Case Name: *Titchfield Festival Theatre Limited v Secretary of State for Housing, Communities and Local Government and Fareham Borough Council [2025] EWHC 833 (Admin) (16 April 2025)*

Full case: Read here

Commentary: The Claimant, Titchfield Festival Theatre Limited ("Titchfield"), appealed the decision of an Inspector appointed by the First Respondent, the Secretary of State, dismissing an appeal against an enforcement notice under the provisions of Section 289 of the Town and Country Planning Act 1990 ("TCPA 1990"). Titchfield is a non-profit community and youth theatre which had been issued with a planning enforcement notice after expanding its theatre venue.

Sitting as a Deputy High Court Judge, Neil Cameron KC dismissed the appeal, offering a helpful summary of the approach to accrued lawful use rights, the merging and expansion of planning units, and the meaning and import of the expression "a new chapter in planning history". In this case, the creation of a new planning unit meant that it was not possible for the claimant to revert to the previous lawful use under section 57(4) TCPA 1990 (which provides that where an enforcement notice has been issued in respect of any development of land, planning permission is not required for its use for the purpose for which it could lawfully have been used it that development had not been carried out) because there was no previous lawful use of the land comprising the new planning unit.

The background facts

The Claimant occupies premises in Fareham, Hampshire, which is made up of three distinct areas, known as Areas A, B and C. Areas A and B were purchased in 2010 and in 2012 planning permission was granted by Fareham Borough Council to develop Areas A and B: the description of that development was "retrospective application for continued use of Unit A for D2 and theatre purposes and Unit B for Storage Use." In 2021, the Claimant purchased Area C. A year later, planning permission was granted to extend the warehouse building area (Area C) and raise the roof and extend the walls to join the warehouse building and the Area A/B building. A 463-seat theatre was created within Areas B and C.

Fareham Borough Council issued an enforcement notice, alleging the following breaches of planning control, and requiring the Appellant to cease the use of the site as a theatre and to restore the site:

- 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 appellant appealed against the enforcement notice on the grounds set out at section 174(2)(a), (b), (e), (f), and (g) of the TCPA 1990. An Inspector was appointed and an inquiry was held in May 2024. Both the appellant and second respondent made legal submissions to the Inspector on the alleged loss of existing lawful use rights. In essence, the Appellant contended that the development that occurred at the site did not constitute a radical enough change to open up a new chapter in planning history, and so the theatre use rights associated with the site had not been extinguished. The Defendants' position was that the lawful use rights which had accrued to Area B had been extinguished, and the appellant could not revert to them, so theatre use limited to areas A and B could not be reinstated without subdividing the new planning unit and materially changing the use of area C.

Grounds of Challenge

Ground 1 was a reasons challenge with four limbs:

- The inspector failed to give valid or rational reasons for concluding that the theatre use rights which accrued in Area B prior to the incorporation of Unit C were lost as a result of the incorporation of Unit C. It is irrational to conclude that the change from a small to a large theatre is a change in the character of use;
- Further or alternatively, the inspector erred in law in concluding that the creation of a larger planning unit was not an expansion of the previous existing planning unit;
- Further or alternatively, in concluding that the new planning unit gave rise to additional traffic movements, noise, and parking demand, the inspector failed to take into account that Unit C's previous use as a workshop and storage unit also generated traffic, noise and parking demand, and therefore had not applied the correct baseline for comparison purposes when considering if the character of use of the site had changed; and
- Further or alternatively, under the ground (f) appeal, lesser steps which would re-late only to Area C were rejected by the Inspector on the flawed basis that Area B did not have lawful theatre use rights.

The second ground of challenge had two limbs and concerned the proper interpretation and application of section 57(4) TCPA 1990, which provides that where an enforcement notice has been issued in respect of any development of land, planning permission is not required for its use for the purpose for which it could lawfully have been used it that development had not been carried out. Those limbs were:

- That the inspector erred in law in holding section 57(4) TCPA 1990 did not act to allow the unit B land to revert to its last lawful use (i.e. theatre use). Just because

the land enforced against was both unit B and unit C together, this did not preclude unit B from reversing to theatre use; and
- Further, the inspector failed to take into account the Mansi principle in construing s.57(4), to which she expressly referred.

After setting out the relevant statutory framework and caselaw, the Judge dealt with the grounds of challenge.

Ground 1

The Judge rejected this ground of challenge. The Inspector correctly applied the relevant case law and exercised planning judgment appropriately and lawfully. The Inspector found that the amalgamation of the two planning units resulted in a change in the character of use. The judge found that the Inspector had not erred by not expressly stating that a new chapter in planning history had begun, and that it was interchangeable with the expression "creation of a new planning unit." Nor was the Inspector required to consider whether there was a radical change in the planning history of the site: whether the alteration to the use of the site was such to produce a new planning unit was sufficient, and that was a question of fact and degree. Nor did the Judge accept the appellant's submission that the expansion of an existing planning unit to create a larger unit cannot lead to the making of an inference that the planning status is inconsistent with preservation of a prior existing use. The Inspector's reasoning gave rise to no substantial doubt as to whether she erred in law.

The third limb was also not made out. The Judge found that the qualified details of pre-existing traffic movements, noise generation and parking associated with the past use of the site were capable of being a material consideration, but not so obviously material that a decision-maker was required to have regard to them. The Judge also held that the Inspector carried out a careful examination of the material on traffic and parking before her, and did not err by failing to take into account pre-existing traffic, noise and parking issues at the site.

Under the fourth limb, the judge held that the Inspector had properly stated, with a fault-less approach, that as she had found that accrued lawful use rights of Area B as part of theatre in Area A had not survived the breach of planning control. Therefore, the Appellant's argument based on preservation of existing use rights fell away.

Ground 2

The Judge did not accept the Appellant's submissions on the construction of section 57(4) of the TCPA 1990. The absence of the definite article "the" before the word land in section 57(4) did not support the submission that the "land" should be read as meaning

any part of the land. The Judge held that the first phrase of section 57(4) described the circumstances in which the subsection applies, namely where an enforcement notice has been issued in respect of any development of land. The land referred to in the first phrase of section 57(4) was to the land to which the enforcement notice relates. The Inspector's approach was without error: she was right to say that the land which was subject to the enforcement notice was Areas B and C and that the lawful use relied upon related to Areas A and B. She also was right to say that the land subject to the enforcement notice did not have a lawful use, as the lawful use did not include area C, and, given her findings on the creation of a new planning unit, she was right to say that Areas A and B no longer existed as a planning unit. For those reasons, Ground 2 was not made out.

Case summary prepared by Gregor Donaldson