

ITEM No ...4.....

REPORT TO: PLANNING COMMITTEE – 16 AUGUST 2021

REPORT ON: REQUEST FOR DIRECT ACTION TO REMOVE FIXTURES AND FITTINGS FROM UNAUTHORISED GYMNASIUM AT UNIT 7 AND 8, WEBSTER PARK, 17 DUNSINANE AVENUE, DUNDEE

REPORT BY: EXECUTIVE DIRECTOR OF CITY DEVELOPMENT

REPORT NO: 220-2021

1 PURPOSE OF REPORT

- 1.1 This report seeks authority to take appropriate action to seek compliance with an Enforcement Notice at Unit 7 and 8, Webster Park, 17 Dunsinane Avenue, Dunsinane Industrial Estate, Dundee, DD2 3FU.

2 RECOMMENDATION

- 2.1 It is recommended that the Committee authorise direct action under the terms of Section 135 of The Town and Country Planning (Scotland) Act 1997 as amended to allow the Council to enter Unit 7 and 8, Webster Park, 17 Dunsinane Avenue, Dunsinane Industrial Estate, Dundee, and take the necessary steps to ensure the terms of the Enforcement Notice are complied with, following the non-compliance of its terms by the tenant and landowner.
- 2.2 Thereafter, it is recommended that Committee authorise the Executive Director of City Development to recover any expense reasonably incurred by the Council in taking such action from the tenant or landowner.

3 FINANCIAL IMPLICATIONS

- 3.1 The quote obtained from Dundee Contract Services is estimated as being up to £5,514.61. This includes provision of all labour; equipment; dismantling; transportation and storage costs to remove the fixtures and fittings associated with the unauthorised use as a gymnasium. The Council would seek to recover the costs from the landowner and/or tenant.
- 3.2 There is a risk that the Council may not be able to recover the costs directly. The Town and Country Planning (Scotland) Act 1997 makes provision for the Planning Authority, in certain circumstances, to recover costs by selling any materials removed, thereafter returning any remaining proceeds to the appropriate party.

4 BACKGROUND

- 4.1 This report relates to two purpose built industrial units located on Dunsinane Avenue within the Dunsinane industrial estate. A gym has been operating from within the units since Spring 2019 without planning permission. A summary of the planning history of the units is contained within Appendix 1.
- 4.2 An Enforcement Notice was served on the tenant and landowner on 12 November 2020 in accordance with Section 127 of the Town and Country Planning (Scotland) Act 1997 as amended.
- 4.3 The notice requires the land owner and/or tenant to:
- a cease the use of the Unit at 7 and 8, Webster Park, 17 Dunsinane Avenue, Dunsinane Industrial Estate as a gymnasium; and

- b remove from the Unit at 7 and 8, Webster Park, 17 Dunsinane Avenue, Dunsinane Industrial Estate all and any fixtures and fittings that solely facilitate the use of the said Unit as a gymnasium.
- 4.4 The notice gave a period of 90 days for compliance. That period ended on 2 June 2021.
- 4.5 The gym is still operational and there are no apparent moves by the landowner or tenant to comply with the Notice. The Notice has not been withdrawn by the Council and is still legally binding.
- 4.6 Failure to comply with the requirements of an Enforcement Notice is a criminal offence and leaves both the tenant and landowner liable for prosecution and potentially a criminal record.
- 4.7 The Council has the following two options to pursue the matter:
- a Direct Action - using the Council's powers under Section 146 of the Town and Country Planning (Scotland) Act 1997 as amended to enter the units, remove the fixtures and fittings that solely facilitate the use as a gymnasium and thereafter recover the costs from the landowner; or
- b Prosecute - report the matter to the Procurator Fiscal which, if pursued, may result in a conviction against the tenant and/or landowner. However, the Procurator Fiscal might not report on a case unless every other avenue has been explored.
- 4.8 Option a (direct action) is recommended as the best solution available to the Council. It would have the greatest certainty of ensuring compliance with the terms of the Enforcement Notice.
- 4.9 In carrying out direct action, the Council will act in accordance with the advice and guidance contained in The Scottish Government's Circular 10/2009 "Planning Enforcement".
- 4.10 An agreement has been reached with Dundee Contract Services to enter the units and remove the fixtures and fittings that relate to the gym use. The Council would thereafter store these items for 3 days to allow the owner to reclaim them. If they are not reclaimed within 3 days of their removal, the Council has the right to sell or dispose of them and recover any expenses reasonably incurred.
- 4.11 If the Planning Committee approves direct action, officers would seek to arrange for the works to be undertaken within fourteen days. It is estimated that the work would involve up to three people and take up to four days to complete. No special powers of entry will be required, as there is provision within Section 135 of the Act to allow any officer duly authorised in writing by the Planning Authority to enter land to execute the necessary steps.

Enforcement Action

- 4.12 The Council's principal responsibility as the planning authority is to manage the development and use of land in the long-term public interest.
- 4.13 The integrity of the development management process depends upon the Council's readiness to take enforcement action when necessary. Public respect for the development management system is undermined if unauthorised development, which is unacceptable on its planning merits, is allowed to proceed without any apparent attempt by the planning authority to intervene.
- 4.14 Taking direct action to resolve this breach of planning control is an action of last resort and one that is proposed after a considerable amount of officer time and resource has been spent over the last two years trying to resolve the matter through other means. Throughout this time officers have been willing to offer pre-application advice in relation to alternative locations for the gym use. No approaches have been made.

