

PLANNING AND BUILDING (JERSEY) LAW 2002 (AS AMENDED)

Appeal under Article 108 (2) (b) against a refusal to grant planning permission

Report to the Minister

By Sue Bell MSc., BSc, FCIEEM, CEng, CWEM,
An Inspector appointed under Article 107

Appellant: Mrs Jo Luce

Planning application reference number: P/2023/0733

Date of decision notice: 3 June 2024

Location: 2 Sidon Place, Havre des Pas, St Helier, JE2 4UQ

Description of development: Change of use on the ground floor from café to fast food takeaway. Installation of kitchen extract ductwork to North elevation.

Appeal procedure and date: site inspection and hearing.

Site visit procedure and date: accompanied 29 October 2024; unaccompanied 29 October & 1 November 2024.

Hearing: 31 October 2024

Date of Report: 13 November 2024

Introduction and relevant planning history

1. This appeal concerns a refusal to grant permission for a change in use from a café to a takeaway and the installation of an extraction system to the kitchen.
2. Representations have questioned whether the premises has ever operated as a café. The Department states that based on its records the ground floor unit was last used as a shop (Class A). Indeed, the photograph of the site included in the noise report submitted with the application shows the property in use as a computer shop. At the hearing, the appellant confirmed that the property was purchased as a café but has not operated as such.
3. The application was determined by the Infrastructure and Environment Department (the 'Department') using delegated powers. Three reasons for refusal are listed on the Decision Notice dated 3 June 2024:

“1. The applicant fails to demonstrate the need for the proposed development in this locality, contrary to Policy ER4 (2b) of the Bridging Island Plan (2022).

2. The proposed development, due to noise pollution and odour, would have a harmful impact on the residential amenity of the flats within the same building as well [stet] neighbouring dwellings, contrary to Policy GD1 of the Bridging Island Plan (2022).

3. The proposed development, due to its location along a busy link road, inadequate cycle and pedestrian accessibility, and lack of off-street parking, would have an adverse impact on highway and pedestrian safety contrary to Policies TT1, TT2, and TT4 of the Bridging Island Plan (2022).”

The appeal site and proposed development

4. The appeal site forms one of a terrace of properties situated on the north side of Havre des Pas between Green Street and Havre des Pas Gardens. The unit is located at ground floor level. There is a basement flat below the property, which is accessed from the rear of the terrace. There is also a residential flat on the two floors above the appeal site, which is accessed from a separate street door from Havre des Pas. The area has residential units, vacant shops, visitor accommodation and restaurants.
5. The property is accessed by a step. It has a large glass window to the front. I saw that the owner is currently engaged in fitting out the interior.
6. Permission is sought to operate a takeaway. The submitted plans allow for an extractor duct to the rear of the property. However, the appellant’s intentions have changed during the appeal. They intend to use an air-fryer, which would not require the ductwork. Nevertheless, I am required to consider the application as submitted.

Case for the appellant

7. The appellant’s grounds for appeal and response to the reasons for refusal are:
 - The proposal is within an area identified as a Tourist Destination Area in the Island Plan.
 - The Island Plan provides support for daytime and evening economy uses including takeaways.
 - Policy ER4 (1) of the Island Plan provides support for new or extended uses associated with the daytime and evening economy in tourist destination areas, where they do not have an unacceptable impact on neighbouring residents and uses.
 - The proposal represents a change in use from one type of catering facility (café) to another.
 - There are recent examples of where an application was refused (in part) because of concerns about loss of a restaurant and permission was granted for a standalone restaurant and bar, which was considered beneficial for the tourist destination area.
 - A condition could be applied to control noise from the ventilation ductwork.
 - The ductwork would be designed to be in accordance with relevant British Standards to address concerns about odour.
 - The Statutory Nuisance Law (1999) can be used if any unreasonable nuisance to neighbours occurs.
 - The takeaway would only operate during very limited opening hours, three hours in the late afternoon / early evening and two hours on or around lunchtimes.
 - The site is in a sustainable location with good access to pedestrian and cycle routes and bus routes.
 - Most patrons are anticipated to arrive on foot / cycle from new apartments that have been built.

