

ENFORCEMENT REPORT

MYLNHURST SCHOOL – ALLEGATIONS OF BREACHES OF PLANNING CONTROL RELATING TO THE USE AND CONSTRUCTION OF THE SCHOOL SPORTS HALL/SWIMMING POOL, GRANTED PLANNING PERMISSION UNDER REF:04/04689/FUL, AND TO NON-COMPLIANCE WITH CONDITIONS 3 AND 8 ATTACHED THERETO.

1.0 PURPOSE OF THE REPORT

- 1.1 The purpose of this report is to bring to Members attention allegations of breaches of planning control, and non-compliance with planning conditions at Mylnhurst School, Button Hill, and to make recommendations on any further action required.

2.0 BACKGROUND

- 2.1 Mylnhurst School occupies an area bordered by the rear gardens of residential property that fronts Button Hill, Mylnhurst Road, and Woodholm Road. A Grade 2 Listed former villa, is the main school building located in the centre of the site, which has substantial grounds. Within the school grounds is a swimming pool and gymnasium building constructed following the grant of planning permission in June 2006 (ref:04/04689/FUL).
- 2.2 This permission has over the last 12 months been the subject of several complaints from local residents. The complaints are set out below, and are:-
1. that the current use of the swimming pool/gymnasium within the grounds of the school represents a change of use from the facility that was granted planning permission. The permission granted was for the 'Erection of swimming pool and multi purpose gymnasium with changing rooms'; and
  2. that the school is breaching planning condition 8 imposed on the planning permission by playing amplified music without an approved sound limiter; and

3. that the school is breaching planning condition 3 imposed on the planning permission by not implementing the approved landscaping scheme; and
  4. that the building has not been completed in accordance with the approved plans owing to the omission of solar panels from the roof slope of the building.
- 2.3 Officers have corresponded with complainants on all matters, including stating that in respect of 1. above, that no change of use had occurred. However this view has been repeatedly challenged, and officers decided to reconsider that judgement, and in doing so report the matter to Members with a recommendation on any future action.

### 3.0 REPRESENTATIONS

- 3.1 Prior to the preparation of this report, a letter was sent to 236 neighbouring properties on Woodholm Road, Button Hill, Millhouses Lane, Banner Cross Road, Springfield Road, Silver Hill Road, Ranelagh Drive, Mylnhurst Road, Millhouses Court, and Springfield Glen. This represented properties within a 200m radius of the swimming pool/gymnasium building. The letter set out the alleged breaches of planning control and sought resident's comments on the issues raised by the complaints.

A letter was also sent to the school, advising of the intention to report the matters to the Committee and inviting comment.

- 3.2 Following this notification exercise, 27 responses have been received. 25 of these raise concerns about the breaches, and feel action should be taken, whilst 2 of the responses raise no concerns, and feel no action should be taken. The comments are summarised below, under each topic heading:-

#### 3.3 OBJECTION/COMPLAINT (25)

##### 3.3.1 Use of Swimming Pool/Gymnasium

- Officer's original report stated 'small hall and swimming pool' and 'no increase in staff or community usage';
- Conclusions in officer's report have proved to be wrong in relation to a) safe access to public highway; b) appropriate off street parking; c) not endangering pedestrians; d) on a scale consistent with residential character; e) not overdevelopment; and f) not increasing staff or community usage;
- Original statements made by the school were inaccurate;
- Original submission gave misleading, duplicitous information, and Council naively failed to fully investigate;

