



Appeal Decision

Inquiry held on 14-17 May 2024, 21-22 May 2024 (virtual sessions)

Site visits made on 14 May 2024 and 20 May 2024

by N Thomas MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 12 August 2024

Appeal Ref: APP/A1720/C/23/3336046

Land at 71-73 St. Margarets Lane, Fareham PO14 4BG

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Titchfield Festival Theatre Limited against an enforcement notice issued by Fareham Borough Council.
- The notice was issued on 22 November 2023.
- The breach of planning control as alleged in the notice is 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 requirements of the notice are to:
 - (i) Cease the use of the Land as a theatre;
 - (ii) Backfill the excavated underground area beneath the Land with a suitable inert material (such as compacted aggregate, soil, or similar) to ground level;
 - (iii) Dismantle the stage;
 - (iv) Remove the seating;
 - (v) Dismantle the lighting rig and PA or other sound equipment; and
 - (vi) Remove the resultant materials from carrying out steps (iii), (iv) and (v) from the Land except to the extent that those materials are solely being stored on the Land.
- The periods for compliance with the requirements are:
 - Step (i): two months
 - Steps (ii)-(vi): three months
- The appeal was made on the grounds set out in section 174(2)(a), (b), (e), (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.

Decision

1. It is directed that the enforcement notice is corrected by:
Deleting the word 'Remove' from step (iv) and replacing it with 'Dismantle'.
2. It is directed that the enforcement notice is varied by:
Deleting the word 'three' and replacing with 'seven' in the period for compliance with steps (ii)-(vi).
3. Subject to the correction and the variation, the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Application for costs

4. An application for a partial award of costs was made by Fareham Borough Council against Titchfield Theatre Festival Limited. This application is the subject of a separate Decision.

Preliminary Matters

5. Prior to the Inquiry and following a Case Management Conference (CMC) the appellant withdrew the appeals on grounds (b) and (e) but advised that they wished to pursue an appeal on ground (d). The appellant confirmed during the course of the Inquiry that the appeal on ground (d) was withdrawn.
6. I note that some internal works and fenestration changes have been carried out to the building but have not been included in the Notice. It may be that these works were not development or were not unauthorised, or that the Council decided to under-enforce. These works are not before me.
7. A neighbour has raised a concern regarding overlooking from a top floor flat in the premises. The allegation does not relate to any residential use and this matter is not therefore before me.
8. I am cognisant of the likelihood that those attending the theatre and benefitting from community uses share protected characteristics, such as age and sex, under s149(7) of the Equality Act 2010. I have a duty to have due regard to the three aims of the Public Sector Equality Duty (PSED) as part of my decision. If I uphold the notice and dismiss the appeal on ground (a) it may have negative consequences for some members of the community, particularly in terms of advancing opportunity and fostering good relations.

Matters concerning the notice

9. The enforcement notice was served on individuals, including those who no longer have an interest in the land, but no one has been substantially prejudiced by this. It was also established during the Inquiry that it was correct that it was served on the Company Secretary rather than the Company Directors. The enforcement notice plan includes land owned by a third party, Hampshire County Council (HCC). The Council confirmed that the plan was correct, the notice was served on the third party and this was not disputed by the appellant. The appellant has suggested in their response to the costs application that the notice was invalid, but I have seen no evidence that would lead me to believe that to be the case.
10. The Council has suggested that for consistency step (iv) should be corrected to require that the seating is dismantled rather than removed. As step (vi) requires that the materials resulting from compliance with the other steps are removed, it is excessive to require that the seating is removed in step (iv). This would also conflict with the second part of the same requirement, which allows the resulting materials to be stored on the site. The Council accepts that the site has a lawful use for storage¹. In view of this, no injustice would be caused if I correct step (iv) as suggested.
11. The address on the notice refers to 71-73 St Margarets Lane. It is clear from the plan attached to the notice that it is not concerned with the area at the

¹ Ref P/12/0050/CU as varied by Appeal Ref: APP/A1720/A/12/2186833 for area B and ref FBC.3312/1 for area C.

front of the site (area A) but is concerned with the area within the red line which comprises areas B and C. For clarity I will refer to these areas as areas A, B and C in this decision as shown on the plan at appendix 3 of the appellant's Statement of Case.

Background

12. Titchfield Festival Theatre Limited (TFT) purchased 73 St Margarets Lane in 2010, which comprised areas A and B. In 2012, retrospective planning permission was obtained ('the 2012 permission') to use area A as a theatre and area B as storage. The permission was subject to condition 1, restricting the use to a temporary period until 2 May 2013 (one year from the date of the decision). Condition 2 required compliance with drawings, including a car parking diagram. Condition 3 required the submission and implementation of a Parking Management Plan. Condition 5 required the implementation of the approved car parking diagram and its retention. Condition 6 set out that public performances could only take place in area A and shall be limited to a maximum of 140 performances per annum. Condition 8 set out that area B could be used for purposes falling within use classes B1 or B8² and set out hours of use. The inclusion of use class B1 was to reflect the permitted development rights available at the time.
13. The 2013 appeal³ resulted in the use becoming permanent, through the removal of condition 1. Two theatres were built in area A, known as the Oak (188 seat capacity) and the Acorn (96 seat capacity). The parties agree that, prior to the alleged breach of planning control taking place, areas A and B had been used for a period in excess of 10 years for theatre purposes and had a lawful use as a theatre. I have no reason to disagree.
14. In 2021 TFT purchased area C (71 St Margarets Lane). Planning permission⁴ was sought and granted to extend area C to connect it to area B and raise the height of the roof. A theatre was created within areas B and C known as the Arden Theatre and has 463 seats. The use of areas B and C as a theatre is the subject of the enforcement notice.

The appeal on ground (a) and the deemed planning application

15. Having regard to the reasons for issuing the notice, the main issues are as follows:
 - whether the site is a suitable location for theatre 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,
 - whether the development makes adequate provision for parking in terms of highway safety, and
 - the effect of the development on the living conditions of neighbouring occupiers with regard to noise and disturbance.

