

PLANNING AND BUILDING (JERSEY) LAW 2002 (as amended)

Appeal under Article 108 against a decision made to grant a planning permission

REPORT TO THE MINISTER FOR PLANNING AND ENVIRONMENT

By Mr Philip Staddon BSc, Dip, MBA, MRTPI

Appellant: Ms V Bell (Third Party Appellant)

Site address: 42 Roseville Street, St Helier, JE2 4PJ

Application reference number: P/2022/1717

Proposal: 'RETROSPECTIVE: Demolish the rear wing and extend the first floor balcony with a retained fixed barrier to mark the new designated usable balcony area. AMENDED PLANS RECEIVED. AMENDED DESCRIPTION: RETROSPECTIVE: Demolish rear wing extension and extend first floor balcony. Various internal and external alterations.'

Decision notice date: 7 July 2023

Procedure: Hearing held on 9 November 2023

Inspector's site visit: 6 November 2023

Inspector's report date: 20 December 2023

Introduction

1. This report contains my assessment of the third party appeal made by Ms V Bell (the appellant). The appeal is made against the decision of the department for Infrastructure and the Environment (the planning authority) to grant planning permission for a development at 42 Roseville Street, St. Helier.

Procedural matters

2. In the course of the application, amended plans were submitted, and the development description was revised. I have made my assessment on the basis of the amended description and the plans listed in the decision notice.

Background

3. There is a complex and rather messy planning history that precedes this appeal which includes a number of applications, unauthorised works, plan inaccuracies and discrepancies, and a planning appeal. I have set out my understanding below.
4. No. 42 occupies a corner plot on the west side of Roseville Street, close to its junction with La Route du Fort. The traditional style building occupies

most of the site, although there is a small garden area to the rear, enclosed by a boundary wall. The property is now divided into 4 flats, 2 at ground floor level, 1 at first floor level, and 1 contained within the roof space and dormer roof extensions. There is a 3-storey block of flats to the west, and a 2-storey period residential property to the north, No 40 Roseville Street, which is the appellant's home.

5. In February 2020, an application¹ was submitted for a development proposal described as '*Convert 4 No. bedsits at first floor to create 1 No. two bed residential unit. Demolish and rebuild ground floor extension.*' Whilst it did not appear in the development description, those approved works included the creation of a balcony area, on the roof of the ground floor addition, to serve the first floor flat. It projected from the main wall by about 1.9 metres and is notated on the drawings as having a floorspace of 9 square metres. Most of the northern edge of the balcony was to have been formed by the then existing wall of a 2-storey projection, which would have had some screening effect to the neighbouring property to the north (the appellant's home), but the outermost section of the balcony would not be screened. At the time, the appellant was unaware of this planning application and, as a result, did not make any representations. Officers assessed the scheme to be acceptable and granted planning permission in April 2020 (the April 2020 permission). Other than standard conditions A (time limit) and B (approved plans compliance), no further planning conditions were imposed.
6. There is no dispute that work to implement the April 2020 permission was commenced, and I was advised that Building Control records confirm a start in July 2020. However, during the construction stage, changes were made which departed from the approved scheme. Those of most relevance to this appeal are that the balcony area was constructed larger than approved, with a deeper projection (about 3.2 metres to the edge of the structure), and the 2-storey projection, which would have offered some screening effect to the north, was demolished. The 'as built' balcony included obscure glazed balustrades of about 1 metre in height on the west and south edges, and on the north side, the balustrade is about 1.7 metres high to the top of the obscure glazing and about 1.8 metres high measured to the top of the metal frame. These works, and some other alterations which have limited relevance to this appeal, were unauthorised.
7. A 'revised plans' application² was submitted and validated in December 2020. The development description stated on the planning register records reads: '*REVISED PLANS to P/2020/0090 (Convert 4 No. bedsits at first floor to create 1 No. two bed residential unit. Demolish and rebuild ground floor extension.) Demolish First floor extension and extend balcony to West elevation. Various alterations to ground floor fenestration.*' The officer report on this application noted representations from the appellant concerning privacy and potential noise disturbance, but considered the scheme to be acceptable. The report stated that '*the objections have been carefully considered and the privacy concerns raised have been addressed and*

¹ P/2020/0090

² RP/2020/1571

mitigated by the addition of an obscure privacy screen along the length of the northern side of the balcony, which provides sufficient shielding from the closest neighbouring property. The matter will then be controlled by condition.' Permission was granted on 11 February 2021, with a condition imposed which stated that the development shall not be occupied until the obscure privacy screen to a height of 1800mm from floor level has been fitted, and that the screen will be maintained thereafter.