- Original notification process for the 2004 application was flawed and only immediate neighbours were notified, denying many residents opportunity to raise obvious concerns regarding noise and parking;
- Absence of conditions to prevent intensification or unsociable hours/days of use in original consent;
- Other recent approvals (including St Wilfrid's Gymnasium) have included hours restrictions – why didn't this one?;
- there is an intensification of use as the use has changed 'beyond what may be considered acceptable';
- facilities are hired out of hours, evenings, weekends, and holidays;
- Mylnhurst Sports Education & Leisure (MSEL) set up as a separate company to run the facility;
- Recent advertisement for a school facilities/marketing manager with duty to increase revenue points to change of use;
- Facility is marketed and advertised for private events e.g. weddings, parties, functions;
- Adverts for the premises offer 'an adaptive venue', 'large professional stage and lighting system', and 'full audiovisual facilities';
- Standalone commercial company now operates the facility;
- Chairman of MSEL has publically stated they have deliberately tried to open the school facilities for wider use;
- Over 200 local residents felt sufficiently moved by this to sign a petition;
- A change of use application would provide the Council and local residents the opportunity to look again at the problems that have arisen;
- Difficult to argue that sports facility is not what was approved (i.e. swimming pool and multi purpose gymnasium) but level of activity is questionable;
- Not suitable facility for a residential area;
- Facility is unsustainably overused, with no increase in support infrastructure, meaning traffic congestion, parking pressure and noise pollution;
- School says parking problems are nothing to do with them, as sports centre is separate;
- Accept that living near a school will entail traffic issues at school start and finish times, but now subjected to traffic problems in the evenings, at weekends, and during school holidays;
- Until recently, nothing happened in the pool on Sundays. It does now.
- There is an increase in staff numbers, and in non-school user groups as a result of the development;
- Mylnhurst is a large house in moderate grounds and an inappropriate property for such a leisure complex – purpose built schools can absorb such things more easily;
- Monday to Friday 7.00 am to 7.30 pm and Saturdays to 12.30pm in term time would be acceptable for children's activities;

- A school is entitled to a modest gym and pool but this is out of proportion;
- The proposed change is a shock and would have an adverse effect on traffic congestion, noise and hazards;
- I have noticed a change in the last few weeks, is the school allowing facilities to be used out of hours? If so this will add to general disruption for residents;
- Prospect of more traffic movements – adding to existing air pollution problems;

### 3.3.2 Breach of Condition 8 (Amplified Sound)

- Condition 8 breached on a number of occasions;
- Enforcement officers accept the condition has been breached;
- Rightly imposed by Committee to protect residents;
- No sound insulation in building;
- Annual summer ball with live band and disco is a clear breach;
- This years Summer Ball continued to 1.00am and was deafening;
- Why should this be allowed to continue? What has changed from original decision to impose condition?
- Noise from most recent event was harassing and intrusive and a Statutory Nuisance;
- Causes noise nuisance to neighbours during the many times amplified sound is played – summer ball is particular example;
- Attitude of school is aggressive, and Council should enforce;
- Playing of amplified music has been in evidence for a few years – is it possible to limit the number of occasions this happens?
- Failure to comply with this condition should be enforced against;
- Residents and school are aware of breach – residents met and agreed to give school a chance to behave reasonably, but his failed miserably, and Council failed to act;
- Walking past the school music played during swimming lessons can be heard blaring out;
- We can cope with individual events such as the summer ball (with reasonable sound limits);
- There should be no relaxation of condition 8;

### 3.3.3 Breach of Condition 3 (Landscape Scheme)

- Enforcement officers accept the condition has been breached;
- Promises made to comply by May 2012;
- School continues to prevaricate;
- Complete disregard for rules, and failure of relevant department (Planning) to enforce is inexcusable;
- Immediate action should be taken to comply;
- Landscape works definitely not completed;
- Instead of planting 20 trees as required, only 7 fruit trees planted, plus 1 small sapling – this doesn't redress the loss of large mature trees lost to the building of the sports hall;

- If landscape works haven't been completed, then I object;
- School admits they have not planted the trees;
- Existing school planting is not being trimmed;
- Aware from neighbours that landscaping has not been implemented;

#### 3.3.4 Omission of Solar Panels

- If the school is in breach regarding the solar panels, then I object;
- Solar panels have not been completed and neither has the green roof;
- Lack of solar panels affects environment and local residents as another example of the school ignoring requests/orders;
- Plans show a bank of 12 solar panels and these were 'welcomed' by the officer's report as complying with policy;
- The installation of solar panels could substantially reduce the noise generated by the plant room close to 21 Woodholm Road;