² Of the Town and Country Planning (Use Classes) Order 1987 as it existed prior to the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 coming into force.

³ Appeal Ref: APP/A1720/A/12/2186833

⁴ Ref P.22.0255.FP

16. The site lies outside of any urban settlement boundary. St Margarets Lane has a semi-rural character due to the intermittent ribbon of residential and commercial development, with farmland and open fields apparent in the surrounding area. There is no dispute that the site is within the countryside for the purposes of the development plan. Fareham Local Plan (adopted 2023) (FLP) Policy DS1 sets out the circumstances where development in the countryside will be supported. The most relevant criteria are b), c) and i). There is no requirement that a development must meet all the criteria to be acceptable. Criteria c) and i) are considered in relation to the second main issue.
17. Criterion b) is permissive towards development on previously developed land, where it is appropriate for the proposed use. The site is previously developed land. When making a judgement as to whether the land is 'appropriate' for the proposed use it is relevant to consider compliance with the other relevant policies in the plan, as well as any other material considerations. The most relevant policies are identified in the reasons for issuing the notice and these policies are reflected in the main issues.

Accessibility

18. FLP Policy TIN1 sets out 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. FLP paragraph 10.8 explains that in applying the policy to locations outside the urban area boundaries, it will need to be demonstrated that the intended use and occupiers have a reasonable prospect of a choice of modes of transport to key destinations. The policy also sets out requirements for new development. Requirement a) relates to the delivery of non-road user routes and connections. Requirement b) relates to access to public transport services.
19. The nearest settlement is the village of Titchfield to the southeast, with the larger built-up area of Locks Heath to the west. The edge of the built-up area of Fareham is beyond Titchfield to the east.
20. The site employs approximately 15 members of staff, with five of those being as a result of the appeal development. It attracts a number of visitors in relation to rehearsals and use by community groups. Due to the size of the theatre, it is likely that the largest generator of trips to and from the site is patrons attending performances at the Arden theatre.
21. It is common ground that the site has good pedestrian access from the A27 to the north at St Margarets Roundabout, which has a shared footway and cycleway, but lacks safe pedestrian access to Titchfield to the south due the characteristics of St Margarets Lane. The road crossings at the roundabout are mostly signalised, since being upgraded in approximately 2016. This offers a safer but longer pedestrian route to the centre of Titchfield via the A27, with a footpath through the Titchfield Community Centre car park. There are therefore areas of population within walking distance of the appeal site, but these are towards the outer range of comfortable walking distance of 1,600 metres, and would not therefore be attractive to all patrons, particularly during the dark winter months, bad weather, or for those with young children or reduced mobility. I note that traffic lights at St Margarets Roundabout, while improving pedestrian safety, add to journey times. Furthermore, patrons may come from a wider area than the closest settlements.

22. There are bus stops within 350 metres of the theatre for the X5 service between Southampton and Gosport, but bus services are relatively infrequent and do not continue into the evening. Bus stops for the X4 service between Southampton and Portsmouth are located beyond what is normally considered to be a convenient walking distance from the site. Both services provide connections to local centres and towns such as Fareham and Locks Heath. Bus services may therefore be used by those attending matinee performances or other activities which take place during daytime but do not provide a useful alternative to the private car for patrons attending evening performances. Some patrons may use public transport to get to the theatre and arrange alternative means of leaving after a performance in the evening, for example a taxi or car share. No baseline information has been provided to indicate that this occurs to a significant degree.
23. In terms of the potential to cycle to the site, the shared pedestrian and cycle route on the A27 links to residential areas. Average traffic speeds on St Margarets Lane are slightly higher than the 30-mph limit and there are over 2000 two-way vehicles per day. This would make it unsuitable for most cyclists and/or safety concerns⁵ as part of cycle infrastructure design. Although that does not mean it is not used by cyclists, at times when the theatre is busy and if there is on street parking on the lane, cycling on St Margarets Lane may be challenging and unattractive as an option for most people. Although there are significant residential areas within a 20-minute cycle distance and the site is close to the A27 cycle route, due to the nature of the theatre use and the limitations of St Margarets Lane, it is unlikely that a significant number of patrons travel to the theatre by bicycle. The appellant's highway witness stated that some members of the youth theatre already cycle to the site, but there was no detailed information as to the proportion of trips.
24. Due to its location, most trips to the site are therefore likely to be made by private car. While there is potential for the use of alternative modes of transport, each mode has limitations which means it is unlikely to be a realistic alternative for the majority of trips. The development does not therefore reduce the need to travel by motorised vehicle as it does not offer a genuine choice of mode of travel.
25. The appellant is offering to develop and implement a Travel Plan, with the aim of promoting non car travel to the site. This would be secured through the submitted Unilateral Undertaking (UU). I have not been provided with a draft or outline Travel Plan. No baseline information has been provided as to current travel choices to the site, obstacles to the use of non-car modes, or targets for a modal shift. It is not possible therefore to conclude as to whether any measures to achieve any targets would be likely to be effective or would bring about a shift from motorised to non-car modes of transport. A Travel Plan would not therefore overcome the constraints of the site in terms of accessibility.
26. The UU also seeks to secure parking restrictions on St Margarets Lane through a financial contribution to a Traffic Regulation Order (TRO), which could improve conditions for cyclists and pedestrians through restricting on street parking. Through the UU, the use would cease until the payment was made and the works implemented. Hampshire County Council (HCC) has stated that there

⁵ Image 3.5 on page 12 of Stuart Morton's Proof of Evidence

is no certainty that such a scheme would be implemented as it would require public consultation. Furthermore, although this is likely to improve highway safety, it is not clear whether it would result in a modal shift from motorised transport. I therefore give this little weight.

