

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

Appeal under Article 108(2)(d) against a refusal under Article 21(4) to amend planning permission already granted so as to remove a condition of that permission

REPORT TO THE MINISTER FOR THE ENVIRONMENT

made under Article 115(5)
by D A Hainsworth LL.B(Hons) FRSA Solicitor
the inspector nominated under Article 113(2) from the list of persons appointed under Article 107

Appellants:

Pentagon Jersey Ltd.

Application reference number and date:

RC/2019/0705 dated 4 June 2019

Decision Notice date:

17 October 2019

Site address:

Unit 8, St. Peters Technical Park, La Grande Route de St. Pierre, St. Peter, JE3 7ZN

Application

"Remove Condition 12 (to enable outside storage and other operations) from permission 828/V (demolish part of building and create 4 units, construct 2 No. offices)."

Condition appealed against:

Condition 12 of planning permission 4/11/828 V dated 19 June 1984 in so far as it applies to Unit 8

Inspector's site visit date:

4 February 2020

Hearing date:

6 February 2020

Introduction and procedural matters

1. Planning permission 4/11/828 V was granted on 19 June 1984. It authorised the “demolition of part of main building and division of remainder into 4 separate units, constriction [*sic*] of 2 No. self contained office block. Recladding to entire existing building”.
2. Fourteen planning conditions were imposed. The permission did not record reasons for any of the conditions. All the conditions that are not already spent will remain in force if this appeal is allowed, except Condition 12. Ongoing conditions will include a restriction on any industrial usage to light industry, a limit on noise levels to standards relating to industrial noise in mixed residential and industrial areas and a prohibition on any operations between 10.00 pm and 6.0 am.
3. Condition 12 is as follows: -

“12. That all storage and other operations shall take place within the units hereby permitted and the open areas surrounding the buildings shall be retained and maintained for those purposes shown on the approved plans to the satisfaction of the Island Development Committee”.
4. The application to remove Condition 12, in so far as it relates to Unit 8, was refused by the Planning Committee for the following reason: -

“The removal of Condition 12 from permit 4/828/V is unacceptable as it would be contrary to the requirements of Policy GD 1 of the Adopted Island Plan 2011 (Revised 2014) in that it would further exacerbate issues of noise, nuisance and disturbance to local residents to the detriment of their amenities”.
5. The application was submitted under Article 21, which “applies where a person would like a condition of planning permission removed or varied”. Article 21(4) states: “A condition may be removed or varied in the manner sought by the application, or the application may be refused”. The application did not seek any variation of Condition 12.
6. Because the application did not seek any variation of Condition 12, the appeal has proceeded on the basis that the outcome of the appeal must be either that the appeal is allowed and Condition 12 is removed in its entirety, so far as it applies to Unit 8, or that the appeal is dismissed and Condition 12 remains in force unvaried. There is no power in the Law to vary a condition or to impose new conditions when an application made under Article 21 to remove a condition is determined by the Planning Committee. Nor is there such a power when the Minister determines an appeal against a refusal under Article 21(4) to remove a condition, since the Minister's powers in Article 116 do not extend to making a decision on an appeal that the Planning Committee could not have made under the Law in the first place.

Description of the unit and its surroundings

7. The four units authorised by planning permission 4/11/828 V are in a central part of the Park and are now known as Units 7, 8, 9 and 10. The appellants occupy Unit 8. They also occupy Unit 11, which has its own planning permission and conditions.