- Limited parking is acknowledged. An offroad parking space has been arranged near Rose Cottage.
- Cooking will take place using hot air, rather than oil. Consequently, the ductwork is no longer required, which should remove concerns about noise and odours.

Case for the Department

8. In addition to the reasons for refusal, the Department noted:
- The preamble to policy ER4 identifies that the policy only applies to the named tourist destination areas. In other areas, there is a requirement to demonstrate the need for the proposal. Impact on neighbouring uses also requires to be considered. The proposal is not located in one of the named areas.
 - There is no existing planning permission for the stated current use as a catering establishment.
 - Policy ER4 provides qualified support for proposals that do not have an unacceptable impact on neighbouring uses. The Department considers there are concerns about impacts on neighbouring uses.
 - Objections from DFI Drainage and IE Transport have not been satisfactorily addressed.
 - There are concerns about the location from which the noise impact study was conducted. It was not adequately demonstrated that the amenity of the first floor flat would not be unreasonably harmed. Thus, adverse noise impact cannot be secured by condition.
 - Insufficient information about operating hours has been provided.
 - The quoted examples of restaurants benefit from direct access to/ from the Lido and Havre des Pas footpath.
 - Nine road traffic casualties have been recorded at and near the site.
 - Havre des Pas is a vital link and maintaining flow of traffic is imperative. The proposal is likely to lead to vehicles pulling up onto the kerb or on the side of the road obstructing vehicle flow.

Consultations

9. **IHE Transport** issued two responses (6 and 23 August 2023). Whilst the first response was labelled “comment’ and the second “objection”, the text is otherwise identical. It notes that Havre des Pas is a vital link between La Collete Industrial Estate, the town and the east. Maintaining a flow of traffic is a prime importance to avoid delays including to the Gorey buses. It further notes that the footway by the site is narrow and that there is no parking permitted outside or in the area. The Department is aware of illegal parking, which even if just temporary causes a break in flow of traffic causing disruption. The response lists the road traffic casualties that have been recorded either outside or close to the site. The response concluded that the “location is not best suited to attract frequent customers at any time of the day or day of the week by whichever mode they choose.”
10. **Department for Infrastructure, Operational Services - Drainage** objected to the proposals (5 September 2023). It sought further information about whether there would be any increase in flows to the public foul sewer. It noted that consideration would be required to the disposal of fats and grease to prevent it entering the foul sewer and sought installation of a fat interceptor and / or a bio active grease digester. Further information was also sought concerning disposal of surface water.

11. The **Environmental Health** Department (18 October 2023) requested information about operating hours. It also suggested conditions in relation to limiting the noise of plant or machinery and identified that this would not prevent the applicant from potential Nuisance action if nuisance complaints were received in the future.
12. **Jersey Fire & Rescue** (4 September 2023) did not object to the proposals. It highlighted that the application may relate to a building which will require compliance with the Places of Refreshment (Jersey) Law 1967 or Licensing (Jersey) Law 1974.

Representations

13. Seven comments from six individuals are listed on the Planning Register. Objections relate to:
 - Traffic, parking and road safety.
 - Noise and odour.
 - Late night disturbance, anti-social behaviour and litter.
14. Five of the respondents provided further comments at the appeal stage. Some of these comments relate to a separate issue linked to water supply, which does not form part of this appeal.

Inspector's assessment

15. Article 19 of the Planning and Building (Jersey) Law 2002 as amended states "In general planning permission shall be granted if the development proposed in the application is in accordance with the Island Plan". Planning permission may also be granted for proposals that are inconsistent with the Island Plan if there is sufficient justification for doing so. In reaching a decision, all material considerations should be taken into account.
16. The current Island Plan is the Bridging Island Plan, March 2022 ('the Island Plan'). Having regard to the policies within that plan, the reasons for refusal and the grounds for appeal, and points raised in representations, I conclude that the determining issues in this appeal are:
 - The principle of development.
 - Effects of the proposals on neighbouring amenity.
 - Effects of the proposals on highway safety.
 - Acceptability of proposals in relation to clean water supply and disposal of foul and surface water.