27. A financial contribution would be secured through the UU towards a modal filter on St Margarets Lane. The potential for such a scheme was set out in the draft Fareham Local Cycling and Walking Infrastructure Plan (LCWIP), which sought to reduce the speed limit to 20mph and restrict or prohibit motorised vehicles, to improve conditions for cyclists. HCC has stated that the sum offered (£12,000) would cover a feasibility study. Two TROs would be required and the restrictions on vehicles that would be likely to result from the installation of a modal filter would have implications for local traffic routes.
28. Significant additional funding would be required for this scheme as HCC considers that the likely cost would exceed £100,000. I have not been advised that there is other planned development in the area that is likely to contribute to the works. There is an employment allocation in the FLP on land north of St Margarets Roundabout, but there is no indication as to whether or not it would be required to contribute to improvements to St Margarets Lane. Furthermore, improving conditions for cyclists is unlikely to encourage theatre goers, who may be well dressed, to cycle to performances at the site. It is not clear therefore that the contribution would be effective in making the development acceptable in this regard.
29. I cannot therefore conclude that the site is a suitable location for the use, having regard to its accessibility by sustainable modes of transport. The development is therefore in conflict with FLP Policy TIN1, insofar as it seeks to ensure that development reduces the need to travel by motorised vehicle and offers a genuine choice of mode of travel. It is also in conflict with section 9 of the National Planning Policy Framework (NPPF).
30. The employment allocation on land north of St Margarets Roundabout is relatively close to the site. The site is accessible from the A27 with its shared pedestrian and cycle route and bus stops. It is not comparable with the appeal site which does not benefit from easy cycle access and requires a 350-metre walk to bus stops.
31. The appellant argued that Fareham Town Centre, which accommodates Fareham Live and the Ashcroft Centre, is not accessible by public transport. The railway station is a 20-minute walk away and bus services do not run in the evening. However, the town centre is closer to large residential areas, making it more likely that there will be pedestrian or cycle trips to the site, or that there will be shared trips. The town centre is not therefore comparable with the appeal site in terms of accessibility.
32. While it is an expansion of an existing facility, the provision of the Arden theatre is a large development in its own right which has the potential to generate a significant number of trips. It is not the case therefore that FLP Policy TIN1 is not applicable, as suggested by the appellant.

Vitality and viability

33. FLP Policy R4, although not specifically referred to in the reasons for issuing the notice, was agreed to be relevant. Proposals for new or extended community or

leisure facilities will be supported where they meet the four listed criteria. The policy further states that where community and leisure facilities are considered to be main town centre uses, and when proposed outside of the identified centres, Policy R2 shall apply. Main town centre uses are defined in the glossary to the NPPF as including theatres.

34. FLP Policy R2 sets out that main town centre uses outside of the Borough's centres or parades will be permitted where they can demonstrate that there is no significant harm to the centres and parades, and in specific circumstances. These circumstances are set out in five criteria. As the criteria are linked by the word 'and', proposals need to meet all the criteria in order to be acceptable. Criterion a) requires that the proposal meets a demonstrable need for the use in the proposed location, a full sequential test (ST) has been carried out demonstrating that there are no sites in the centres or parades that are available, suitable or viable. The Borough's centres and parades are listed in Policy R1 and include the town centre of Fareham, district centres, local centres and small parades. Titchfield is listed as a local centre and Locks Heath is a district centre.
35. It is common ground that Policy R2 does not refer to edge of centres and that this policy was found sound through the local plan examination. The supporting text refers to the 'ST in line with the NPPF' (FLP paragraph 7.20). Paragraph 91 of the NPPF sets out that LPAs should apply a ST to planning applications 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 should out of centre sites be considered. It would therefore be reasonable to expect a ST to consider the hierarchy of locations, being town centre, edge of centre and out of centre, as set out in the NPPF.
36. NPPF Paragraph 92 states 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. Paragraph 93 sets out that this sequential approach should not be applied to applications for small scale rural offices or other small-scale development. The term 'small scale' is not defined in the NPPF.
37. The appeal development has resulted in a 463 seat theatre, with approximately 102 performances a year. It was agreed that areas B and C have a combined floor area of approximately 1,200 square metres, but this does not include the first and second floors or basement. In my view a development of this magnitude cannot reasonably be considered to be small scale and a ST is required.
38. The Planning Practice Guidance (PPG)⁶ makes it clear that it is for the applicant to demonstrate compliance with the ST, supported by the local planning authority. The PPG also confirms that consideration should be given to whether there is scope for flexibility in the format and/or scale of the proposal.
39. The appellant has not applied the ST to this development. The only site that was considered by the appellant was the former post office on West Street Fareham, but this was ruled out due to its size. The appellant argued that the extent of the district centres was drawn too tightly to allow space for

⁶ Paragraph: 011 Reference ID: 2b-011-20190722 Revision date: 22 07 2019

development of the size required, the local centres and parades were considered to be too small, and no land was allocated for the use. Edge of centre sites were not considered. Commercial venues such as Fareham Live in the town centre are too expensive to be viable for use by local theatre groups. Alternatively, other venues such as halls are too small to stage ambitious productions. Furthermore, the appellant has not given consideration as to whether any other edge of centre or out of centre sites are more accessible or a better connected to the town centre, as required by the ST.

40. The ST that was carried out in support of the 2012 planning application has been provided but is clearly out of date in relation to the appeal development. The availability of sites is unlikely to be comparable to the situation in 2012. Moreover, the ST was for a smaller theatre of 210 seats with rehearsal space, considerably smaller than the appeal development.
41. The PPG⁷ recognises that certain main town centre uses have particular market and locational requirements which mean they may only be accommodated in specific locations. Robust justification will need to be provided where this is the case. The appellant has put forward various reasons why the ST has not been applied.
42. While I have no reason to doubt that there a connection between Shakespeare and Titchfield, Shakespeare productions take place at the Great Barn, which is an off-site venue elsewhere in Titchfield. The objective to promote the link to Shakespeare is not the robust justification required to demonstrate particular market and locational requirements.
43. Some of the audience, actors, staff and volunteers are local to the appeal site, but it is clear from representations and interested parties speaking in support of the development, that the appeal development has a larger catchment than Titchfield and the nearby area. I recognise that it is not a commercially run regional theatre, but its reach is clearly beyond the immediate community. These considerations do not constitute the robust justification for a locational requirement as set out in the PPG.
44. The appellant suggests that there is a geographical 'gap' in theatre provision between Fareham, Portsmouth and Southampton. TFT has a different 'offer' to the larger theatres in nearby towns, and the evidence indicates that TFT is well supported without any public or private financial support. There are allocations for new housing development to the north of Fareham, which is likely to add to the demand for new cultural facilities. The reference in the Retail and Commercial Leisure Study Update 2020⁸ to a theoretical demand for 1.9 venues based on average ticket revenue per venue is ambiguous (paragraphs 8.9-8.12). It is based on a large study area (Figure 7.1 on page 23) and is not qualitative in terms of the type of theatre. It is noteworthy that the evidence available suggested that there was no need to allocate development sites specifically for commercial leisure uses in Fareham Borough (paragraph 8.12) due to its relatively small market share of cultural activity within the study area. While the theatre is clearly well supported and successful, the evidence does not indicate that it fills a 'gap' in theatre provision or that it must be in this location.