8. Condition 12 requires, first, that “all storage and other operations” taking place at Unit 8 shall take place within the unit. The terms “storage” and “other operations” are not defined anywhere in the permission. Condition 12’s second requirement, that “the open areas surrounding the buildings shall be retained and maintained for those purposes shown on the approved plans”, refers in the case of Unit 8 to plans which show those purposes as (a) Unit 8’s forecourt, which is the area between the main door of the unit and the Park’s main internal road, (b) the car-parking spaces belonging to Unit 8 and (c) a shared landscape strip, no longer present, between the open areas of Unit 8 and Unit 9.
9. Works affecting the open areas of Units 9 and 10 have been carried out since planning permission 4/11/828 V was granted in 1984. The works were approved by the Planning Committee in 2018 (permission P/2017/1522) and are discussed later in this report.
10. The Park has residential development on three sides. La Grande Route de St. Pierre is on the fourth side, with commercial premises on the opposite side of this road. The nearest housing to Unit 8 is in La Ville du Bocage, where there is a row of houses parallel to the Park’s main internal road that is separated from it by short back gardens and a line of boundary trees, hedging and fencing. Unit 8 and its open areas are on the opposite side of this road.

Extracts from Island Plan Policies referred to in the appeal

SP 1 Spatial strategy: Development will be concentrated within the Built-up Area, as defined on the Proposals Map. The Built-up Area includes the Park.

SP 2 Efficient use of resources: Development should make the most efficient and effective use of land and buildings to help deliver a more sustainable form and pattern of sustainable development and to respond to climate change.

SP 5 Economic growth and diversification: A high priority will be given to the maintenance and diversification of the economy and support for existing businesses, in the following ways: the protection and maintenance of existing employment land and floorspace for employment-related use and the provision of sufficient land and development opportunities for existing employment use.

SP 6 Reducing dependence on the car. Paragraph 2.39: new developments should be designed and located to minimise the need to travel.

GD 1 General development considerations: Development proposals will not be permitted unless the following criteria are met such that the proposed development does not unreasonably harm the amenities of neighbouring uses, including the living conditions for nearby residents, in particular by adversely affecting the environment of users of buildings and land by virtue of emissions including noise, vibration, dust, odour and fumes.

EIW 1 Protection of existing industrial sites: Industrial development and redevelopment, including manufacturing, warehousing and distribution uses, will be permitted within the following existing industrial sites: ... St. Peter’s Technical Park, St. Peter.

EIW 4 Extensions or alterations to existing industrial buildings: The extension or alteration of existing industrial buildings will be encouraged, provided that the proposal accords with Policy GD 1 'General development considerations'. Proposals which do not satisfy this policy will not be permitted.

The appellants' representations

11. The main points made by the appellants are as follows: -

- The words "other operations" in Condition 12 are ambiguous but the Department are taking them to include loading and unloading. This compromises the ability of the unit to function as a warehouse, since there is insufficient space for larger lorries to be unloaded within the unit without losing a large amount of storage space; in addition, diesel engines would be running inside the building. There is a need to make use of the outdoor areas at the unit for loading and unloading goods, storing goods in transit and parking for customers' and delivery vehicles. These are all activities that are normal at an industrial unit.
- There are ten units in the Park and none of the others are precluded from loading and unloading outside. In the case of Units 1, 1a, 2a, 11 and 12 the activity is allowed by their permissions. At Units 2 and 7 it is immune from enforcement action because of the lapse of time. Units 9 and 10 are used by the States of Jersey for food preparation. These units are subject to Condition 12 but were nevertheless granted planning permission (P/2017/1522) for alterations that make them reliant on outside loading and unloading, since vehicular access to the inside of the buildings is no longer possible because of the approved alterations. This decision is inconsistent with the approach taken to Condition 12 in connection with Unit 8. [Note: there are no units numbered 3, 4, 5 or 6.]
- The policies in the Island Plan pull in different directions and need to be considered as whole. The balance of considerations weighs in favour of approving the application.
- Condition 12 was imposed at a time when the Park was in an Agricultural Priority Zone, and therefore subject to more restrictive planning policies. The Park is now listed as a protected industrial site by Policy EIW 1, which sets a presumption in favour of development for manufacturing, warehousing and distribution uses in the Unit. There is a shortage of new sites for light industry, which places greater demands on existing protected sites.
- The preamble to Policy EIW 4 indicates that existing industries should be able to expand and develop on their existing sites rather than relocate. Making use of Unit 8, together with Unit 11, has shortened trips made delivering materials to building sites in the west of the Island that were previously made from the appellants' premises in St. Saviour.
- The proposal is in accordance with the strategic policies in the Plan. Insufficient regard has been had to Policies SP 1, SP 2, SP 5 and SP 6.