8. Aggrieved by this decision, the appellant lodged a third-party appeal. The appointed Inspector was Mr Self and his report to the Minister dated 15 July 2021 makes for a long and interesting read. In essence, Inspector Self concluded that the application was so poorly made and riddled with inaccuracies that it should be deemed invalid and could not be properly determined, and he recommended that the appeal be allowed on that basis. However, his report also dealt with the scenario where the Minister might wish to 'rescue' the application, and suggested possible changes to the balconies useable area and screening that might be secured by planning conditions.
9. On 26 November 2021, the Minister decided³ to allow the appeal on the basis that there were too many ambiguities, and confusion about what was proposed, to enable the application to be accurately assessed and determined. The Minister further stated that, due to the inadequacies of the documentation, he *'does not offer any opinion as to the planning merits, or otherwise, of the proposed development or of the works completed to date.'*
10. There then followed a period of delay and inaction in terms of addressing the planning issues at the property. However, in February 2023, a further application, which is the subject of this appeal, was validated. The description which appears on the register states: *'RETROSPECTIVE: Demolish the rear wing and extend the first floor balcony with a retained fixed barrier to mark the new designated usable balcony area. AMENDED PLANS RECEIVED. AMENDED DESCRIPTION: RETROSPECTIVE: Demolish rear wing extension and extend first floor balcony. Various internal and external alterations.'*
11. With regard to the balcony, which is the most relevant development component to this appeal, the application proposed that the main structure would be retained as built, but that the effective useable area of the balcony would be reduced to a depth of 1900mm (the projection approved under the first application P/2020/0090). This would be achieved by installing a raised timber structure⁴ to fill approximately the (western) outer third of the current balcony. The box structure is shown as being 1101 mm high on its inner edge, with what appears to be a 'roof' with a shallow fall towards the balustrade. The existing obscure glazed balustrades would be retained as built.

³ Ministerial Decision MD-PE-2021-0082

⁴ The structure was initially proposed as 'raised planting bed' but amended in the course of the application to a 'raised timber structure' – see applicant's agent's letter dated 8 May 2023 and drawing no. K09/R.115 (although the drawing date was seemingly not updated).

12. The appellant again lodged objections to this application, but officers considered the scheme to be acceptable and granted planning permission on 7 July 2023 under their delegated powers. A planning condition was imposed requiring the timber structure to be put in place before use of the balcony, and maintained thereafter. A further condition required cycle parking to be provided, again before the balcony was brought into use. The appeal is made against this decision.

Summary of the appellants' grounds of appeal and the responses of the planning authority and applicant

13. The appellants' case is set out in the appeal form and enclosures and a more detailed Statement with an appendix. There are 3 stated grounds of appeal, which are:
- The planning history of 'illegal' development and, in particular, the findings of the appeal Inspector in respect of RP/2020/1571 and the Minister's subsequent decision, mean that the development has already been assessed and rejected. It should not be approved 'by the back door'.
 - That the balcony is 'overbearing' and 'unreasonably affects levels of privacy' in her home, which conflicts with policy GD1 of the Bridging Island Plan (BIP) (2022).
 - The unauthorised development, and the planning authority's handling of it, has caused considerable upset and distress for three years, without a just and fair outcome being achieved.
14. The planning authority issued a Response document with appendices, including the officer report, and a Second Response document. It submits that the application has been properly made and assessed and that the development accords with the relevant policies set out in the BIP, with particular regard to policy GD1 concerning amenity effects, and policy GD6 relating to design.
15. The applicant has also submitted a Response document and enclosures. The response concludes with the view that the retrospective alterations to the balcony are considered sympathetic to solving issues of privacy and noise reduction, and that setting the balcony at 1.9 metres depth from the main wall is similar to the previously approved scheme. Additionally, there will now be a full height privacy screen.

