

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

Appeal under Article 108 against a decision made to refuse to remove a condition attached to a Planning permission

REPORT TO THE MINISTER FOR PLANNING AND ENVIRONMENT

By Mr Philip Staddon BSc, Dip, MBA, MRTPI

Appellant: Mr M Cotillard

Site address: Field No. J227, La Rue Des Landes, St John

Application reference number: RC/2019/0922

Proposal: 'Remove condition 5 (in the event of disuse and disrepair, remove and restore to agricultural use) from Permit 6605/H (Construct agricultural shed with offices).'

Decision notice date: 19 March 2020

Procedure: Written Representations

Inspector's site visit: 17 August 2020

Inspector's report date: 14 September 2020

Introduction

1. This report contains my assessment of the appeal made by Mr M Cotillard against the Planning Committee's decision to refuse permission to remove condition 5 attached to a Planning permission granted in 1996. The permitted development relates to an 'agricultural shed / potato store' on a site within the Green Zone in the parish of St John. Condition 5 requires the removal of the building and the restoration of the land to agricultural use, in the event of the building falling in to disuse or disrepair.

Procedural matters

2. The description of the proposal stated in the application form is slightly different to that employed in the decision notice. However, the decision notice description is clearer and more precise and I have therefore used it for the purposes of this report.
3. The Appellant's submissions have included reference to the appeal being made under Articles 108 and 110. However, the appeal is clearly made under Article 108(2)(d), as it follows a formal decision on an application made to remove the subject condition.

4. Following my initial review of the paperwork, I assessed that the appeal was suitable to be dealt with under the Written Representations procedure. The Judicial Greffe consulted with the parties on my intended procedural route. The Appellant requested the Hearing procedure, citing some frustrations at the manner in which the Planning Committee, and its officer support, had operated in this case.
5. I considered these submissions, but remained of the view that the Written Representations procedure is suitable in this case. In reaching that procedural decision, I considered the main issues in this appeal to be clear and discrete and that matters relating to the operation of the Planning Committee are of limited relevance to the assessment of the Planning merits of its decision. Moreover, in the light of the Covid-19 pandemic and its impact on appeal proceedings, the ability to conclude the appeal within a reasonable timescale is a further consideration.

Main issue

6. The main issue is whether condition 5 attached to Permit 6605/H, which requires the removal of the building and restoration of the site to agricultural use in the event that the building falls into disuse or disrepair, is reasonable.

The appeal site

7. The appeal site is situated in the Green Zone, a short distance to the north-west of St John's village. It lies to the east of La Rue Des Landes and just beyond a residential cul-de-sac called Clos de Perquage (which is within the defined Built-Up Area). Access to the site is gained by a hard surfaced driveway which extends from La Rue Des Landes.
8. Most of the site is occupied by a large modern agricultural building which measures about 36 metres in length and is around 30 metres wide, with a height stated to be about 17 metres to the ridge of its shallow pitched roof structure. The building is constructed on a substantial concrete base which the Appellant says is steel reinforced and entailed the removal of topsoil and subsoil when it was installed. The building is a steel portal framed structure with its walls and roof planes clad in metal sheeting. There are roller shutter access doors on the south elevation.
9. Internally, there are 2 distinct elements to the building. The first part comprises the main large single open barn which includes a part mezzanine floor at one end; when I visited these areas were in use for storage of a wide range of items including vehicles, building materials, machinery and other paraphernalia. The second part is at the eastern end and comprises 6 units of agricultural workers' accommodation, 3 on the ground floor and 3 on the first floor, and there are associated windows, doors and an external staircase (to access the first floor units) serving this residential use.
10. There were also some small quantities of building materials stored externally at the front of the building at the time of my inspection.

Planning history

11. Planning permission for the building was granted in October 1996 under Permit reference 6605/H and the development was described as, '*Construct agricultural shed / potato store with office and toilets at first floor*'.
12. The permission was subject to seven conditions which included compliance with Building Bye-Laws; the standard time limit; approval of external materials; landscaping; a restriction on use to 'agricultural storage'; and the 'disuse or disrepair' condition, which is the focus of this appeal. There are no reasons stated for the imposition of the conditions.
13. The precise wording of condition 5 states:

"In the event of the agricultural building falling in to disuse or disrepair, it is to be removed from the site and the land is to be restored to agricultural use."
14. Since the construction of the building, there have been a number of refused applications for vehicle related uses. An application to change the use of part of the building to dry storage and disaster recovery was approved in 2008 (ref P/2007/1246). A proposal to convert part of the building to agricultural workers' accommodation was approved in 2009 (ref P/2008/1364) and a subsequent application seeking to remove the agricultural workers occupancy condition was refused in 2010 (ref RC/2010/0983).

