

REPORT TO MINISTER FOR THE ENVIRONMENT

By Graham Self MA MSc FRTPI

Appeal by Mrs Margaret Holland Prior against a grant of planning permission.

Reference Number: P/2021/0314.

Site at: Seagull House, La Neuve Route, St Brelade, JE3 8BS.

Introduction

1. This appeal is against the grant of planning permission for development described in the application as: "Change of use of ground floor from Class A (Shop) to Class B (Cafe). Various alterations to fenestration throughout and install ground floor awning to cover alfresco area to East elevation. Remove and replace both, pitched pantile and flat roof sections. Remove and make good 2 No. chimney stacks and re-paint all elevations."
2. The description in the decision notice was similar except for the omission of the comma after the word "both" and the addition of the words: "AMENDED PLANS: Install extract vent on pitched roof".
3. The application was made by Mr Brigham Young.
4. I held a hearing into the appeal on 9 March 2022 and inspected the site on the same day.
5. The "Reason for Approval" as stated in the planning officer's report on the application was:

"Permission has been granted having taken into account the relevant policies of the Adopted Island Plan, 2011 (Revised 2014), together with other relevant policy and material considerations, including consultations and representations received. Notably, the development's relationship with neighbouring properties has been specifically considered in relation to the potential for there to be detrimental intrusions of privacy and loss of light. Based on the representations received, as well as the amending of the proposal, it is considered that the proposal will not significantly, or unreasonably, impact the amenities that occupants should expect to enjoy."
6. This report provides a description of the appeal site and surroundings, followed by summaries of the cases for the appellant, the planning authority, the applicant and other parties. I then set out my assessment, conclusions and recommendation. The appeal statements, plans and other relevant documents are in the case file for you to examine if necessary.

Application Documents

7. Apart from the normal application form and plans, supporting documents submitted by or for the applicant include: a report titled "Preliminary Roost Inspection"; a document titled "Design Statement Access Statement Historic Impact Statement Waste Management Statement"; Existing and Proposed Sketch Views; Existing External Doors and Windows Schedule; Bat Survey Results Report; Airclean company specifications of Kitchavent 2000/3000/4000 unit; and a letter from Aura Sound & Air Ltd about sound levels.

Intended Conditions

8. The permission which would have been granted in the absence of the appeal would have been subject to the two standard conditions A and B covering timing of implementation and compliance with plans, plus the following four conditions:¹
 1. The use hereby permitted, which relates to both the interior of the building and the alfresco area to the east between the building and the public pavement, shall only operate between the hours of 08.00 and 21.00.
 2. Prior to the development being brought into first use, visibility splays shall be laid out and constructed in accordance with the approved plans (Drawing 116). The visibility splays shall then be retained thereafter and no visual obstruction of any kind, including al fresco furniture and any mobile signage, shall be positioned within this area (marked by orange hatching on the drawing).
 3. The roof lights shall be of a conservation type, shall be set into the roof so that the glazed section is flush with the pantiles as shown on Drawing GGL-EDG-0114-1101.
 4. Any plant or machinery hereby approved shall be installed, maintained and operated to such specification that noise generated from these units shall be at least 5dBA below background noise levels when measured in accordance with BS4142:2014, from within the curtilage of any nearby property.

Site and Surroundings

Drawing 1370/103 provides a useful series of photographs of the site and surroundings, with viewpoints shown. The positions of windows and doors in the existing building are shown in Drawings 1370/101 (plans) and 1370/102 (elevations). Photographs showing views from the appellant's property, Les Burins, have also been supplied by the appellant's planning adviser by agreement with all parties at the site inspection (these are photographs taken during the inspection); I have asked that these photographs be placed on the case file for you to see if required.

9. La Neuve Route runs roughly parallel to the shoreline and in the vicinity of this site has an approximately north-south alignment. The site is on the west side of this road. The building on the site has two storeys towards the front (east) and a single-storey towards the rear (west), this part being known as the Sail Loft. The building was closed and appeared to be largely unused at the time of my inspection. The rear part of the appeal property (the Sail Loft) is Listed Grade 3 (Historical Listing BRO 139). It has granite block walls with a ridged pantile roof. The walls in most of the rest of the building have a rendered finish.
10. On the opposite (east) side of the road there is a public car park next to the sea shore. To the west are properties which mostly front on to La Rue du Croquet. To the north of the site there is a clothes shop (marked on plans as Chi Chi Boutique) and a car sales site. Behind the Chi Chi Boutique there is a courtyard area which appears to be used for parking, with vehicular access from La Neuve Route.
11. To the south of the appeal site fronting La Neuve Route there is a garage, beyond which are premises advertising denture repairs and a number of cafes or restaurants, including Shinto, Uno and Costa. The Shinto site includes an open-air area laid out with tables and chairs; as far as I could see, opening hours were