Inspector's assessment

Ground 1: The planning history of 'illegal' development and, in particular, the findings of the appeal Inspector in respect of RP/2020/1571 and the Minister's subsequent decision, mean that the development has already been assessed and rejected. It should not be approved 'by the back door'.

16. I do appreciate the appellant's frustration that, having 'won' her last appeal against the grant of permission under RP/2020/1571, it should not be necessary to repeat the process. However, this ground of appeal must fail

because, as I explained above (paragraph 9), the Minister did not assess, or decide, the planning merits of that case. In essence, he just agreed with Inspector Self that the application was such a mess, it could not be properly assessed or determined. The appeal was allowed on that basis only. Whilst Inspector Self did provide his views on possible options, should the Minister wish to rescue that application, the Minister chose not to engage in that exercise and, as a result, the planning merits of RP/2020/1571 have not 'already been assessed and rejected' by the Minister. This is simply a matter of fact.

17. The appellant is correct that unauthorised development has occurred at the appeal site, and that is in breach of Article 7 of the Law. However, that fact alone does not prevent the applicant from seeking to rectify matters by the pursuit of a retrospective planning application. Indeed, the Law includes a specific provision under Article 20, which allows for applications to be made for development already undertaken. That Article does not limit the provision to the pursuit of a single application. Moreover, the planning authority is not compelled to enforce against and prosecute every instance of breach of Article 7, as the enforcement provisions in the Law are discretionary, the word 'may' [serve an enforcement notice] being critical in Article 40(2), and the test that any action be 'expedient' being contained within Article 40(1)(b). Given the facts in this case, and the commentary provided by Inspector Self in terms of possible amendments to make the scheme acceptable, there seemed good reason to allow the applicant a further opportunity to address matters. All of that said, the very long delays in this case have caused understandable frustration.
18. On this ground, the appeal should not succeed.

Ground 2: That the balcony is 'overbearing' and 'unreasonably affects levels of privacy' in her home, which conflicts with policy GD1 of the Bridging Island Plan (2022).

19. The appellant submitted that there should not be a balcony in this location at all. She considers that the U-shape format of 3 buildings (Nos 42 and 40 Roseville Street, and the block of flats to the west) makes this an unsuitable location for a balcony.
20. In terms of broad principle, I cannot agree with this position for a number of reasons. First, this is a relatively densely developed part of the Built-up Area, where new development is directed, and there is inevitably a degree of compromise in terms of amenity and privacy effects. Second, and related to the first point, the appellant's south facing windows are not entirely private, being visible from windows in neighbouring buildings and from La Route de Fort. Third, whilst not of compelling weight, planning permission has previously been granted for a balcony under reference P/2020/0090, and whilst the BIP has been adopted in the intervening time, there have not been any significant changes to GD1 policy considerations, and consistency in planning decisions is an important principle, established by UK caselaw. Fourth, another Inspector has assessed the earlier application under RP/2020/1571 and, whilst finding significant shortcomings with the documentation, he did not identify any in principle objection to the creation

of a balcony in this location. Fifth, the recently adopted 'Residential Space Standards' (RSS) (October 2023) highlights the importance of amenity space provision for flat occupants.