The principle of development

17. The property is located within the Town and built-up area where Policy SP2 - spatial strategy of the Island Plan notes that development will be focussed. In addition, Policy PL1 - Development in Town supports development in Town where it makes a positive contribution to the strategic concepts of the Plan for Town.
18. Policy SP6 - Sustainable Island economy places a high priority on the creation and maintenance of a sustainable, productive and diverse economy. It provides support for new businesses and the redevelopment of vacant or under-utilised employment land.

19. Cafes and takeaway restaurants are identified within the Island plan as examples of non-retail activities that form part of the daytime and evening economy use, which are guided by Policy ER4 - Daytime and evening economy uses. Parties differ in terms as to whether part 1 or part 2 is relevant for this proposal.
20. Part 1 supports daytime and evening economy uses “within St Helier town centre, the defined centre at Les Quennevais or at a tourist destination area”, where these do not have an unacceptable impact on neighbouring residents and uses. Part 2 provides support for daytime and evening economy uses outside the areas identified in part 1 subject to three criteria:
 - it is in the built-up area;
 - there is a demonstrable need for such uses;
 - in cases outside the built-up area, where use is made of existing buildings or, where existing buildings are redeveloped, an environmental improvement is secured, relative to the local character of the area.
21. The Department considers that part 1 of Policy ER4 applies only to those tourist destination areas listed in the preamble to the policy, i.e. “the tourist destination areas of St Aubin, St Brelade’s Bay and Gorey Harbour”. As the proposal is not in one of these areas, the Department considers that part 2 of the policy applies. The proposal is within the built-up area, but the appellant has not provided any details as to the demonstrable need for the development, as set out in the policy.
22. The glossary of the Island Plan does not define tourist destination areas, nor are these listed or included on a plan to accompany Policy ER4. However, the appellant has directed me to Figure E4, which shows the location of tourist destination areas, which is included within the preamble to Policy EV1 - Visitor accommodation. Even allowing for the scale and representative nature of the map, it identifies the area around Havre des Pas and the Lido as a tourist destination area. Whilst the Department has suggested that Figure E4 is designed for the purposes of Policy EV1, I can see no indication that tourist destination areas are defined differently for each policy. The appellant has also referred to its discussions with the Department, from which it understands that the Department may consider that the tourism development area applies only to the southern side of Havre des Pas. I can see no support for such a position within the Island Plan.
23. Whilst the preamble can provide explanatory text, it does not form part of the policy. Part 1 of Policy ER4 refers to tourist destination areas without any qualification. However, even if I accept the appellant’s position, that Part 1 is the relevant part of the policy, support for development is conditional on proposals not having an unacceptable impact on neighbouring residents and users. I consider this aspect further below.

Effects of the proposals on neighbouring amenity and uses

24. Policy GD1 - Managing the health and wellbeing impact of new development states all development proposals must be considered in relation to their potential health, wellbeing, and wider amenity impacts. Part 1d of the policy refers to effects arising from emissions including noise and fumes. The preamble to Policy ER4 recognises that some day and evening economy uses can have potential amenity impacts, including noise and disturbance and cooking odours. Environmental Health has objected to the proposals on the basis of noise associated with the proposed duct and extraction fan. Some of the representations also raise concerns about impacts from noise, disturbance, and odours.