#### 3.3.5 General

- Non-compliance is disappointing;
- Transgressions amount to wilful disregard for regulations and for local residents
- School often complies with Planning requests for a few weeks then ignores again;
- School has a track record for not complying and should be monitored closely;
- No objection to sound of school children but the booming voice of 'organiser' in school holidays (almost every day for some hours) is very disturbing;

### 3.4 SUPPORT/UNCONCERNED (2)

#### 3.4.1 General

- The school's activities cause little or no convenience to local residents;
- Never disturbed by noise or other school activities;
- School is well shielded from houses and behaves in a proper manner;
- Only problem is parking, which is inevitable, and double yellow lines on corners/Button Hill would improve safety;
- Comments regarding alleged breaches are trivial, and only people pointing out minor technical breaches;
- Playing of amplified music is almost exclusively during school hours, and within the building – not major nuisance;
- School should be allowed to get on with educating children, which requires use of the sports hall/swimming pool, and playing of music, without continued hassle from local residents;

- Majority of local residents are happy with the school and its activities;
- Our house on Millhouses Lane backs directly onto Mylnhurst's grounds, and we have not been troubled by excessive noise in 20 years;
- There is one evening event per year (Summer Ball) that might potentially cause noise and we receive advance notification from the school;
- We do not understand the fuss – the school have always been courteous neighbours;

#### 4.0 ASSESSMENT OF BREACHES OF CONTROL

##### 4.1 Use of Swimming Pool/Gymnasium

4.1.1 The planning permission granted for the swimming pool/gymnasium was based upon the information submitted with the application at the time. The building was described as a replacement for the existing outdated structure on the site, and supporting submissions did not anticipate an increase in the numbers of staff or non-school groups using the premises. At the time the application estimated the original facility was used by between 500 and 600 non-school users each week for various activities, including swimming clubs, singing, karate, and Irish dancing.

4.1.2 No use class was specified within the planning permission. The building is however, a school building that has been constructed within the school grounds. The school grounds form the 'planning unit', and the established use of the site is for the purposes of education, falling within Class D1 of the Town and Country Planning (Use Classes) Order 1987. The buildings within the grounds therefore also take this use as part of the wider planning unit.

4.1.3 The dual use of school sports facilities is a common occurrence across the city where the public's use and the activities that take place are deemed to be ancillary to the primary education use. Indeed many permissions that have been granted recently for new school buildings have been subject to Community Use Agreements, to actively pursue and ensure that the school's facilities are made available for use by the general public.

4.1.4 Following the receipt of the information contained within enforcement complaints officers have served Planning Contravention Notices, to gather information about the current activity, and have interviewed representatives of the school, and the organisation which manages the facility (Mylnhurst Sports Education & Leisure (MSEL)).

4.1.5 Despite the different sources of the information, there is a strong correlation within the information provided, so officers are satisfied that

it represents the correct position. The range of uses is very similar to that originally envisaged, but there is an increased level of usage by non-school users. Information from August 2011 indicates that the weekly usage was in the order of 700-800 non-school users per week.