21. The more pertinent matter in this case is whether the proposed changes to the balcony adequately address amenity concerns and, more specifically, if they satisfy the policy GD1 requirement that the development does '*...not unreasonably harm the amenities of occupants and neighbouring uses, including those of nearby residents.*' Clearly, Inspector Self gave considerable attention to this matter in his July 2021 report, under the heading 'Planning merits issues'⁵. I have reviewed his findings very carefully and I was mindful of them when I made my site inspection of the balcony itself, and from the appellant's home, where I viewed from the bedroom and other first floor windows which face south.
22. I do agree that reducing the balcony depth to about 1900mm projection from the main wall feels appropriate, and at that depth, its use is more likely to be confined to sitting and passive activities, rather than a socialising space, although this cannot be guaranteed. However, I do not agree that this is adequately achieved by inserting the timber upstand structure within the western part of the as built balcony. It would be of a contrived design, at odds with the principles of good design set out in policy GD6. Moreover, I can well imagine that future occupants would be tempted to remove it, which would allow more intrusive views into the appellant's bedroom and other windows. There is also the possibility that it could be used as a sitting/perching surface, just as people sometimes sit on kitchen worktops, and, again, this would result in intrusive effects and loss of privacy to neighbouring occupants.
23. I am also not convinced that the balustrade details on the north edge of the balcony are sufficiently robust to protect the occupants of the appellant's home from unreasonable loss of privacy. Whilst the glass is obscured, there are large gaps between and above the glass panels. On my inspection, I was able to gain clear views through the gaps at the side of the glass panels towards the bedroom and other windows in the appellant's home. When I viewed from the other direction (from the appellant's home), I assessed that the presence of people on the balcony would be quite discernible and could feel intrusive. I was also able to view through the gap above the obscure glazed panel (I am relatively tall) towards the appellant's property. I do agree with Inspector Self's assessment that people using the balcony are more likely to be drawn to look to the south and south-west, rather than northwards towards the appellant's home, but this is by no means certain and the close separation distance means that, from the appellant's home, there would be a strong perception of intrusion, which would be unneighbourly and unwelcome.
24. I did note Mr Gibbins' submission that the screen is of a standard component structure, used widely elsewhere on the Island, and I also noted the applicant's submission that wind loading will be a consideration in terms of the potential to fill any gaps. However, this is a sensitive location where

⁵ Paragraphs 40 – 46 Inspector's Report dated 15 July 2021 – Appeal Reference: RP/2020/1571

the issue of privacy effects has already been highlighted through the earlier appeal, and I am not satisfied that the submitted proposal sufficiently addresses amenity concerns, given the relatively close proximity of the windows in the appellant's home and, in particular, the bedroom. Indeed, it feels to me that the proposal employs a 'do minimum' response to limit the costs of rectifying an unauthorised and, in my view, currently unacceptable balcony development.

25. On this ground, I conclude, on balance, that the effects from actual and perceived overlooking would be unreasonably detrimental to the living conditions and amenities enjoyed by occupants of No 40 Roseville Street. The proposal therefore conflicts with BIP policies GD1 and GD6, which require developments to avoid unreasonable harm to amenities of neighbouring uses, and to be of a high standard of design which respects neighbouring uses.

Ground 3: The unauthorised development, and the planning authority's handling of it, has caused considerable upset and distress for three years, without a just and fair outcome being achieved.

26. As I noted above in my ground 1 assessment, the complexities and delays in this case have clearly been frustrating for those most affected. Whilst some of the delays are understandable and have been explained, I do have some sympathy with the appellant's submission that she has been subjected to a protracted saga, concerning a development which has a direct effect on the enjoyment of her property. That said, I understand that, since the last appeal decision, the applicant has not allowed recreational use of the balcony.
27. Whilst acknowledging the appellant's upset about the delays and the planning authority's handling of this case, these are not matters that directly affect the assessment of the proposal before me, which I must assess on its strict planning merits.

Conclusions and recommendation

28. For the reasons stated above, I consider that the appeal should be ALLOWED on Ground 2, and that planning permission should be REFUSED for the following reason:

Reason: The balcony, by virtue of its overall size, design and proximity to windows of neighbouring residential property, would result in an unreasonable loss of amenity to occupants of No 40 Roseville Street by virtue of actual and perceived overlooking effects and loss of privacy. The proposal therefore conflicts with policies GD1 and GD6 of the Bridging Island Plan (adopted March 2023), which require developments to avoid unreasonable harm to amenities of neighbouring uses and to be of a high standard of design which respects neighbouring uses.

29. If the Minister were to accept my assessment and recommendation, it should be apparent to the applicant that there remains scope to produce a scheme that is acceptable in planning terms. Put simply, reducing the balcony structure size to a depth of 1.9 metres and including an adequate

privacy screen on its north side in terms of depth, height and absence of any viewing gaps, would address the identified issues. Whilst I appreciate that the prospect of a third application may not find favour with the appellant, I do think that the applicant should be given an opportunity to consider this option, although the Minister may wish to set a time limit for the submission of any such application, as an alternative to considering the expediency of enforcement action. I would suggest that a period of 3 months would be reasonable.

P. Staddon

Mr Philip Staddon BSc, Dip, MBA, MRTPI