25. Whilst the appellant's proposed cooking methods have changed meaning that the extractor duct is no longer required, I do not consider this to be a minor change capable of amendment through the appeal process. I have therefore considered the proposals as set out in the application and on the Decision Notice.
26. The appellant has supplied an "Assessment of noise from proposed kitchen extract fan" report. This concludes that mitigation measures could be applied to reduce levels to 28 dB, i.e. 5 dB below the measured background levels of 34 dB. The Environmental Health Department has queried the conclusions, owing to the choice of location for assessment of baseline noise levels. These were assessed on a flat roof at the rear of the property, close to a first-floor window, which I understand serves a bedroom. The Department considers that this does not represent the location where maximum noise would be experienced. It notes that the report identifies the main contributory factor in mitigating noise levels to be the distance from the termination point. On that basis, there is a window which is only in the order of 1.5 metres from the termination point compared to the flat roof, which is c. 4 metres away. Consequently, the Department is not assured that the upper levels of the flat would not be adversely affected by noise. This issue has not been resolved.
27. Little detailed information has been supplied about the proposed opening hours, other than it would operate "during the early evening hours and lunchtimes." It is therefore difficult to be clear about the periods over which any noise or disturbance from the extractor equipment and/or visitors to the takeaway may occur. During my site inspection, I saw that the property is located on a busy road and that there are pubs and restaurants nearby. Thus, I would anticipate that there would be a degree of background noise associated with these uses, particularly in the evenings. Nevertheless, there are residential units immediately adjoining the property and the rear parts of these units are shielded to a degree from noise associated with the road. I conclude that a condition could be applied to restrict hours of operation and hence disturbance.
28. The property does not appear to have its own dedicated external amenity space. I have no information about bin storage or disposal of waste and management of any odour associated with this to avoid effects on residential neighbours.
29. In conclusion, there is insufficient information to demonstrate that the proposal would not result in unreasonable effects on neighbouring amenity as a result as noise or odours, contrary to Policy GD1 of the Island Plan.

Effects of the proposals on highway safety

30. Policy TT1 - Integrated safe and inclusive travel notes that the contribution to safe and integrated travel will be a consideration in all development proposals. There will be support for proposals that provide for access by different groups. I note that the site is accessed via a step and that there is no alternative means of entry. The policy also requires a transport assessment and travel plan to be submitted for development that has the potential to generate significant amounts of movement. I would consider that a takeaway would generate significant footfall. The appellant considers that the market research they have conducted suggests most customers would originate from the new residential developments in the area. However, no evidence has been provided to support this.

31. In addition, Policy TT1 notes that development which compromises the physical integrity and / or proper functioning of the island highway network, will not be supported. During my site inspection I saw that Havre des Pas was extremely busy. Traffic was semi-constant, even at different times of the day, necessitating lengthy delays for pedestrians to cross. I observed several vehicles either stopping or parked - sometimes partially on the pavement. These included vehicles making deliveries to other nearby restaurants. These impeded flow of both vehicles and pedestrians. I consider that the current proposal would add to this.
32. Policy TT4 - Provision of off-street parking seeks provision of an appropriate level of accessible, secure and convenient off-street parking to accompany development that has the potential to generate vehicular movements. The proposals do not provide any parking for visitors. The appellant has indicated that off-road parking has been arranged nearby, to allow for deliveries. I estimate that this is in the order of 250 metres to the east of the proposal site. This is an informal arrangement with a family member and hence I cannot consider it to be a permanent, long-term solution to the parking issue. In any case, I consider that use of this as a delivery drop-off point is likely to prove impractical, owing to the distances involved and the width of the pavements between the parking space and proposal site.
33. The footpaths, particularly along the side of the proposed development vary in width but are especially narrow adjacent to the property. The width makes it difficult for two pedestrians to pass in opposite directions without either stepping into the road, or into a doorway.
34. The appellant maintains that the premises is in a sustainable location. Policy TT2 - Active travel sets out that development proposals must demonstrate that provision for walking and cycling has been prioritised in the design of the proposals. I accept that the site is close to the cycle/ walkway along Havre des Pas and that there is a bus service. Nevertheless, as noted above, pavements are narrow and there are no bike parking facilities. IHE Transport has provided details of the number of road traffic collisions in this area and has objected to proposals. The absence of a transport assessment and travel plan means that there is no evidence to support the view that most visitors would not arrive by car or that the development would not further increase the known collision risk in this area.
35. I conclude that the proposals have the potential to generate high levels of footfall and / or requirement for parking and that insufficient information has been provided to demonstrate how this could be accommodated, in line with the requirements of policies TT1, TT2 and TT4 of the Island Plan.