- 4.1.6 This does lead to an increase in activity in and around the school, as users arrive and depart, and also puts additional pressure on available parking spaces within the school, and upon surrounding streets. However, an increase in this activity does not mean that a material change of use has occurred. It may be a consequence of the change, but it is not a determining factor in the judgement on the actual use of the building.
- 4.1.7 Whilst the information obtained does identify that specific hours of use of the facility by the school is of a lower proportion than by external users, this is due to periods of nil use during parts of the school day, where the facility is clearly open to use by the school if it so desired.
- 4.1.8 It is important to note that MSEL, whilst set up as a separate 'arms length' organisation, does operate within the umbrella of the school. Its registered address is within the school grounds, and approximately 50% of the directors of MSEL are also directors of Mylnhurst School, so there is a clear correlation between the two companies. This is relevant, as case law indicates that connection of the sports facilities' operator with the school is an important consideration when assessing whether the use is ancillary to the main education function.
- 4.1.9 Therefore, although the level of use of the facility does appear to be greater than originally envisaged, the actual use remains the same. Its original purpose was to provide swimming and leisure opportunities both connected, and unconnected with the education of children and adults either associated or not associated with the school. This has not changed. Although there is an acknowledged increase in the level of activity, intensification of the use does not however amount to a material change of use, in a case where the use itself is the same.
- 4.1.10 In this context officers considered that a material change of use had not occurred, and determined under delegated powers to take no further action. As stated in para 2.3 above, after the receipt of several letters querying that view, it was considered appropriate to review that decision and bring the matter before Committee.
- 4.1.11 In preparation of this report, officers have reconsidered all the available evidence, and further reviewed case law on the subject. The nature of the use has not changed in the intervening period. Whilst there are cases where dual use of school facilities have been held to amount to a change of use, these have not been in cases where there is a strong connection between the school and the operator of the facility, and as explained in para 4.1.8 above that connection does exist here, which is considered critical to this case.

4.1.12 It is worth also noting that in the period following officer original delegated decision to take no further action, complaints were submitted by neighbouring residents to the Local Government Ombudsman (LGO). Although this deals principally with the matter of maladministration, in considering the question of whether the Council had properly considered whether it was possible to take 'enforcement action against the school for its increased use of the pool and gym', the LGO determined that the Council's view that the increase does not require a new planning application was 'supported by law'. The LGO found no case for maladministration.

4.1.13 In summary on this point therefore, whilst there has been an increase in the level of activity over and above what was originally envisaged, the use remains ancillary to the primary education use of the site, is operated by a company that has direct linkages with the school, and it is therefore considered that a material change of use has not occurred.

#### 4.2 Breach of Condition 8 (Amplified Sound)

4.2.1 Condition 8 states that 'No amplified sound shall be played within the building except through an in-house amplified sound system fitted with a sound limiter, the settings of which shall have received the prior written approval of the Local Planning Authority'.

4.2.2 It is important to note at this point that the condition was never intended to prevent the playing of amplified music within the building, but was intended to ensure appropriate control over the level of noise permitted.

4.2.3 No sound limiter is fitted within the building and amplified sound has been played within it for some time. This ranges from a small in house public address system, and small portable stereo for such as dance classes, to a full sound system for events such as the Summer Ball, where a live band and a disco form part of the event. There is therefore a clear breach of condition 8.

4.2.4 The majority of the initial enforcement complaints received relate to the Summer Ball, and this is further repeated in the representations received as set out above, though some of the representations also refer to regular events such as swimming lessons, where the address system is used.

4.2.5 During this year's Summer Ball, generally acknowledged as the noisiest event that takes place in the building, with specific measures put in place by the school to attempt to minimise disturbance to residents, noise monitoring was undertaken at the site boundary (the boundary between the school and neighbour's gardens). This identified that it was possible for the event to take place, with amplified music,



and for the sound levels not to exceed 55dB at the site boundary. The exception to this coincided with doors to the building being left open, allowing greater noise levels to escape.

- 4.2.6 55dB is the World Health Organisation (WHO) recommended day time (0700 – 2300hrs) level for noise to be experienced before generating community annoyance.
- 4.2.7 Nonetheless the current operations are clearly of concern to local residents, and if unrestricted, noise from such events is capable of causing significant disturbance. The level of impact from the most recent Summer Ball followed a significant level of officer involvement to ensure measures were put in place for the event to prevent, or at least minimise disturbance. It is not therefore considered reasonable to continue in this manner without the requirements of the condition being addressed through appropriate enforcement action.
- 4.2.8 However, in June 2012, the school submitted an application to vary condition 8, in order to allow amplified sound to be played, without the use of a sound limiter, but subject to other restrictions.
- 4.2.9 The application (ref:12/01891/FUL) appears elsewhere on this agenda, and is recommended for approval with an alternative wording for a replacement condition 8 as follows:

Amplified sound within the building shall only be permitted:

- 1. Between 0800 - 2130 hours; and
- 2. When all external openings including emergency doors and windows are fully closed,

and so that noise breakout from the building when measured at the site boundary does not exceed the ambient noise levels by more than 3 dB(A) when measured as a 15 minute LAeq

Excepting one event per calendar year when amplified sound shall only permitted;

- 1. Between 1700 - 2400 hours; and
- 2. When all external openings including vents, emergency doors and windows are fully closed, and the Music Noise Level shall not exceed 55Db when measured as a 15 minute LAeq at the site boundary.

- 4.2.10 If the recommendation to approve this application is agreed by Members, then this would allow the school to play amplified music, but should also provide appropriate protection to residents. Monitoring of the noise levels would be necessary to ensure compliance.

4.2.11 If the recommendation to approve the application is not agreed, then the original condition 8 would remain, and it would be appropriate to enforce against the non-compliance with the condition, on any future occasions when the terms of the condition are breached.

#### 4.3 Breach of Condition 3 (Landscape Scheme)

4.3.1 Condition 3 states that 'Before any work on site is commenced, a landscape scheme for the site shall have been submitted to and approved by the Local Planning Authority. The scheme shall be carried out in accordance with the approved details within 1 month of the occupation of the development or within an alternative timescale to be first agreed in writing with the Local Planning Authority. When the above-mentioned landscaping has been carried out, thereafter the landscaped areas shall be retained. The landscaped areas shall be cultivated and maintained for 5 years from the date of implementation and any failures within that 5 year period shall be replaced in accordance with the approved details unless otherwise authorised in writing'.

4.3.2 In accordance with this condition, a landscape scheme was submitted and approved, in February 2009. The reference in the representations to 20 new trees is understood to be a comment based upon the indicative drawings submitted with the original planning application. This was not however reflected in the scheme that was formally submitted and approved to discharge the condition in 2009.

4.3.3 In any event, the landscaping works carried out on the site do not reflect the approved planting scheme. Some planting has occurred but officers consider that this falls considerably short of the approved scheme.

4.3.4 Since this matter was brought to officers' attention discussions have taken place with the school, who have explained the approved scheme could not be implemented due to the proximity of tree positions to new drainage runs associated with the building, and an alternative landscape scheme is being proposed.

4.3.5 A revised application to discharge the landscape condition is imminent, and officers are confident that once implemented the revised planting scheme will be an acceptable solution to the current breach.

4.3.6 Given the current level of co-operation on this point, it is not considered appropriate to take formal enforcement action at this stage. However, in the event of unsatisfactory progress towards resolving the breach, a further report would be brought before Members with a recommendation on any future action.

#### 4.4 Omission of Solar Panels

- 4.4.1 The approved application drawings included an array of solar panels proposed to be placed on the roof of the premises. The solar panels were referred to in the report to Committee that considered the application, and were welcomed as a measure that would improve the sustainability credentials of the development, by providing an element of renewable energy. It is clear that the solar panels have not been erected.
- 4.4.2 There were no conditions attached to the permission that specifically required the installation and retention of the panels, and neither was there a condition requiring the development to be built in full accordance with the approved plans. The latter is standard practice since October 2009, but was not at the time of this decision. A specific condition was not considered appropriate at the time due to the absence of policy support for their requirement. The Core Strategy policies that now require such features on large scale development were not adopted until March 2009.
- 4.4.3 The absence of the panels has minimal impact upon the external appearance of the building such that it could not reasonably be argued that the building as constructed differs substantially from the building that was granted planning permission.
- 4.4.4 In these circumstances it is not considered that the absence of the solar panels represents a breach of planning control, and no further action can therefore be taken to require their installation.