The appeal proposal and the Planning Committee's decision

15. The application (ref RC/2019/0922) sought the removal of condition 5 such that the building could be retained permanently. I understand that the Appellant had been unable to find a new tenant for the building due to changes in the agricultural sector, but considered that returning the site to agriculture would not be feasible.
16. Consultation responses from Environmental Land Controls and Comite Rurale de St Jean opposed the application on the basis of erosion of the countryside and the agricultural land bank, along with concerns about setting a precedent.
17. The National Trust and 2 interested parties also opposed the application on grounds including that the condition was accepted when implementing the permission, and that the Green Zone should be protected.
18. The Committee refused the application for the following reason:

The application site is located within the Green Zone. The removal of condition 5 of Permit 6605/H would reduce the protection of the Green Zone provided by condition 5, which required the removal of the building from the site in the event of it falling into disuse or disrepair. The condition anticipated the restoration of the land to agricultural use, which cannot occur with the building remaining on site.

Summary of the cases of the parties

The Appellant

19. The Appellant considers that the refusal decision was unreasonable and cites five specific grounds. First, the Committee stated that it opposed the proposal as it would result in the loss of the building from agriculture when this would not be the case and the actual refusal reason was changed by officers. Second, the condition fails to meet the required tests for Planning conditions, as it is unreasonable, imprecise and not enforceable. Third, later permissions relating to the building, including that for staff accommodation, effectively nullify the original Permit. Fourth, the demolition of the building would be contrary to Island Plan policies which promote re-use of buildings, the efficient use of resources, waste minimisation and presume against the loss of residential accommodation. Fifth, disuse and repair conditions have not been routinely used for some time because they are considered unreasonable and unenforceable.

The Planning Authority

20. It is acknowledged that officers recommended approval, but the Committee shared the views of those who objected to the application, including the States' Environmental Land Controls service. It rebuts the Appellant's claim that officers adjusted the refusal reason and states that the reason reflects the minutes (of the March meeting). It notes that the application follows an earlier application to take the building out of agricultural use and change its use to a vehicle workshop, which was refused on multiple grounds, including the existence of the disuse or disrepair condition.
21. It states that the Department takes a cautious view to proposals to change the use of agricultural buildings, as well as new building proposals, and highlights the importance of the Island Plan's spatial strategy which directs development to the Built-Up Area. It contends that the Committee's decision was consistent with Policy ERE 6, which limits agricultural buildings to those that are demonstrably essential and requires their removal in the event of redundancy. It points out that the reasonableness of this type of condition has been tested and confirmed in the Royal Court¹. The Department does not agree that subsequent permissions within the building, such as the workers' accommodation, nullify the original permission and states that other cases referred to by the Appellant were located in the Built-Up Area (and not the Green Zone).

Other parties

22. An interested party has submitted a representation which expresses concern that the removal of the condition would lead to the Appellant seeking to change the use to a commercial enterprise, which would be out of place in this quiet rural location accessed by a narrow green lane. It further states that Green Zone land is a precious resource and should only be lost for the most pressing of reasons.

¹ Kerley versus the Minister for Planning and the Environment – Royal Court (Samedi Division) 2008.