¹ Note: The conditions on the permission as set out in the decision notice were inadvertently numbered with two both numbered 1. I have translated the numbering above to what was obviously intended.

not displayed at the time of my inspection. Uno appears to offer café and takeaway services and advertises its opening hours as 0900-1600 Tuesdays to Saturdays and 0900-1700 Sundays. Costa advertises its opening hours as 0800-1600 Monday to Sunday.

12. The layout of buildings and plot shapes in the immediate vicinity of this site is complicated. The property to the rear or west of the appeal site (Les Burins) contains two dwellings (one on a raised ground floor, the other on all or parts of four floors), and there is a ground floor maisonette immediately behind the appeal site, with access on to the alleyway in the north of the site. Les Burins is a listed building (Grade 3)². The garden area for Les Burins is immediately east of that property and adjacent to the west end of the appeal property. There is also a "cottage studio" dwelling (Seagull Cottage) just across an alleyway south of the appeal site, behind a garage which fronts La Neuve Route. Seagull Cottage is a listed building (Grade 4.)
13. La Rue de Croquet is at a higher level than La Neuve Route and in this vicinity the properties fronting the former are mostly taller than those to the east. From the upper floors of Les Burins including a balcony, there are high-level easterly views across the lower buildings towards the sea. North of Les Burins is Beechwood House. This property also appears to be subdivided, the rear (eastern) part being a ground floor dwelling known as Beach Cottage, which has a doorway access on to the alleyway in the northern part of the site.

Case for Appellant

14. The main grounds of appeal are, in summary:
 - The decision to grant planning permission was perverse. It was based on the Department being satisfied that the proposal would not cause unreasonable harm to the amenities of local residents, but the applicant had not provided any evidence to support this assertion. The decision was made in error.
 - The lack of clarity about noise, odour and light pollution affecting neighbours is of concern. There is no independent data about likely noise levels from the proposed extract fan, and no local guidance on the reasonable or unreasonable impacts of noise, odour or light, and how these might be measured to provide meaningful controls.
 - Of the 12 public comments on the application, four supported the principle of a café, eight objected on grounds including noise, smoke, odour, obstruction and traffic conflict on a private right of way, the proposal to paint the building black, and breach of legal rights relating to the proposal to install opening clear-glazed windows.
 - Under the General Development Order the proposed café could become a restaurant serving food and alcoholic drink with al fresco facilities and a restaurant liquor licence, leading to unsocial behaviour and late-hour noise.
 - The proposed development would cause unreasonable harm to the amenities of the appellant's property and to air quality, contrary to Island Plan policies GD1 and GD13. Emissions will vent directly into her dining room and lounge.

² The Sail Loft and Les Burins are evidently within the same listing. The listing description for Les Burins evidently refers to "a townhouse with associated sail loft, circa 18th century with earlier origins".

- The implications of the development on the appellant's legal rights over land affected by the proposal have not been agreed. This includes the type of windows in the west elevation of the application property. These matters affect the scope of conditions on any planning permission.
- Proposed arrangements for access to the premises (including for deliveries and servicing) are not clear, raising concerns about potential harm to highway safety.

Case for Planning Authority

15. The documents submitted by the planning authority include a statement of case with attachments, one of which is the Department's report to the planning committee on the application.
16. The planning authority make the following main comments.
 - The appeal site is within a designated Tourist Destination Area where development adding to the vitality and tourist interest of the area are encouraged under policy EVE2 of the Island Plan.
 - Changes to the proposal have been made to try to overcome concerns by the Environmental Health Officer. Impact on adjoining properties would not cause unreasonable harm to amenities. Conditions limiting hours of use and noise levels were to be attached to the planning permission.
 - The impact on adjoining properties has to be considered in the context of the site which is on a main road in a tourist area.
 - Safety for pedestrians using the access way would be similar to any access which abuts or crosses a footpath, or where al fresco eating areas adjoin roads. A condition would have been imposed requiring visibility splays to be created and maintained. Any conflict between vehicles and pedestrians would not be such as to warrant refusing permission.
 - Legal restrictions on the property are a matter of civil law which could be enforced independently of planning law.
 - The proposal is considered to be supported by several Island Plan policies and would satisfy the requirements of Policy GD1.