- The relevant provision of Policy GD 1 is sub-paragraph 3.c., which indicates that development should not unreasonably harm the amenities of neighbouring uses. The test is unreasonableness and regard should be had to the context within which residential amenity is assessed. Residential amenity on land next to protected industrial estates should not be given as much weight as residential amenity in other locations. In this instance, the Park operated as a factory before the houses were built in La Ville du Bocage.
- Unit 8 has only on average 0.63 deliveries per week and between 10 to 12 daily return trips by forklift trucks transferring materials between Units 8 and 11. The noise impact assessment dated 28 November 2019 prepared by the appellants' professional advisers concludes that if the condition is removed "the additional noise due to deliveries to Unit 8 will be of a negligible significance and in our opinion, noise should not be a reason for objection to a planning approval".
- The appellants believe that the main reasons for the residents' complaints arises out of the authorised use of Unit 11 and the movement of vehicles and forklift trucks between Units 8 and 11, which is not controlled by Condition 12 and is a legitimate operation. Unit 11 has an external yard specifically authorised for loading.
- Condition 9 of permission 4/11/828 V allows operations at Unit 8 to be undertaken between 6am and 10pm on 7 days a week, including public holidays. In order to mitigate the impact of their operations on residential properties, the appellants stated on 20 May 2019 in a letter to the Department that they would introduce the managerial practices set out in **Appendix 1** to this report. During the appeal, they made the statement set out in **Appendix 2** to this report.

The case for the Growth, Housing and Environment Department

12. The Department state that the application was refused because it was considered that to remove the condition and allow for external storage and other operations including frequent movements of materials would exacerbate issues of noise, nuisance and disturbance to local residents to the detriment of their amenities, contrary to Policy GD 1.
13. The Department state that the Park is designated as a protected industrial site and that it is the intention that such sites are retained for commercial use. However, they state that the use of such sites must take into account their context, which in this case includes nearby residential properties. At its closest point Unit 8 is located about 10 metres away from the rear boundary of the nearest house (No 22) and about 20 metres from the rear elevation of that house.
14. Policy EIW 4 specifically requires development to satisfy Policy GD 1. The Department draw attention to the supporting text, paragraph 5.129, which states: -

"Enabling existing industries to expand and develop on existing sites rather than relocate makes economic sense because it uses existing land resources and buildings more efficiently. However, where there are potential problems

associated with an industrial operation, it is important that any extensions or alterations mitigate, rather than exacerbate, its impact.”

The Department's view, supported by the Committee, is that the removal of Condition 12 would enable a change to take place, leading to an increase in activity that would have an unacceptable impact on residential amenities.

15. The Department accept that similar planning conditions do not apply to other units in the Park, but they do not consider that this should condone or encourage activity that would be harmful to residential amenities. They state that the reasonable requirements of the appellants have to be balanced with the reasonable expectations of residents and that this is what the Department and the Committee have done in this case.
16. The Department maintain that the appellants are operating one business operation split across two units with staff and vehicles moving between the two as if the estate road were part of an external storage and loading yard. They state that Unit 8 was not laid out with large external areas or yards and maintain that the external storage which has taken place can be unsightly and result in vehicles being parked beyond the authorised forecourt; this moves activity away from the building and closer to the houses, as well as harming the appearance of the Park and interfering with its use by other businesses and visitors.
17. In response to the appellants' claim that there is an inconsistency between the decision taken on Unit 8 with the approach taken at Units 9 and 10, the Department state: -

