed to conduct any proper impact test.

16. Other issues which are relevant to compliance with policy R2 include accessibility by public transport (criteria c), parking provision (criteria b) and amenity implications (criteria e). These issues are addressed separately.

17. Overall, there is a clear conflict with Policy R2. This necessarily causes no-compliance with Policy R4 on Community and Leisure Facilities.

Policies DS1 and TIN1 – lack of accessibility by sustainable transport modes and countryside location *(Inspector's 1st main issue)*

18. The Inspector's first main issue refers to the sustainabilty of the location in terms of sustainable modes of transport. The LPA considers that the issue of location also relates to the fact that that appeal site is located in the countryside and is therefore subject to a more restrictive policy approach in line with policy DS1.

Sustainable travel modes

19. Policy TIN1 provides that 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"* and will be permitted where, among other things, it gives *"priority to non-motorised user movement"*.

20. The unauthorsied theatre use manifestly fails on this front. There is no suitable walking route to the south of the appeal site. There is no safe and attractive cycle route serving the appeal site. There are some bus services within a reasonable walking distance, but the last bus is too early to make bus travel a realistic option. Given the wide catchment which a theatre of this size would have, it is obvious that the vast majority of patrons will have to travel by private car. There is no "genuine choice" about this.

Countryside location

21. Policy DS1 provides that development in the countryside will be supported where it falls within one of the specified categories. In this case it is common ground that three categories are potentially relevant, namely that development:

> "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."

22. The LPA's case on each point is as follows.

23. As to criteria b), it is accepted that the unauthorised development is on previously developed land. However, it is not *"appropriate for the proposed use"* because (i) it is a main town centre use and the sequential and impact tests have not been satisfied, (ii) it is in an unsustainable location and fails to reduce the need to travel by motorised vehicle, and (iii) there is inadequate parking provision.

24. As to criteria c), it is accepted that the unauthorized development is a *"leisure facility"* but the Appellant has not demonstrated a *"local need"*. The evidence is that theatres draw patronage from wide catchment areas, and there is no basis for suggesting that the Arden Theatre would be any different. This is not merely a *"community"* facility as envisaged in the Local Plan.

25. As to criteria i), in circumstances where the sequential test is not satisfied, the Appellant cannot demonstrate that a location outside the urban area is 'required'.

26. The LPA will therefore argue that the appeal site is in an unsustainable and inappropriate location, in conflict with policies TIN1 and DS1.

Policies TIN1 and TIN2 – inadequate parking *(Inspector's 3rd main issue)*

27. Putting it neutrally, the Appellant's position on the issue of car parking has been in a state of flux.

28. In 2013 an Inspector concluded that it was appropriate to determine the car parking requirement on the basis of 1 space per 5 seats. Both parties have adopted this approach, although in the LPA's view it is highly conservative.

29. A 463 seat theatre would generate a requirement for 93 spaces on this basis.

30. Mr Morton's assessment is that 23 cars can be accommodated on the appeal site, generating a shortfall of 70 spaces. The Appellant claims that 40 cars can be accommodated with a management plan in operation.[1] If that were accepted then the shortfall would be 53 spaces. It is therefore common ground that the on-site parking is insufficient.

31. The shortfalls would be greater still if the Arden Theatre was used at the same time as the existing theatres in Area A; although the Appellant says that it *"will be looking to restrict the use of the Arden Theatre"* so that it *"will not be used for performances when the Oak and Acorn Theatre … have performances on"*.[2]

32. The inadequate parking provision leads to queuing in the carriageway outside the theatre and parking over footways and leads to an unsafe situation for pedestrians. Several local residents attest to this, in addition to Mr Morton.

33. In its SoC the Appellant relied on off-site parking at St Margaret's Nursery and the Holiday Inn as meeting the on-site shortfall. However, the Holiday Inn parking has since been withdrawn. The Nursery parking is understood not to be available for matinee performances.

[1] TF proof para 5.8
[2] TF proof para 5.2

34. Various other possible off-site parking areas have been mooted, either on TFT's website and now in Mr Fisher's proof of evidence. These will be explored in evidence. The LPA's overall position will be that the Appellant has not identified sufficient off-site parking capacity to accommodate the likely demand and avoid the existing problems of indiscriminate parking and queuing on the highway. Further, none of the off-site parking is within the Appellant's control and none of it is secured by any legal mechanism. It cannot be relied on as being available in the long term.

35. The Appellant has proposed a Unilateral Undertaking to prevent the unauthorised Arden Theatre from being used unless a parking scheme relating to off-site land has been approved and implemented. It is understood that the Appellant intends to rely on land opposite the appeal site (which it does not own), in the event a pending planning application for 97 car parking spaces is successful. However, the UU has been drafted to enable the identification of alternative off-site land.

36. The UU involves a high degree of uncertainty. The Appellant is essentially seeking permission for a development which is currently unacceptable, on the basis that a solution may turn up in the future. But there is no guarantee a solution will turn up, and even if it does, no guarantee that it will endure in the long term. This has the effect of deferring a decision about the acceptability of the parking provision to a later point, but this issue which goes to the heart of whether permission should be granted and ought to be determined now.