Representations by Applicant

17. The documents submitted by or for the applicant at appeal stage include: a letter responding to public comments; a letter containing information about a proposed vent; an email about the "Kitchavent" extraction vent; and a letter containing comments on additional public or neighbour comments. This last item contains comments on kitchen extraction, noise abatement and odour abatement, and text headed "Misunderstood Rights of Way" which quotes an email to Advocate Anna Field from Solicitor Mr Paul Scally, making a number of detailed points about what are referred to as inaccuracies in Ms Field's representations.
18. The applicant disputes the appellant's case and puts forward the following main points.
 - The proposal would not cause unreasonable harm to the appellant's enjoyment of her properties. All relevant government departments were consulted during the application and the scheme was amended to satisfy all requirements, including those relating to the position of the extract flue and noise generation. Noise abatement was also subject to a specialist assessment and report published as part of the application.

- Windows facing Seagull Cottage to the south would be non-openable in accordance with property deed restrictions. The proposal would include replacing the existing windows with new ones with better sound attenuation performance. The sash design would be aesthetically appropriate in accordance with the building's historic status and an improvement on the existing windows.
- Controls on amplified audio equipment are unnecessary as a café is not the kind of place where music would be played at levels to cause disturbance; any nuisance could be subject to action under noise nuisance legislation.
- No unreasonable harm to air quality would be caused. The filtration equipment specified would exceed the requirements for the light duty café use cooking proposed.
- The proposed lighting would include down-lighted external signage designed not to dazzle or distract highway users. Internal lighting would not cause any greater light spill than a normal domestic arrangement. Contrary to the appellant's suggestion, there would be no window or door openings in the west elevation which abuts an adjoining wall.
- The scheme would not restrict free access to the rear private courtyard by vehicles or pedestrians. Safe use of the highway would not be affected. Visibility splays were agreed with the highway authority. Two proposed bollards would demarcate the vehicular access to the private courtyard and enhance pedestrian safety. Deliveries would use roadside parking provision as do other premises nearby.
- The proposal would not conflict with policy criteria as set out in Policy GD1 of the Island Plan.

Representations by Other Parties

19. About 12 written representations on the application are listed in publicly available records as "Public Comments". However, there are several submissions from solicitors apparently on behalf of the appellant. I do not know why these have been categorised separately as public comments, but most of the points raised were argued anyway by or for the appellant.
20. Some people who wrote in support of the proposal appear to have done so because they supported the idea of the premises being operated by a company named Locke's. That firm is not now intending to occupy the building, so those comments may have reduced weight. Other representations express concern and/or objections about obstruction of the access to the rear of properties fronting La Rue de Croquet, the potential for noise and disturbance, the position of the extract flue and potential resulting fumes, and the proposed black colour as depicted on application plans.

Assessment

21. The main issues raised by this appeal concern the effect of the proposal on the amenities and access arrangements for neighbouring residential properties, particularly the property immediately to the west, Les Burins. As usual, the assessment has to be made having regard to policy in the Island Plan.
22. The objections to the development on amenity grounds principally relate to noise, fumes or smell, and loss of privacy. The appellant's concerns on these grounds are understandable. However, some of them are either overstated or inaccurate or have been overtaken by amendments since the proposal was first made. I refer to three examples below. The first is the group of claims that:

"The use proposed includes a doorway directly opposite the entrance to Seagull Cottage. This doorway serves the toilet area for the proposed café/restaurant....There are a number of openable windows proposed along the southern façade of Seagull House at ground floor level. Customers using the café/restaurant would be able to watch any person using the alleyway to access Seagull Cottage".³