“The Appellant has suggested that the Department has been inconsistent in that in approving an application for units 9 and 10 (P/2017/1522), it allowed the original loading doors to be blocked up thereby not allowing for loading or unloading inside the building. This is correct in so far as the approved layout does not include any space within the building for unloading. The operation is however for the preparation of meals for the General Hospital, and not a warehouse/storage use. Moreover, it is to be expected that vehicles would reverse up to the doors which lead into the building so that the doors of the vehicles will be immediately adjacent to the doors of the building. The loading/unloading activity will be less than that for a warehouse and will be predominantly inside the building, as will all of the food preparation. That permission does not condone nor allow for any significant external activity. The removal of Condition 12 as proposed in the application at appeal *would* however allow for significant external activity.”

18. The Department acknowledge that the appellants' offer of a variety of improvements may be helpful. They state that many cannot be controlled through a planning application, but they are welcomed.

Representations made by others

19. All of the representations appear to have been influenced by the confusing context in which they were made. The background to the appellants' application is as follows. The Department issued two enforcement notices on the basis that Condition 12 applied to Unit 11 as well as to Unit 8. This prompted the applicants, with the concurrence of the Department, to submit an application to remove Condition 12 from both units. This was the

application that was advertised and consulted upon. After the appellants had fully researched the planning history of the Park, the Department accepted that Condition 12 did not apply to Unit 11. The application was amended to relate to Unit 8 only, but it was not re-advertised and the Department's report to the Committee continued to confuse matters by basing its recommendation on the effect on residential amenities of the appellants' business operations at both units.

20. The Department for Infrastructure raised no objections. They commented that the site, which they described as both Units 8 and 11, is already heavily used so it is unlikely that the proposal would result in a significant increase in traffic movements.

21. The Environmental Health Officer commented, again in relation to both units, as follows: -

"The situation which currently exists (in relation to noise and similar) at the site, and that which is proposed, is unlikely to be classed as a Statutory Nuisance under the Statutory Nuisances (Jersey) Law 1999. As a result, Environmental Health has no objections to the proposed development.

The applicant should note however that even if Planning permission is granted it does not defend the applicant from potential Nuisance action in the future. If nuisance complaints are received in the future, the matter may be investigated and considered under the Statutory Nuisances (Jersey) Law 1999 and further mitigation measures may then be required.

However, this department would recommend that restrictions are placed on the days and times when the outside areas can be used and the types of items which can be stored outside."

22. During the course of the appeal, the Environmental Health Officer has studied the appellants' advisers' noise impact assessment and considers that it is lacking in detail and rather limited in its scope.

23. Objections have been received from many nearby residents. Most of the objectors do not distinguish between the use of Unit 8 and the use of Unit 11. Many objectors clearly believe that Condition 12 applies to Unit 11 as well as to Unit 8 and have as their main concern the activities that are taking place at Unit 11. Some are under the misunderstanding that the condition applies to the use of the Park as a whole, or to the roads in the Park as well, or to the hours of use of the units. The main points put forward, in so far as they clearly do not relate solely to Unit 11 and are relevant to this appeal, are: -

- Condition 12 is needed for the overall protection and wellbeing of nearby residents.
- Condition 12 had worked well for both residents and the occupiers of the commercial units for over 35 years.
- Loading and unloading activity makes a lot of noise as does the movement of forklift trucks.
- There are problems with exhaust emissions and air quality.

- All activities should take place within the unit.
- There is no peace and quiet.
- Traffic movements around the Park have increased considerably and make it impossible to enjoy the gardens.
- The catering unit at Units 9 and 10 has added further noise, vehicles and footfall.