Acceptability of proposals in relation to disposal of foul and surface water

36. Disposal of foul and surface water was not cited in the reasons for refusal of the application, but I note that Operational Services - Drainage objected to the proposals, owing to a lack of information.
37. The proposals would not increase or alter the extent of runoff. Thus, I conclude they would not have adverse effects on the quantity of surface water.
38. The Drainage department response provides details of measures necessary to reduce grease inputs to the foul sewerage system. Notwithstanding the appellant's intention to alter cooking practices, which would reduce grease levels, I am satisfied that these requirements could be applied to any permission that was granted.

Other matters

39. The appellant has suggested that the premises was previously used as a café. I have been provided with no evidence of this. The previous recorded use is as a shop. Whilst I accept that retail use would generate footfall, the level and nature of activity would be different to that of a takeaway.
40. The appellant has referred me to other recent decisions involving restaurants in the close vicinity of the appeal site. They have requested 'parity' in decision making, suggesting that these approved developments would also generate vehicle movements, may not provide parking and may contribute to illegal parking.
41. Whilst there should be consistency in decision-making, each application must be considered on its own merits. I do not have the full details of these other proposals before me. However, based on the limited information discussed at the hearing, I am satisfied that there are material differences between those proposals and the current application.
42. In reaching my recommendations, I am conscious that any grant of planning permission goes with the land and hence the way in which that permission is implemented may not always be within the control of the appellant.

Conditions

43. I invited parties to submit a list of any conditions that should be appended, should permission be granted. Recommended conditions were also included in the consultation response from Environmental Health and the Drainage Department had highlighted areas where further information was required.
44. The Department suggested four conditions. The first of these would limit opening times to between 08:00 and 21:00 on Monday to Saturday, and not at any time on Sundays and Bank Holidays. The proposed times would allow for more than the few hours around lunchtime/ early evening suggested by the appellant. I accept that it would be appropriate and necessary to define limits on opening times to safeguard neighbouring amenity.
45. The second reason was proposed by the Environmental Health team and sets limits on noise levels associated with plant and machinery to be at least 5dBA below background noise levels when measured in accordance with BS4142:2014. I accept that this would be reasonable and necessary to safeguard neighbouring amenity.
46. The Department's suggested third condition addresses the further information required by the Drainage department. It would require prior approval of proposed drainage works. It would therefore be appropriate and necessary.
47. The fourth proposed condition would require the submission and approval of a Parking Management Strategy, which must be approved prior to the first operational use of the takeaway. Whilst this condition may go some way to mitigating the concerns identified above in relation to parking, I find that it would be difficult to ensure that any agreed plan was enforced. In addition, I have concluded that the concerns in relation to traffic and highways are wider than parking for deliveries and for staff. I am therefore not satisfied that such a condition would be adequate to address the concerns identified above. Should the Minister disagree with my

recommendation, this condition should be broadened in scope to provide a full traffic and travel assessment.

Conclusions

48. There is policy support for the principle of development of an activity that would contribute to the daytime and evening economy, within the built-up area of Town and a tourist destination area. However, this support is not unqualified. The proposals fail to demonstrate that there would not be unacceptable impacts on neighbouring uses. In addition, there are concerns about the effects on traffic and transport, in an area for which there is a history of road traffic collisions. I therefore conclude that the proposals would not accord with the Bridging Island Plan overall.

Recommendations

49. I recommend that the appeal should be dismissed, and that planning permission should be refused.
50. If the Minister decides to disregard my recommendation and grant planning permission, then I recommend that this should be subject to conditions, as set out in paragraphs 43 - 47 above.

Sue Bell
Inspector 13 November 2024