⁷ Paragraph: 012 Reference ID: 2b-012-20190722 Revision date: 22 07 2019

⁸ Fareham Retail and Commercial Leisure Study Update Report Lichfields April 2020

45. The representative of the Theatres Trust referred to research that shows that amateur theatres are often located in rural areas as they cannot afford town centre rents. In this case the appeal site is owner occupied. The PPG makes it clear in paragraph 12⁹ that land ownership cannot provide the justification for accommodating the use in a particular location. I acknowledge that there are only rare opportunities for new theatres to be built, due to considerations such as viability and scale, but sequential considerations still apply. No detailed evidence has been put forward showing that it would not have been viable to locate the theatre in a sequentially preferable site.
46. The pre-existing use of areas A and B was as a theatre with ancillary uses including community uses. The expansion and the provision of the Arden theatre has expanded the range of facilities available, but it is not clear that this meets a specific local need that has to be provided in Titchfield or in this countryside location. The Arden theatre is independently accessible and while it may be more convenient for it to be co-located with the pre-existing theatres, rehearsal spaces and storage, I have seen no firm evidence to show that it would not be feasible to locate the theatre in a more accessible or urban location. The appellant stated that the theatre did not need to be co-located with the rehearsal space, storage and community uses on the site. Nonetheless, there has been no consideration of the availability of a site to accommodate either the entirety of the uses being carried out in areas A, B and C, nor a smaller development of the Arden Theatre without the ancillary uses.
47. The evidence has not demonstrated that there are no sequentially preferable sites that could be available and suitable for the use. Nor has it been shown that a countryside location is required.
48. The Council suggested a number of sites that appeared to be available and would be sequentially preferable to the appeal site. The onus is on the appellant to undertake a ST, based on an assessment of available sites in terms of their suitability and viability for the appeal development. It is not sufficient therefore for the appellant to simply set out reasons why the selection of sites identified by the Council would not be suitable or viable.
49. FLP Policy R2 sets a threshold of an impact assessment for main town centre uses proposed outside of the defined retail sets, of over 500 square metres (gross). The development is above the threshold of 500 square metres. No impact assessment has been carried out by the appellant as to the effect on the town centre, local centres and parades of locating the theatre in an out-of-town location. There is an emphasis in the FLP on the impact of retail development, but the policy covers all town centre uses.
50. The Theatres Trust recognises that a theatre can add a significant annual spend within the local area, hence the sequential preference for a town centre site, where complementary uses can help to support the vitality of town centres as recognised in the PPG.¹⁰ The appellant's assertion that theatregoers support local business such as the pub in Titchfield was not backed up by any evidence. Due to the countryside location, there are limited facilities or services nearby that offer the opportunity for shared trips.

⁹ Paragraph: 012 Reference ID: 2b-012-20190722 Revision date: 22 07 2019

¹⁰ Paragraph: 001 Reference ID: 2b-001-20190722 Revision date: 22 07 2019

51. I therefore conclude that the development is harmful to the vitality and viability of the Borough's centres or parades. It is in conflict with FLP Policies R2 and R4, insofar as they seek to direct main town centre uses to town and district centres and parades. It is also in conflict with FLP Policy DS1, insofar as there is no demonstrable need for a countryside location and there is no demonstrable local need that cannot be met by existing facilities elsewhere. It is in conflict with section 7 of the NPPF.
52. The appellant has referred to Locks Heath Free Church where planning permission¹¹ was granted in 2014 for an extension to an existing church to provide a new worship area and activity hall. I heard that this has become a larger auditorium with an unrestricted use and the appellant is of the view that it should have subject to the ST. Be that as it may, it was permitted on the basis of a community use, rather than a commercial theatre, and it does not indicate that the ST should not be applied in this case.

Parking and highway safety

53. St Margarets Lane has a 30-mph speed limit. It is wide enough for two vehicles to pass but narrows in the vicinity of the appeal site and to the south of the appeal site. From the north of the appeal site up to St Margarets Roundabout the lane has a footway on the west side and has street lighting. There are no parking restrictions.
54. When on street parking occurs on the lane, it is likely to reduce the width of the lane to one carriageway, particularly in the vicinity of the appeal site. Drivers also park partly onto the footway in order to maximise carriageway width, but this can then force pedestrians onto the road. On-street parking may also reduce visibility for other drivers and create hazards for cyclists. On-street parking is therefore likely to create a less safe environment for pedestrians, cyclists and other drivers. Drivers arriving at the theatre and trying to park may find that they have to queue or turn around to look for parking elsewhere, which is likely to interfere with the free flow of traffic on St Margarets Lane. This is likely to result in inconvenience and frustration for other drivers and potentially lead to unsafe manoeuvres. The parties agree that on-street parking and queuing on the highway associated with the theatre do occur, although the frequency was not quantified. There is only one recorded accident in recent years, involving a cyclist and a parked car. It is not known whether the accident had any connection with the theatre. There was no dispute that there is the potential for inadequate parking provision to result in highway safety implications.
55. The 2012 permission was subject to condition 5 which required the approved car parking and turning areas to be laid out within the site to enable 30 cars to be parked and for vehicles to turn so they may enter and leave the site in a forward gear. The approved car parking diagram indicates 30 parking spaces on the site, but it is not clear that they are all independently accessible and allow for turning so that vehicles do not need to reverse onto St Margarets Lane.
56. The 2013 appeal decision explains that applying the County parking standard of 1 space per 5 seats, the theatre development at 210 seats would generate a need for 42 spaces. The Inspector reasoned that the under provision was

¹¹ Ref P/13/0575/FP

acceptable for several reasons. Namely an assertion that parking demand generally falls below the normal on-site capacity, a supervised scheme to manage the parking, the unattractiveness of the lane for safe parking, and the Highway Authority's ability to impose parking controls if necessary. The Inspector accepted however that it would be physically possible to accommodate 35 cars on the site with a managed scheme.