#### 5.0 ASSESSMENT OF ENFORCEMENT OPTIONS

##### 5.1 Planning Contravention Notice

- 5.1.1 Section 171C of the Town & Country Planning Act 1990, ('the Act') provides for the service of a Planning Contravention Notice (PCN). It requires information about the suspected breach control and property ownership. It also gives an opportunity for the developer to meet with officers to make representations. In this case, Planning Contravention Notices were served and responded to within the course of the information gathering stage of this exercise and there is no benefit in serving further PCN's at this stage.

##### 5.2 Breach of Conditions Notices

- 5.2.1 Section 187A of the Town and Country Planning Act 1990 allows for the service of Breach of Condition Notices (BCN) on persons who have not fully complied with the conditions attached to their planning approvals. These notices can be served to cover any number of

breaches and would give the school 28 days to comply with the outstanding issues. Failure to comply could lead to prosecution through the Magistrate's Court.

5.2.2 BCN's could therefore be served to cover conditions 3 & 8 - however as the school has responded positively to discussions about the breaches of the two conditions, such formal action is considered inappropriate at this stage.

### 5.3 Enforcement Notice

5.3.1 Section 172 of the Act provides for the service of an Enforcement Notice to remedy a breach of planning control. This form of action would be appropriate if it were determined that a material change of use of the swimming pool/gymnasium had occurred. There is a 10 year time limit for such action to be taken, and there is no question of that period having been exceeded in this case.

5.3.2 This report concludes that no material change of use has taken place, so in this context an enforcement notice is not appropriate, however, if a change of use had taken place, an enforcement notice could be used to require the unauthorised use to cease.

### 5.4 Temporary Stop Notice

5.4.1 Section 171E of the Act provides for the service of a Temporary Stop Notice (TSN) if it is expedient to require a breach of planning control to be stopped immediately. The temporary stop period lasts for 28 days to allow the Council time to decide / implement further enforcement action, if necessary. There is no right of appeal against a TSN. This option has been discounted at this time because as previously stated it was officer opinion that no change of use had taken place.

### 5.5 Stop Notice

5.5.1 Section 183 of the Act provides for the service of a Stop Notice in conjunction with an enforcement notice (S172). A stop notice is not recommended in this case at this time because there is not considered to be a material change of use of the premises, or a development progressing on the site that is unauthorised.

## 6.0 FINANCIAL IMPLICATIONS

6.1 There are no financial implications arising from the recommendations of this report

## 7. EQUAL OPPORTUNITY IMPLICATIONS

- 7.1 There are no equal opportunities implications arising from the recommendations of this report.
- 8.0 RECOMMENDATION
- 8.1 That:
- a) in respect of the use of the swimming pool/gymnasium building, Members note that no material change of use has occurred, and resolve to take no further action in this regard; and
  - b) in respect of the breach of condition 8 (amplified sound) Members note that the school has submitted an application (ref:12/01891/FUL) to vary the terms of condition 8, and subject to this application being approved resolve to take no further action on this matter. In the event of that application being refused, Members authorise the Director of Development Services and Head of Planning to take any appropriate action, including if necessary the service of enforcement notices and the instigation of legal proceedings to secure compliance with the condition; and
  - c) in respect of condition 3 (landscaping) Members note that the school is actively working towards the implementation of a revised landscape scheme, and resolve to take no further action at this stage, but in the event that the Head of Planning is not satisfied sufficient progress is being made towards this implementation, authorise the Director of Development Services and Head of Planning to take any appropriate action, including if necessary the service of enforcement notices and the instigation of legal proceedings to secure compliance with the condition; and
  - d) in respect of the omission of solar panels from the roof of the swimming pool/gymnasium building Members note that this does not constitute a breach of planning control and resolve to take no further action on this matter.
- 8.2 The Head of Planning is delegated to vary the action authorised in order to achieve the objectives hereby confirmed, including taking action to resolve any associated breaches of planning control.



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Head of Planning

5/12/12