Inspector's assessments and conclusions

Scope of the appeal

24. Several issues have been raised by the Department and others in connection with the use of Unit 11. Consideration of these issues is outside the scope of this appeal. The appeal relates solely to Unit 8 and to the application to remove Condition 12 in so far as it relates to Unit 8. The units are both occupied by the same business, but they are separate planning units and there is no basis in planning law for treating them in combination.
25. The Department and others have raised concerns about traffic movements between Units 8 and 11. There are no planning controls available to manage traffic movements between units or on the roads in the Park. Vehicular traffic movements between Units 8 and 11 can therefore continue to take place unrestricted by planning controls whether Condition 12 remains in force or is removed. Consideration should, however, be given to whether its removal could have the effect of increasing these traffic movements and, if so, whether that could have an effect on residential amenities.
26. The Department's explanation concerning Units 9 and 10 (see paragraph 17 above) is flawed. The permission for Units 9 and 10 relates to building works only; permission for a change of use was not needed. All four units were permitted in 1984 by the same planning permission and the use of all four was made subject to the same Condition 12. This condition still applies to them all, regardless of who from time to time is in occupation of any of the units or the type of use each occupier undertakes in the units in accordance with the permission. This remains the case if the authorised use of one of the units generates a different volume or type of vehicular traffic to the authorised use of another unit, or if the vehicular traffic at any one of the units varies from time to time between successive authorised uses of that unit.
27. For the reasons given in paragraphs 5 and 6 above, the options available when this appeal is determined are limited to allowing the appeal, which would result in Condition 12 being removed in its entirety so far as it applies to Unit 8, or dismissing the appeal, with the result that Condition 12 would remain in force unvaried.
28. In the latter event, the appellants would have to operate within Condition 12. It would still be open to them either (a) to submit an application relating to Unit 8 to vary Condition 12 (and to vary any of the other conditions on the permission) in the manner proposed in the application or (b) to submit a planning application to retain Unit 8 subject to a new set of planning conditions. Some measures not capable of being dealt with by planning

conditions that are in the appellants' operational procedures could be included in a planning obligation agreed with the Department under Article 25.

Interpretation of Condition 12

29. The terms of Condition 12 are set out in paragraph 3 above and details of its requirements are explained in paragraph 8 above. The first requirement, that "all storage and other operations shall take place within the units" has given rise to uncertainty in this appeal, particularly because the words "other operations" have not been defined. The second requirement of Condition 12 is clear in so far as it has the three purposes explained in paragraph 8, but the words "to the satisfaction of the Island Development Committee" introduce uncertainty because they do not tell occupiers of the units, with sufficient clarity, what might be required of them. There is a further lack of clarity because no reason for the condition has been recorded on the permission.
30. When the exact meaning of a planning condition is in doubt its interpretation should be based on the ordinary meaning of the words used, having regard to the context in which they are used and the requirement in Article 23(1) of the Law that a condition must "fairly and reasonably" relate to the proposed development.
31. With the above considerations in mind, I interpret Condition 12 as follows: -
 - "Storage" is the act of keeping things somewhere so that they can be used later. It applies to things that are not in transit, but which are put on one side for a period of time because they are not needed at present or because their use is not contemplated in the short term. The use of the open area of Unit 8 in connection with things in transit may nevertheless be a breach of Condition 12 if it prevents the open area being used for the purposes shown on the approved plans.
 - The loading and unloading of things on the forecourt of an employment unit is universally accepted as a basic functional need of such units. If Condition 12 was intended to prohibit this activity it should have done so in specific terms and justified the prohibition with adequate reasoning. The words "other operations" in the condition are not sufficient to do this. This interpretation is reinforced by the planning permission granted in 2018 in respect of Units 9 and 10, which authorised works that made it inevitable that loading and unloading would take place on the forecourts, where it does so at present without being considered to be a contravention of Condition 12.

Effect if the appeal is allowed and Condition 12 is removed in respect of Unit 8

32. It is very apparent that Condition 12 cannot simply be removed from Unit 8 as proposed in the application, in isolation from any application being made for its variation or replacement, without giving rise to potentially adverse consequences for the appearance of the Park, residential amenities and parking requirements for the unit. The remaining conditions in the planning permission would not be adequate, for example, to control the nature (e.g. size, materials, location, enclosure) of any outside storage or to deal with the likely loss of car parking spaces resulting from the use of the open area for storage and other operations that are not currently allowed.