57. I note that since the 2013 appeal decision the number of theatre seats has increased to 284 in Oak and Acorn theatres. Based on the 1:5 ratio, this would give rise to a need for 57 parking spaces.
58. The Council has questioned whether 1 space per 5 seats is sufficient, and anecdotal evidence from a neighbouring resident indicates that car occupancy is generally 2-4 people. In any event, no baseline data on modal split or car occupancy rates has been provided that would justify a different level of parking provision.
59. Based on the 463 seats provided in the Arden Theatre, and using the 1:5 ratio, the theatre could generate a demand for 93 parking spaces. The appellant has suggested a condition preventing public performances from taking place at the Arden Theatre at the same time as public performances at any of the other theatres at the site, in order to reduce the pressure on parking. However, rehearsals could still take place concurrently in those theatres, and the condition would not prevent performances at the other theatres immediately before or after a performance at the Arden, resulting in additional parking demand.
60. There was disagreement between the highway consultants as to the number of parking spaces that can be provided on the site, taking in the additional land that serves area C. The Council's highway consultant considers that 19 spaces can be accommodated. This is on the basis that all spaces would be independently accessible and that vehicles could enter and leave the site in a forward gear.
61. The appellant considers that 38 spaces could be accommodated, but this would be reliant on active management of parking. It would include three spaces at the front of the site that cannot be accessed in a forward gear, four disabled parking spaces at the front that cannot be independently accessed, 10 parking spaces along the southern boundary of the site that would block access to the parking spaces adjacent to the building, and 10 parking spaces in a tandem arrangement at the eastern end of the site.
62. The nature of the use lends itself to a managed approach to parking, whereby parking stewards can ensure an efficient use of the space available. However, as 30 parking spaces were to be provided for the pre-existing use of the site prior the Arden Theatre being constructed, which was 12 less than required, and 26 less than the need generated by the actual number of seats in Oak and Acorn¹², it is clear that any additional parking need generated by the Arden could not be met on site.
63. Even putting to one side the shortfall in parking from the pre-existing use as two theatres, if all the spaces were available for patrons of the Arden, and the parking was being successfully managed by volunteers, there would still be a

¹² 284 in total giving rise to a need for 57 parking spaces based on the 1:5 parking ratio

shortfall of 55 spaces. It is therefore clear that there is insufficient parking capacity on the site to cater for the development, even if no other performances or rehearsals are taking place concurrently and parking is being managed.

64. Overspill on street parking on St Margarets Lane could be prevented through parking restrictions, and the UU would secure the funds to draw up and consult on a TRO, and to implement the works if the TRO is made. However, alternative parking would still be required.
65. The appellant has the use of the car park to St Margarets Nurseries, opposite the site. It is conveniently located and it provides 24 spaces but is only available during the evenings. Even in the evenings there would still be a shortfall of 31 spaces. It would not assist with matinee performance parking. By itself it is insufficient to meet all the parking needs generated by the theatre. Furthermore, there is uncertainty whether the land will be available in the longer term.
66. There is a public car park associated with an area of open space called Abbey Meadows. It contains 37 spaces but is not under the control of the appellant. It is at the outer edge of being within the 800 metres walking catchment. It is accessible via a lit route along Cartwright Drive although the car park itself is unlit and surrounded by open land. As it is a public car park its availability for patrons cannot be controlled by the appellant. It is unlikely to be fully in use in the evenings as it serves an area of open space, but equally being unlit and around a 10-minute walk away it is unlikely to be a safe and attractive option during the winter months.
67. The appellant has secured the use of MacFarlane's¹³ for parking in the evenings between 1800 and 2300 hours and on weekends between the hours of 1300 and 2300. It is understood to provide 55 parking spaces. It is slightly further away from the appeal site than the Abbey Meadows car park. The termination of the licence is subject to two months' written notice. Its availability in the long term for patrons cannot therefore be assured.
68. There is an undetermined planning application¹⁴ being considered by the Council to construct a car park for 97 parking spaces on land opposite the theatre. HCC as highway authority has raised various concerns about the application. I can have no certainty that permission will be granted for the car park.
69. Therefore, the alternative parking provision put forward by the appellant is unsatisfactory. Moreover, any patrons arriving by car and finding that the on-site car park is full may be redirected. This is likely to give rise to queueing in St Margarets Lane and drivers may attempt to turn around if they have arrived from the north. Volunteers are not able to direct traffic within the public highway. Due to the number of performances per year, this situation is likely to be a regular occurrence. The inadequate parking provision is harmful to highway safety.
70. Through the signed UU the appellant undertakes to cease the use unless a parking management scheme in accordance with the proposed parking layout plan at Schedule Three of the UU has been approved and implemented. The

¹³ Copy of Licence to occupy provided to the inquiry (document no. 14)

¹⁴ Ref P/24/0304/FP

parking management scheme shall include the location of parking land over which the owner has the appropriate rights for use, a copy of the document by which the rights are granted, details of how the parking land will be used and details of the planning permission for the use of the parking land. The use shall cease in the event that the parking scheme is not complied with. However, I have no certainty that sufficient and appropriate off-site parking will be provided, in a suitable location. The development is not acceptable in planning terms and would not be made acceptable by the UU. Likewise, it is unclear whether the Travel Plan would result in a modal shift away from motorised transport and a reduction in the demand for parking spaces.