4.15 All avenues within the planning system have been exhausted. Refusal of planning permission has been supported at a local review body and the serving of the enforcement notice has been independently assessed and supported by a Scottish Government appointed Reporter.

4.16 It should also be noted that complaints have been received from members of the public raising concerns regarding public safety, specifically with regards to road safety in an industrial estate.

5 POLICY IMPLICATIONS

5.1 This report has been subject to an assessment of any impacts on Equality and Diversity, Fairness and Poverty, Environment and Corporate Risk. There are no major issues.

6 CONSULTATIONS

6.1 The Council Management Team have been consulted in the preparation of this report and are in agreement with its content.

7 BACKGROUND PAPERS

7.1 None.

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GH/AH/KM

6 August 2021

APPENIDX 1**PLANNING HISTORY FOR UNIT 7 AND 8, WEBSTER PARK, 17 DUNSINANE AVENUE**

- 1 Planning Application 18/00147/FULL - Erection of 8 No industrial units for commercial use (Use Classes 4, 5 and 6) with associated parking and drainage. Approved 1 May 2018.
- 2 Planning Application 19/00291/FULL - Change of Use to Gym (Class 11 Assembly & Leisure). Refused 19 September 2019 due to the following reasons:
 - i The proposed gym (Class 11) does not fall within Use Class 4, 5, or 6. The proposal therefore fails to accord with Policy 3: Principal Economic Development Areas of the Dundee Local Development Plan 2019. There are no material considerations to justify a decision contrary to the Plan.
 - ii The proposed gym would not support the function of the Principal Economic Development Area and is of a scale and nature that is aimed towards attracting visiting members of the public. The proposal is not ancillary to the Economic Development Area and therefore fails to comply with Policy 6 of the Local Development Plan 2019. There are no material considerations to justify a decision contrary to the Plan.
 - iii The proposed gym would result in an out of centre development that is at odds with The Town Centres First Principle, fails to satisfy the sequential approach and would draw trade from existing centres and leisure parks. The proposal is therefore contrary to the requirements of Policy 7 and Policy 21 of the Local Development Plan 2019. There are no material considerations to justify a decision contrary to the Plan.
- 3 Appeal to Local Review Body against refusal of 19/00291/FULL Change of Use to Gym (Class 11 Assembly & Leisure). Decision upheld and the appeal dismissed on 10 September 2019.
- 4 Planning Application 19/00821/FULL - Temporary Change of Use to Gym (Class 11 Assembly & Leisure) (Retrospective). Refused 17 December 2019 due to the following reasons: .
 - i The proposed gym (Class 11) does not fall within Use Class 4, 5, or 6. The proposal therefore fails to accord with Policy 3: Principal Economic Development Areas of the Dundee Local Development Plan 2019. There are no material considerations to justify a decision contrary to the Plan.
 - ii The proposed gym would not support the function of the Principal Economic Development Area and is of a scale and nature that is aimed towards attracting visiting members of the public. The proposal is not ancillary to the Economic Development Area and therefore fails to comply with Policy 6 of the Dundee Local Development Plan 2019. There are no material considerations to justify a decision contrary to the Plan.
 - iii The proposed gym would result in an out of centre development that is at odds with The Town Centres First Principle, fails to satisfy the sequential approach and would draw trade from existing centres and leisure parks. The proposal is therefore contrary to the requirements of Policy 7 and Policy 21 of the Dundee Local Development Plan 2019. There are no material considerations to justify a decision contrary to the Plan.
- 5 Appeal to Local Review Body against refusal of 19/00821/FULL Temporary Change of Use to Gym (Class 11 Assembly & Leisure) (Retrospective). Decision upheld and the appeal dismissed on 10 September 2020.
- 6 Enforcement Notice served 12 November 2020 giving a 90 day period for compliance.
- 7 Appeal submitted by agent on behalf of the operator of the gym to the Scottish Government against the serving of the Enforcement Notice. Notice upheld and the appeal dismissed on 4 March 2021.

- 8 Planning Application 21/00157/FULL - Retrospective application for change of use of units from Class 4, 5 and 6 to gym Class 11. Submitted 10 March 2021. Council declined to determine application due to the following reason:

The planning authority have refused more than one similar application in the previous 2 years.

- 9 Planning Application 21/00325/FULL - Change of use of units (Class 4, 5 and 6) to Wellness hub including gym (Class 11), physiotherapy clinic (Class 2) and shop (Class 1). Submitted 5 May 2021. Council declined to determine application due to the following reason:

The planning authority have refused more than one similar application in the previous 2 years.

- 10 Planning Application 21/00409/FULL - Retrospective change of use Class 4, 5 and 6 to wellness hub Class 11, physiotherapy clinic Class 2 and shop Class 1 and extension to existing building. Submitted 28 May 2021. Council declined to determine application due to the following reason:

The planning authority have refused more than one similar application in the previous 2 years.