33. If the appeal were allowed, there would therefore be no assurance that the general development considerations in Policy GD 1 would be met or that the efficient operation of the Park as a protected industrial site would not be affected. The drawbacks would not be outweighed by any of the operational and other policy considerations put forward by the appellants.
34. For the above reasons, I have come to the conclusion that permission should be refused for the removal of Condition 12 in so far as it applies to Unit 8.

Inspector's recommendation

35. I recommend that the appeal is dismissed.

Dated 1i April 2020

D.A.Hainsworth

Inspector

Appendix 1

Managerial practices

- Require lorries to be switched off when unloading/loading
- Request haulier lorries to arrive after 8am
- Operate a new fleet of gas powered forklift, one gas powered side loading and one electric side loader
- Keep shutter doors closed until 7am
- Reduce outdoor movements
- Mostly, load lorries in the afternoon
- Additional racking to Unit 8 to remove movements from Unit 8

Appendix 2

Statement by the appellants (some of which relates to Unit 11, which is not under consideration in this appeal)

The appellants have carried out numerous measures to mitigate the impact of their operations on the neighbouring residential properties and these include the following:

1. Brand new gas forklift trucks and one electric combi truck were purchased to minimise noise and are serviced/maintained regularly to ensure they operate as designed.
2. Forklift speed is automatically limited on the new machines.
3. The reversing sirens on forklifts has been monitored and checked for the sound volume and compared against the manufacturer's specification by an outside source.

4. Gas powered Green combi restricted to indoor use as much as possible.
5. Brand new 2019 Heavy Goods lorry purchased, reducing emissions, noise and size.
6. Brand new cantilever racking purchased to remove all timber from Unit 8 to Unit 11 (neighbour request)
2. A traffic management plan has been created showing routes round the park and in particular in red where forklifts travel to the Unit (neighbour request).
3. Specifically designed indoor customer parking within Unit 11.
4. Products moved away from the exit door of Unit 8 (neighbour request).
10. Roller shutter doors are not opened before 07:00hrs and are closed at 16:00hrs Monday to Friday and between 08:00hrs and 13:00 hours Saturday.
11. The roller shutter doors are maintained regularly, and components greased to minimise noise.
12. Strict delivery vehicle operating hours and reduction of multiple delivery vehicle arrivals (neighbour request)
13. Fitment of door close to Trade counter door to reduce slamming (neighbours request)
14. Independent noise and operation review.
15. Smokers' awareness and relocation (neighbour request)
16. 'No Parking' and 'Switch off engine' signage mounted externally on Unit 11.
17. Delivery vehicle rules
18. All staff have received a toolbox talk on minimising noise around the premises.

Additional to this, other protocols have been put into place and include:

Delivery Vehicle Rules

- Lorries are to be switched off immediately.
- Please make sure deliveries are staggered and not arriving at the same time.
- No deliveries before 8am or after 3pm.
- No parking on yellow hatching or roadside opposite Unit 11 (next to neighbour's hedge).
- The one-way system and the speed limit on the estate to be adhered to.

Pentagon West Staff Operational Procedures

a. Arriving & Leaving site

Use one-way system.

Do not exceed speed limit.

Do not create excess engine or personal noise.

Do not open roller doors earlier than 7am.

b. Lorry and Vehicle Operations

Lorries should be loaded each evening.

Do not load/unload in the car park.

Do not let lorries park on the hedge side of the main road.

Do not unload lorries at Unit 11 if goods are stored in Unit 8 - and vice versa

Switch off parked lorries immediately.

Forklifts must use one-way system and are not to use the 'no-entry' road.

Forklifts must be operated sensibly and kept well below the speed limit.

The Green Combi is to be used inside only.