71. The 2013 appeal decision found that car parks that were not in the control of the appellant could provide an acceptable alternative, but this was in the context of a much lower level of under-provision.
72. While parking restrictions on St Margarets Lane would improve highway safety, vehicles queuing and attempting to turn around outside the theatre would cause inconvenience and be hazardous to other highway users, including pedestrians and cyclists. I therefore conclude that the development is harmful to highway safety due to inadequate provision for parking. It is thus in conflict with FLP Policies TIN2 and R2 insofar as they seek to ensure that development is permitted where appropriate levels of parking are provided and there is no unacceptable impact on highway safety.

Noise

73. It is common ground that the noise from the theatre is audible at neighbouring residential properties during applause and during periods of performances with high levels of music. The dominant path of noise transfer is via the roof of the auditorium, and the parties agree that noise breakout would be reduced to an acceptable level if the sound insulation of the roof were to be upgraded.
74. Two options for upgrading the roof were put forward. One would involve a suspended mass-barrier ceiling and the other would involve the installation of a secondary roof structure above the existing roof. The second option would result in a taller building with a new roof covering. This would be a different development to the one that is the subject of the enforcement notice, and to require this through a planning condition would result in a development that may have planning consequences, for example in terms of character and appearance, that have not been properly considered. I could not therefore impose a planning condition requiring a new external roof structure. If I were minded to allow the appeal I could impose a condition requiring that the roof insulation be upgraded internally. I have no reason to believe that such a scheme would not be effective in reducing noise transmission to acceptable levels.
75. A second source of potential noise nuisance to neighbouring residential properties is from patrons arriving and leaving the Arden Theatre. It was suggested by both parties that this could be adequately controlled through a noise management scheme and an acoustic barrier fence. The acoustic fence could be located on the boundary of the site between the car park and the neighbouring field to the south side of the site. In the view of the main parties this would reduce the noise to an acceptable level for nearby residential properties and I have no reason to disagree.

76. The parties have suggested that a noise management scheme should include measures to ensure all windows and doors are kept closed during shows and rehearsals, as well as details of any ventilation system to include noise breakout calculations. As there are three sets of doors at the main entrance to the theatre I am satisfied that such a condition could be enforced. The hours of use for performances and rehearsals could also be controlled.
77. Subject to appropriately worded conditions, the development would not be harmful to the living conditions of neighbouring occupiers as a result of noise and disturbance. It is therefore not in conflict with FLP Policy D2 which seeks, amongst other things, that development ensures good environmental conditions for new and existing users. It is not in conflict with the section 15 of the NPPF.

Other considerations

78. The appellant argued that a fallback position exists which is a material consideration. The basis for this is the accrued lawful use of areas A and B for theatre use. Therefore, it is argued, if I uphold the notice and the requirements are complied with, the use of areas A and B as a theatre could continue, and area C would revert to a storage use, through section 57(4). As a result, the Arden Theatre could be reduced in size to be wholly contained in area B. The appellant estimates that a reduced Arden Theatre would have 341 seats, and that this could run alongside the Oak and Acorn theatres.
79. The parties agree that the use of areas A and B accrued a lawful use for theatre purposes prior to the incorporation of area C. However, it needs to be established whether the reversion to the accrued use would be lawful under section 57(4).
80. It has been established through case law that a lawful use can be lost in specific circumstances. One of those circumstances is where there has been the formation of a new planning unit. Whether a new planning unit has been created is a matter of fact and degree for the decision maker to determine.
81. The parties agree that prior to the current breach of planning control, there were two planning units - the planning unit previously consisted of areas A and B and that area C previously formed a separate planning unit. They also agree that the unit of occupation is now all three areas¹⁵. While there are three separate theatres and a number of ancillary activities taking place, they are not in physically separate and distinct areas that are occupied for substantially different and unrelated purposes. The Arden Theatre straddles areas B and C, which are no longer physically subdivided. Amongst other things, area C provides backstage space as well as dressing rooms, part of the stage and orchestra pit of the theatre. I am therefore satisfied that a new planning unit was formed when area C was incorporated into the theatre use with the construction of the Arden Theatre.
82. I have had regard to the case of *Stone*¹⁶ and the other authorities discussed in the legal submissions on this question in coming to this conclusion. In *Stone* an existing lawful use was found to be capable of being extinguished by the creation of a new planning unit in respect of the land in question. In this case, the amalgamation of two planning units into one has resulted in a change in

¹⁵ Statement of Common Ground 8 May 2024

¹⁶ *Stone & Stone v SSCLG & Cornwall Council* [2014] EWHC 1456 (Admin)

character of the use. It has changed from a small theatre and ancillary uses in areas A and B, to a much larger theatre use over the three areas (A, B and C) and the formation of a new planning unit. The new planning unit contains a large theatre which has given rise to additional traffic movements, noise generation and parking requirements. These indicate that the character of the use has changed and that this has planning consequences, such that the change has been material. As the expansion of the planning unit has been onto land that was previously in a separate and unrelated use as storage, it is not the case that the theatre has simply been extended.