Inspector's Assessment

23. This case focuses on the appropriateness of imposing Planning conditions, and, in particular, whether the requirements of a condition are 'reasonable'. In Jersey, Article 23² of the Law provides the decision maker with wide ranging powers to impose Planning conditions, subject to them being 'fairly and reasonably' related to the development proposed.
24. I have not been made aware of any specific published guidance concerning the approach to imposing Planning conditions in Jersey. However, I understand from this and other cases that the 'six tests' employed in England are used as a sensible and uncontentious reference point. These tests require Planning conditions to be: necessary; relevant to Planning; relevant to the development to be permitted; enforceable; precise; and reasonable in all other respects. As such, they overlap with the requirements of Jersey's Article 23.
25. I am aware that 'disuse or disrepair' conditions have quite a long history in Jersey. They were often employed on glasshouse and horticultural developments, where large utilitarian structures may be considered justified for economic production purposes but, given their finite and temporary nature and their associated visual impact on the countryside, deemed unsuitable as permanent structures once they had reached the end of their productive lives. Policy ERE 6 in today's Island Plan maintains a similar approach and says that conditions and / or planning obligation agreements will be used to secure removal of buildings and structures should they become redundant to the agricultural sector.
26. In this case, there is nothing transitory or temporary about the building that was permitted in 1996. Indeed, it is a heavily engineered and permanent structure and, unlike horticultural structures of lighter construction, is unlikely to deteriorate simply through being vacant. Moreover, its construction appeared to have involved the removal of substantial quantities of topsoil and sub-soil and its replacement with a deep concrete base, which the Appellant says is steel reinforced. Whilst I do not agree with the Appellant's view that later permissions within the building, including that for residential accommodation, have 'nullified' the original permission, they do compound and confirm the permanence of the building and its robust construction.
27. Condition 5 has no accompanying reason or policy justification to explain its purpose, but it is assumed to relate to the same principles of limiting impact on the countryside by ensuring that built structures were essential and, once no longer in use, would be removed. Whilst that principle may be well grounded in respect of a glasshouse or shed developments of a lighter construction, it could not, in my view, be reasonably applied to a heavily engineered permanent building, such as the appeal property.
28. In this case, the Department controlled the construction details through the provisions of condition 1, which required compliance with building byelaws,

² Article 23 - Planning and Building (Jersey) Law 2002 (as amended).

and it would have been aware of the permanence of the building, including its heavily engineered steel superstructure and extensive and deep reinforced concrete foundations, which would have required substantial site excavation.

29. The effect of implementing the development was, in effect, the permanent loss of any underlying 'agricultural use' of the land that condition 5 seemingly sought to restore. As such, the requirements of the condition, which could be triggered simply by a lack of use of a perfectly serviceable building, would be disproportionate and draconian.
30. Not only would condition 5 require the dismantling of a large permanent building which is currently in good condition and includes 6 units of residential accommodation, it would also involve extensive works to break up and remove all of the deep concrete foundations. It would then require the importation, from an unknown location, of substantial quantities of soil, levelling and the restoration of fertility. This could involve very significant demolition arisings and lorry movements to export and import materials, and could take a considerable time to implement.
31. In my assessment, agricultural use on the site could only be restored by a programme of works that is so extensive and draconian that it would stray beyond any normal parameters of reasonableness, and would sit outside the scope of a Planning condition. I assess that the condition should be removed.
32. In reaching my view, I have noted the Royal Court case referred to by the Department, but find the circumstances to be materially different, including that it related to a residential development which was clearly permitted on a temporary basis for a time limited period.
33. I have also taken into account concerns expressed about setting a precedent, should this appeal be allowed. However, each case is determined on its merits and there are a number of material considerations in this case that differentiate it from other developments with 'disuse or disrepair' conditions, most notably concerning this building's heavily engineered and permanent structure, along with the added presence of residential accommodation.
34. Whilst I recognise the view expressed by some that the Appellant implemented the permission in the knowledge of the requirements of condition 5, this does not provide a sound basis for maintaining a condition which is unreasonable in Planning terms.
35. I have also noted concerns about the future use of the building should this appeal be allowed, but this appeal concerns condition 5 alone and the permitted use remains limited by condition 4 to agricultural storage, other than in the parts subsequently permitted for other uses, i.e. the residential units. Any alternative use proposals would need to be the subject of a separate Planning application and would fall to be determined on their merits in the light of the relevant policies within the Island Plan (notably Policy ERE 5) and any other material considerations.

Conclusion and Recommendation

36. For the reasons stated above, I conclude that condition 5 attached to Planning permission 6605/H does not meet the test of being reasonable and it should be removed. I recommend that the Minister **ALLOWS** this appeal.

P. Staddon

Mr Philip Staddon BSc, Dip, MBA, MRTPI