23. The proposal now subject to appeal would not include a doorway in the south elevation directly opposite the entrance to Seagull Cottage. A door which appears to have been a proposed emergency exit is shown in the drawings of the proposed south elevation, but it would not be positioned directly opposite the entrance to Seagull Cottage. In any event, during the hearing the applicant's representative accepted that this feature could be modified so that the door could be closed off permanently (that is to say there would be no opening). The ground floor windows in the south elevation would be opaque-glazed and could be subject to a condition to ensure that they would be non-openable, so customers would not have any view of persons using the adjacent alleyway.
24. The second example is the claim that emissions from the café "will vent directly into [the appellant's] living space (dining and lounge)." ⁴ This is an exaggeration, given that emissions would be vented by a through a vertical extract and filtered system around 20 metres from the dining and lounge areas at Les Burins. The distance mentioned in the appellant's statement may have referred to an originally proposed flue location; but as now proposed the flue would be at approximately the point where the roof shape changes and the front part of the building joins the rear former sail loft part. The extract vent would of course be closer to the dwellings at Seagull Cottage and the other ground floor maisonette to the west, but would be well above the height of any door or window in those dwellings.
25. The third example is the appellant's reference to the site being "in a residential location". The appeal site is in an area where there is a mixture of commercial and residential properties in close proximity to each other, with the premises fronting La Neuve Route like the appeal site being predominantly commercial. The policy background includes designation of this locality as a "Tourist Destination Area" covered by Policy EVE2 which, among other things, supports proposals for al fresco activities associated with restaurants and cafes. This policy has to be balanced against the provisions of other policies such as those in Policy GD1 covering the protection of the living conditions of nearby residents.
26. In terms of noise and other environmental effects, the proposed use might well have a greater impact on the amenities of neighbouring dwellings than the previous use of this site as a shop. However, it is necessary to judge whether harm to amenity would be "unreasonable" – that is the criterion in Policy GD1. The changes made since the original scheme was proposed have helped in this respect. Taking into account details such as the non-openable, obscure-glazed windows in the south elevation, the revised location of the extract flue, the scope for imposing conditions to restrict opening hours, and the location of the proposed al fresco area next to the road at the part of the site furthest from nearby dwellings, I consider that the impact on residential amenities would not be unreasonable. The greatest such impact would probably be on the proposed first floor flat within the appeal site, but as that would be an integral part of the proposal and no worse than any dwelling above a café or restaurant, I do not see this aspect as a reason to refuse planning permission.

³ Appellant's Statement of Case, page 11.

⁴ Paragraph 9.8, page 16.

27. Turning to access matters, one of the appellant's objections arises from a right of way which evidently relates to the use of the access way between Les Burins and La Neuve Route. Concern is also raised about the potential safety hazards and conflict between pedestrians or café patrons and vehicles accessing the courtyard north of the site.
28. In my judgment these concerns are overstated. There is no good reason to think that this access would be frequently used by vehicles. Although it is conceivable that a particularly careless or inconsiderate driver could cause an accident, that could apply to many broadly similar situations. Even allowing for the possible presence of children or disabled people as suggested by the appellant, I consider that the effect of the development on highway safety, or off-street safety, would be within acceptable limits.
29. I have one reservation about those points. Two bollards positioned as proposed would be about 1.5 metres apart, and would leave only about 0.5 metre to the edge of the appeal site, including the strip of land where there is a right of way between the main road and Les Burins. Without having access to the full legal documents and property history it is difficult for me to discern whether the bollards would physically impinge onto the right of way; even if access past the bollards would be possible so as not to affect the legal right of way, the bollards would be more than a chair's width apart, and tables and chairs placed immediately next to the bollards could result in safety hazards or at least a risk of obstruction of the right of way. A small restriction of the area available for customers outside, and/or possibly an additional bollard, may be all that is needed to improve the demarcation of the al fresco area. I return to this point when suggesting possible conditions below.
30. The appellant has stated that in addition to legal rights over land within the appeal site, she has contractual rights which may affect the proposal, that the Statutory Nuisance Law (1999) may apply and that there would be grounds for breach of contract, because a purchase contract provides that there shall never be anything carried out at the appeal property which by its noise, smoke, odour or otherwise could be prejudicial or cause a nuisance to the owner of Seagull Cottage. If legal rights were to prevent the proposed development being implemented, or were to prevent a condition being met, or if a breach of contract were to occur, that would primarily be a matter for civil litigation outside planning law. Whether an offence would be committed under the Statutory Nuisance Law if the appeal proposal were to be implemented in such a way as to cause a nuisance would be a matter for that law.
31. Light pollution has also been mentioned. If the proposal were to be implemented, artificial light would obviously be emitted through the windows, including those with obscure glazing. But the harm to amenity likely to be caused to neighbouring residents would not be significantly worse than if the premises were used for many other purposes, including use as a shop which could be open during the hours of darkness.
32. One of the other matters raised by the appeal is the visual impact of the black coloured external finish proposed for the rendered parts of the walls. The colour was evidently wanted by an intended business occupier who is not now interested in taking the premises, and the applicant is willing to consider another colour. This is perhaps largely a matter of taste, but anyway could be suitably left for detailed control subject to a condition.
33. From the viewpoint of design and appearance, the proposal would have benefits. These would include the refurbishment of a run-down property, part of which as

noted above is a listed building with historic character; there would also be design improvements such as the removal of a roof-top water tank. These benefits have to be taken into account when considering objections.