83. The implication of *Stone* is that careful consideration needs to be given to the wording of section 57(4). The 'land' which is the subject of the enforcement notice is areas B and C. The lawful use which has been established through the passage of time, relates to areas A and B, which formed one, self-contained unit. The 'land' does not therefore have a lawful use, as the lawful use does not include area C. The land with a lawful use as a theatre (areas A and B) no longer exists as a planning unit. I therefore conclude that section 57(4) does not permit a reversion to a lawful theatre use in area B as suggested by the appellant, because that planning unit no longer exists.
84. In terms of the alleged fallback position therefore, the lawful theatre use is restricted to area A by dint of the 2013 permission. Area B has a lawful use for storage through the 2012 permission and area C, as a separate planning unit, has a lawful use through its 1963 permission. There is therefore no possibility, even merely theoretical, of installing a theatre in Area B without planning permission. The fallback position relied upon by the appellant does not therefore exist. I note that the 2013 permission was subject to a condition restricting the use of Area B to B1 and B8 uses. It is not the case therefore that Area B could be used for the range of uses falling within Class E. It has not been put to me that there is any other fallback position in this regard.
85. To be weighed in favour of the ground (a) appeal is the evidence to show that the community theatre and associated uses are valuable facilities that serve a wide area, including local groups and clubs. I am aware that the site is used by a Men's Shed and youth theatre groups, amongst other groups. Voluntary groups also use the premises for storage. I heard that the community groups that use the facilities are beneficial to participants, particularly in terms of learning skills, gaining self-confidence, improving mental health and engendering sense of belonging. There are also outreach programmes to schools and care homes. Although the appellant stated that rooms could be hired elsewhere for activities such as the youth theatre and rehearsals, I acknowledge that there are benefits to co-location of community groups and the theatre.
86. Community groups may find it difficult to locate suitable alternative premises for their activities and it is perhaps unlikely that premises would be available that allow the various activities to take place at the same venue. This may have negative consequences for equality of opportunity and the need to foster good relations between those who share protected characteristics and those who do not. However, some of these uses were already taking place in areas A and B prior to the breach of planning control. I therefore give these benefits moderate weight.

87. I also heard that the standard of the theatre facilities at the Arden Theatre is high, with sufficient seats to allow productions to be viable, so that, for example, full scale youth musicals can be staged. The Arden Theatre has also been used by an orchestra, which gives unique opportunities for young musicians to play alongside professionals and gain invaluable experience. Furthermore, tickets are more affordable than at the regional theatres. I also give some limited weight to the promotion of the Shakespearean link to the local area.
88. The theatre is self-funded and is not reliant on any public or private subsidy or support beyond that generated by its activities. I heard that this is unusual and I give this consideration moderate weight.
89. There are five jobs associated with the use, which is a benefit to which I give moderate weight due to the relatively low number.
90. The Council considers that the appellant undertook intentional unauthorised development (IUD). A Written Ministerial Statement (WMS) in August 2015 set out a change to national planning policy to make IUD a material consideration. This is due to the harm that is caused where the development of land has been undertaken in advance of obtaining planning permission. One of the Government's stated concerns is that there is then no opportunity to appropriately limit or mitigate the harm that has already taken place, and enforcement action is expensive and costly for local planning authorities. Although the WMS has not been incorporated into the NPPF, a subsequent statement by Brandon Lewis (Minister for State for Housing and Planning) made on December 2015 confirmed the change to national policy.
91. The appellant applied¹⁷ for the change of use of Area B to a mixed use of storage and theatre rehearsal space, with ground floor workshop and extension to the hours of use. This was refused for reasons relating to the unsustainable and poorly accessible location of the site, and the inadequate provision for parking spaces. It cannot therefore be said that the appellant did not know that planning permission was required for the development. As a result of the unauthorised development, the theatre has been installed and has been operating without any planning controls, causing planning harm, including potential highway safety issues and effects on the living conditions of neighbouring occupiers. The appellant stated that he had been advised by his legal team to continue with the works, partly due to the need to finish the orchestra pit.
92. However, the appellant sought planning permission through the appeal on ground (a) and paid a fee for consideration of the deemed planning application. Planning permission should not be refused simply on the basis that the development was carried out without planning permission. The enforcement procedure is intended to be remedial rather than punitive. The appellant intended to undertake unauthorised works, but applied for planning permission and took the opportunity to regularise the use and the works. I therefore give moderate weight to IUD as a material consideration.
93. It was put to me that the appellant has a history of undertaking works or activities without the benefit of planning permission, in relation to this site as well as other sites. It seems that there were specific circumstances relating to

¹⁷ Ref P/19/1053/CU

those works, and it would not be appropriate for me to comment as there are ongoing proceedings.

94. The alleged breach of planning control includes the engineering operation to excavate and create an underground area beneath the land. This has created a basement area which provides an orchestra pit. The works are therefore part and parcel of the Arden Theatre and facilitate its use. The Council has not raised any specific concerns in relation to these works.
95. Various matters have been raised by local representations. This includes concerns that a septic tank may be discharging to nearby watercourses and causing pollution but as I am dismissing the appeal for other reasons I have not considered this matter further. In any event it may be controlled through other legislation.
96. It was suggested by an interested party that the development could be made acceptable by imposing conditions, such as limiting it through a cap on audience numbers and preventing the Acorn and Oak theatres from being open at the same time. While this may assist with some of the concerns, it would not overcome the conflict with the development plan and the planning harms that I have identified.
97. The parties have agreed a schedule of planning conditions and a UU but for the reasons set out above, with the exception of issues relating to noise, they do not overcome the harm I have found.

Planning balance and conclusion

98. Section 38(6) of the Planning and Compulsory Purchase Act 2004 states that if regard is to be had to the development plan the determination must be made in accordance with the plan unless material considerations indicate otherwise.
99. I have found that the matter of noise could be satisfactorily controlled through an appropriately worded condition, but this does not overcome the harm that I have identified in relation to the other main issues. Although the site is previously developed land, it is not appropriate for the use due to the conflict with other policies in the FLP. It therefore conflicts with criterion b) of FLP Policy DS1.
100. There is conflict with the development plan as a whole in terms of the suitability of the location for the development with regard to its accessibility, harm to the vitality and viability of the Borough's centres and parades, and harm to highway safety through inadequate parking provision. When all the benefits are considered, this does not outweigh the conflict with the development plan as a whole.
101. In relation to the PSED, due regard has been paid to the potential effects on community groups, who may share relevant protected characteristics. Although the appeal on ground (a) is to be dismissed, these considerations have been at the forefront of the decision-making process. The outcome is a proportionate one.
102. The appellant suggested that a temporary planning permission could allow time for the undetermined application for a car park opposite the theatre to be decided and if necessary an appeal to be submitted and determined. This would mean that the harm in relation to the effects on highway safety through

insufficient parking would continue for a considerable period of time. Furthermore, I have found that the site is an unsuitable location for the development in terms of its accessibility by sustainable modes of transport and would be harmful to the vitality and viability of centres and parades. I have seen no evidence that there would be a change in these circumstances following a temporary period. The use of a temporary condition would not therefore overcome the harm I have identified.