Policy D2 – impact on residential amenity (noise and disturbance) *(Inspector's 4th main issue)*

37. The parties respective noise experts have agreed a statement of common ground which resolves all issue between them.[3] It is agreed that it is necessary to impose conditions to ensure an acceptable impact on neighbouring amenity, and that

[3] CD B.2

with such conditions adverse impacts will be avoided. On that basis there would be no breach of policy D2, provided conditions are imposed.

38. Accordingly it is suggested that there will be no need to hear formal evidence on noise matters, however the noise witnesses are available should there be questions from the Inspector or members of the public.

Other material considerations - claimed fallback position

39. The Appellant advances a fallback position which it says is a material consideration in the appeal, namely that it could lawfully develop a smaller 341-seat Arden Theatre in Area B alone. [4] This is said to be on the basis that Area B was continuously used for theatre purposes for over 10 years, which the Appellant can revert to in the event the EN is upheld.

40. This claimed fallback position is an entirely new point raised for the first time in Mr Donohue's proof of evidence, and further advanced in Mr Fraser's rebuttal. The Appellant should not be able to raise wholly new points which were not identified in its SoC: see PINS Procedural Guidance Annex B para B.2.2. [5]

41. On the basis of the Appellant's evidence – some of which was produced only two working days ago – it is accepted that Area B was used for activities which were ancillary to the theatre use permitted in Area A for a continuous period of at least 10 years. Accordingly that use was lawful prior to the unauthorised works.

42. However, those rights have been lost and the Appellant cannot revert back to them. It is common ground that, prior to the unauthorized works, Areas A and B together were a single planning unit in (lawful) theatre use, and Area C was a separate planning unit in storage use. It is also common ground that, as a result of the unauthorized works, Ares A, B and C are now a new single planning unit. There

[4] ID proof para 7.36, RP proof para 3.3

[5] "New evidence will only be exceptionally accepted where it is clear that it would not have been possible for the party to have provided the evidence when they sent us their full statement of case."

is no ground (b) appeal and therefore the Appellant accepts that this was a material change of use.

43. The consequence of creating a new planning unit was that the rights which had accrued to Area B were lost: *Panton*[6] and *Stone*[7]. The planning unit in respect of which they had accrued no longer exists. Instead there is a new planning unit with no lawful use rights. There could be no resumption of a theatre use of Areas A and B together without subdivision of the new planning unit.

44. Contrary to the LPA's case, even if Area B still has a lawful theatre use, it does not follow that the result of reverting back would be a 341 seat theatre in Area B. A judgement is needed on the likelihood of that happening, which will in turn inform the weight to be given to any fallback position which does exist.

Conclusion on ground (a)

45. The unauthorised development is contrary to policies R2, R4, DS1, TIN1 and TIN2 and contrary to the Fareham Local Plan 20137 as a whole. Planning permission should be refused unless material considerations indicate otherwise. The claimed fallback position is either not a material consideration at all, or if it is, it carries no weight. There are no other material considerations which indicate a decision otherwise than in accordance with the development plan.

GROUND (F)

46. The EN as drafted seeks to remedy the breach of planning control by requiring the theatre use to cease, while reflecting the lawful uses of Areas B and C. A minor amendment is proposed to improve consistency. The LPA will argue that there are no lesser steps that would remedy the breach. The steps are not excessive.

[6] *Panton v SSETR* (1999) 78 P & CR 186 at 193
[7] *Stone v SSCLG* [2014] EWHC 1456 (Admin)

47. Insofar as the Appellant's ground (f) argument is premised on the claimed fallback position then it must be rejected for the reasons already given.

48. Finally, it is noted that the Appellant has identified various 'scenarios' to consider but has not identified the alternative steps which it suggests should be imposed as an alternative to those currently included in the EN.

GROUND (G)

49. The Appellant contends that the time for compliance should be extended to 9 months, from the 3 month period currently set out in the EN. As Mr Jupp explains, the LPA would accept a 7 month period based on the letter from EBC South Ltd.

CONCLUSION

50. The LPA will argue that:
    a. Ground (d) is not made out.
    b. Ground (a) should be rejected and planning permission should be refused
    c. Subject to the minor amendment proposed by the LPA, the steps required by the EN are not excessive and ground (f) should be rejected.
    d. The LPA is willing to agree to an extended period for compliance of 7 months so the ground (g) appeal should be allowed to that limited extent.

51. Overall, the EN should be upheld. The LPA intends to seek costs in respect of the Appellant's ground (d)/fallback argument.

Emma Dring

14 May 2024

cornerstone barristers

Appearances:

Emma Dring – counsel (instructed by Hilary Hudson, solicitor, Southampton, Fareham and Havant Legal Partnership)

Stuart Morton, BSc (Hons), MSc, MCHIT of i-Transport – transport witness

Brian Scrivener, MIOA of Sound Advice – noise witness

Steven Jupp, BA, LLM, MRTPI of Planning Solutions – planning witness