34. The appellant's objection that if permitted, the premises could change from use as a café to use as a restaurant without the need for specific planning permission (because of the provisions of the Use Classes Order) is weak, given the practical difficulties of defining and attempting to enforce such a distinction. If the distinction is meant to relate to serving alcohol, licensing laws and restrictions would apply. Limiting the opening hours to the extent covered by Condition 1 of what would have been the permission would provide a degree of control – with two provisos as explained in paragraphs 39 and 40 below.

Conclusions

35. This is a case where a balance has to be struck between benefits and disbenefits. I can understand why the appellant has raised concerns, but in my judgment they stem from overestimating the likely impact of the development, not allowing for the potential impact from some other possible occupier without a need for planning permission, and discounting the benefits of the proposal. Changes made since the application was originally made have also helped, and further amendment which could be subject to conditions would further help to control the potential impact of the proposal on residential amenity. The objections on safety grounds do not justify refusing planning permission.
36. The general thrust of relevant planning policies is in support of the proposal. The site is in an area where under the Island Plan, tourism-related development is to be encouraged subject to safeguards which in my judgment would be sufficiently met in this instance.
37. I conclude that the planning authority's decision to grant planning permission should be confirmed, subject to some modification of the original conditions as discussed below.

Conditions

38. I make some general points here before considering possible conditions in more detail.
39. As I pointed out at the hearing, Condition 1 of the would-be permission as worded by the planning authority would not be appropriate because it purports to require the "use" to "cease operating" every evening at 2100 hours, and to comply with such a requirement would mean emptying the premises of all equipment by that time every day so that the premises become "unused" overnight.
40. The planning authority's condition would also purport to require the business to *stay open* from 0800 to 2100 ("shall only operate between the hours of...), and this would be an unreasonable imposition if, say, an operator wanted to open later in the morning or close earlier in the evening. What the condition is really aimed at is requiring the *servicing of customers* or *opening of the premises to business* to be prevented outside that time period. Conditions of this type are usually better worded negatively ("...shall not be open for business other than...).
41. At the hearing a schedule of 13 conditions was submitted on the appellant's behalf (without prejudice to the appellant's case against granting permission). Several of the matters referred to in this schedule, including for example window or door openings and the position of the proposed bollards, would be covered or

partly allowed for by the revisions I am recommending. Others among the suggested conditions would in my judgment be unnecessarily restrictive, would be adequately covered by repeating the conditions which would originally have been imposed (including the condition relating to noise levels), or would duplicate non-planning legislation. I do not see the justification for removing "all permitted development rights" as suggested in the appellant's schedule.

42. On balance, I agree with the applicant and planning authority that a condition prohibiting any amplified music would not be necessary, bearing in mind the type of development proposed and the fact that if disturbance were to be caused, action could be taken under non-planning legislation.
43. I consider that permission should be granted subject to the conditions listed in paragraph 8 above (with revised numbering) with the following amendments and additions.
- (i) The wording of Condition 1 should be amended so that it reads: "The premises (including both the interior of the building and the alfresco area between the building and the public pavement) shall not be open to customers for business outside the hours 0800 to 2100 on any day".
 - (ii) The windows in the south elevation of the café part of the premises shall be kept closed while the premises are open for business.
 - (iii) Notwithstanding the black colour shown on the submitted drawings, no development shall be carried out until revised colour details have been submitted to the planning authority for approval and have been approved. The development shall not be carried out other than in compliance with such approval.
 - (iv) Notwithstanding the details of the proposed opening in the west end of the south elevation shown on the submitted drawings, no development shall be carried out until details of a revised arrangement with no opening doorway have been submitted to the planning authority for approval and have been approved. The development shall not be carried out other than in compliance with such approval.
 - (v) Notwithstanding the details of the proposed position of the bollards shown on the submitted drawings, no development shall be carried out until revised details have been submitted to the planning authority for approval and have been approved. The development shall not be carried out other than in compliance with such approval.

Recommendation

44. I recommend that the appeal be dismissed and that planning permission be granted subject to conditions as described above.

G F Self

Inspector

23 March 2022.