103. For the reasons set out above, the appeal on ground (a) fails and I shall refuse planning permission for the deemed application.

The appeal on ground (f)

104. The ground of appeal is that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by the breach.
105. The alleged breaches of planning control are the change of use of the land to theatre use and the engineering operation to excavate and create an underground area beneath the land. As the notice requires the use to cease and the excavated area to be backfilled with inert material, the purpose of the notice is to remedy the breach of planning control. Nonetheless, it allows some of the internal alterations and fittings to be retained that have facilitated the change of use.
106. The appellant has suggested various lesser steps. The appellant argues that in order to preserve existing use right of area B as a theatre then the steps could be restricted to area C. As I have found that the accrued lawful use of area B as part of the theatre in area A has not survived the breach of planning control, this aspect of the ground (f) appeal falls away.
107. The appellant has also suggested that if I were to dismiss the appeal on ground (a) solely due to insufficient parking, I could delete all of the steps except for step 1, requiring only the use to cease so that the appellant had the opportunity to secure alternative parking provision. This would avoid unnecessary costs and works. However, I have also found that the use is in an unsuitable location and is harmful to the vitality and viability of centres and parades.
108. The appellant has suggested that the use of the site for ancillary theatre purposes including by community groups, rehearsals and storage would not generate noise or car parking, and therefore there would be no need to remove the items listed in the enforcement notice as they could be used for rehearsals. However, such uses would need to be ancillary to a lawful theatre use in the same planning unit. The use of the premises for purposes ancillary to the theatre would by definition be part of a primary theatre use which has not been found to be lawful through any legal grounds of appeal. It is not a lesser step as it would not remedy the breach of planning control.
109. While in some cases it may be acceptable to retain works that could be used in relation to a lawful use of a site, in this case it has not been argued that the equipment such as the stage, seating and rigs would be used in association

with a lawful use. It is not therefore an obvious alternative to retain them on site.

110. The appellant has also suggested that the requirement to backfill the basement area is unnecessary and will cause drainage issues. The excavated area is part of the breach of planning control, which would not be remedied if the requirement to backfill it were to be deleted. The means of doing so is a matter for the appellant and the Council.

111. The appeal on ground (f) therefore fails.

The appeal on ground (g)

112. The ground of appeal is that the periods for compliance with the steps fall short of what should reasonably be allowed. The period for compliance with step (i) is two months. The period for compliance with the rest of the steps is three months. The appellant originally requested that the period for compliance with steps (ii) to (vi) be increased to six months but requested nine months in their statement of case. The reason for this is to allow time to source specialist contractors to remove technical equipment and the materials necessary to infill the excavated area. A letter has been provided from EBC South Ltd which confirms that it would take three weeks to remove the seating and two months to remove the 'mezzanine', although there is no requirement in the notice to removal internal works. Nor is there a requirement to reinstatement the dividing wall, which is estimated to take 3 months. To fill the basement would take 2 weeks and to dismantle the stage would take 6 weeks. Therefore, the time estimated for the steps required by the notice would be 11 weeks.

113. On this basis, it would be reasonable to increase the compliance period. The appellant and the Council have agreed that a period of 7 months would be reasonable. It seems to me that this would allow time for contractors to be sought and the works carried out. It strikes a reasonable balance between the needs of the appellant and the objective of bringing the breach of planning control to a timely resolution. To this extent the appeal on ground (g) succeeds.

Conclusion

114. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with a correction and a variation and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

N Thomas

INSPECTOR

10. LPA's and appellant's suggested conditions
11. Suggested noise condition from LPA
12. Extract from appellant's VAT records
13. Written Ministerial Statement and Chief Planning Officers letter on Green Belt protection and intentional unauthorised development 31 August 2015. Statement from Brandon Lewis Ministry of Housing, Communities and Local Government made on 17 December 2015 on Green Belt protection and intentional unauthorised development.
14. Licence to occupy on a long term basis relating to Macfarlane Packing car park dated 1 May 2024
15. LPA's legal submissions on the previous lawful use of Area B
16. Appellant's legal submissions in respect of alleged loss of existing lawful use rights
17. Extract from FLP paragraphs 7.11 to 7.19
18. Copy of Theatres Trust statement to the inquiry and location analysis of small and community theatres.
19. Calculations sheet from Stephen Jupp (increase in seats)
20. Extract from FLP Policies Map showing Titchfield Primary Shopping Area
21. Copy of email from Hannah Goldsmith to Rebecca Stanton dated 28 February 2024 11.22am and draft SOCG dated February 2024
22. Extract from Core Strategy adopted 2011 pages 25-26
23. Draft unilateral undertaking
24. Section 106 obligations justification statement on behalf of the LPA 17 May 2024
25. R (oao Midcounties Co-operative Limited) and Forest of Dean DC and Trilogy Developments Limited [2014] EWHC 3059 (Admin)
26. Appellant's position statement on ground (d) appeal
27. Itinerary for site visit walking route
28. R(oao) Childs v FSS & Test Valley BC [2005] EWHC 2368 (Admin)
29. Copy of drawing no. 022.0032-0004 Revision P04 proposed parking layout (Abbey Meadows public car park, St Margarets Nurseries, Titchfield Festival Theatre) (Paul Basham Associates)
30. Copy of drawing numbers ITB19829-GA-002 Revision C and Revision D Potential parking plan (i-Transport)
31. Draft unilateral undertaking (revised)
32. LPAs S106 Position Statement (revised)
33. Copy of s106 agreement relating to land at Cartwright Drive, Titchfield
34. List of suggested conditions (LPA and appellant)
35. Noise attenuation fence suggested position
36. Email from Stuart Morton giving LPA and appellant opinions on alternative walking route to the rear of Titchfield Community Centre.
37. Drawing showing Areas B and C labelled
38. Floor plans of areas A, B and C annotated with theatre locations
39. Appellant's closing submissions
40. LPA's closing submissions

Documents submitted after the inquiry

1. Unilateral undertaking