

REPORT TO MINISTER FOR PLANNING AND ENVIRONMENT

By Graham Self MA MSc FRTPI

Appeal by Mr and Mrs Hawgood against approval of a planning permission

Reference Number: P/2022/1699.

Site at: Le Fresnais, La Route des Champs, St Saviour, JE2 7SR.

Introduction

1. As explained further in paragraphs 7 and 8 below, this appeal is being considered by the written representations procedure. I carried out a site inspection on 7 July 2023.
2. The appeal is against the approval of planning permission for development described in the application as: "Construct two storey extension to North elevation and one storey extension to South elevation. Various internal alterations. Construct office room to South of site."
3. The application was made by Mr and Mrs Soby.
4. The planning authority's stated reason for approval was:

"Permission has been granted having taken into account the relevant policies of the approved Island Plan, together with other relevant policies and all other material considerations, including the consultations and representations received."
5. A note about requirements for protecting wildlife was added to the reason for approval. The permission would also have been subject to standard conditions A and B referring to the start of development and compliance with submitted plans, plus the following conditions:
 - C No part of the development hereby approved shall be occupied until the proposed secondary bedroom window in the west elevation at first floor level and the 2-bathroom *[sic]* windows in the north elevation at first floor level are fitted with obscure glass and restricted in its/their opening mechanism to no more than 200mm. Once implemented, the obscure glazing and restricted opening mechanism shall be retained as such thereafter.
 - D The existing boundary hedge along the eastern site boundary shall be retained on *[sic]* unless otherwise agreed in writing with the Chief Officer.
 - E The office room hereby approved shall only be used for purposes ancillary to the main dwelling Le Fresnais and in particular, the accommodation is not approved for use as a separate residential unit.
 - F No part of the development hereby approved shall be commence *[sic]* until the details in respect of occupancy numbers, confirmation of foul and surface water disposal for the existing property, has *[sic]* been submitted to and approved in writing by the Chief Officer.

Format of Report

6. This report refers to some procedural matters, followed by a description of the site and surroundings and summaries of the cases for the appellants, the planning authority and the applicants. The summaries are based mainly on the submitted written statements and are in two parts (under the sub-headings "Main Case" and "Rejoining Comments"), reflecting the fact that some fairly substantial comments were submitted at the latter stage. Representations by a third party are also reported. I then set out my assessment and conclusions, including comments on possible conditions, and recommendation. The full written submissions by all parties are in the case file for you to consider if necessary. All references to the Island Plan are to the current Bridging Island Plan.

Procedural Matters

7. On first reading the documents submitted for the appeal I considered that the written representations procedure could be suitable for this case. However, for this type of appeal the normal procedure under Article 114(4) of the 2002 Law is for a hearing to be held, and the appeal form indicated that this was the appellants' preference.¹ Arrangements were therefore made for a hearing, and the Judicial Greffe administrator notified the parties of the hearing arrangements by email on 7 June.
8. On Friday 30 June (only a week before the scheduled hearing date) the Judicial Greffe received an email sent the previous evening from the appellants, which queried the reasons for holding a hearing and indicated that the appellants would prefer the written representations procedure. I received this information later on the same day and asked for the views of the applicants and planning authority to be checked by telephone if possible.² The appeal procedure was then re-arranged as written representations, with a start time for the site inspection adjusted from what would have been the start time of the hearing. The change of procedure was made using the powers available to me under Article 114(5) of the Law

Site and Surroundings³

9. The appeal site is on the south side of La Route des Champs, which is a lane of mostly single-vehicle width leading generally towards the west and north off Rue Saint-Thomas. The house at Le Fresnais stands back from the road at a distance which varies (because the front of the house is not parallel to the road, and the road bends) between about 4 and 10 metres. The house has two storeys, but the part nearest the front is single-storey with a flat roof. During my inspection I was able to stand on this flat roof in the approximate locations where windows would be positioned in the front of the proposed extension.

¹ The information provided for appellants at Section 9 on the appeal form lists the types of appeals normally dealt with by written representations (this list does not include appeals against the grant of planning permission) and states that all other appeals are normally dealt with at a hearing. The form also invites appellants to "explain why" if they think their appeal should be dealt with differently, but this part of the form was left blank, thereby indicating that the appellants preferred to have a hearing, and no statement otherwise was made in submitted documents until the 29 June email.

² This was not easy for the appeal administrator, because of the limited time before the scheduled hearing; also the appellants' email was sent when the applicants were away from Jersey and their contact details were not readily available to the Judicial Greffe.

³ There are photographs on Drawing Number 987-002 which show the appeal property.

10. The rear part of the garden attached to Le Fresnais slopes down away from the house. In the rear, south-east corner at the time of my inspection there was a levelled area, apparently the intended location of the proposed office outbuilding. Beyond this area to the south there is an open field which when I saw it was mostly covered with rough grass. There is a hedge of evergreen species about 3 metres high along the side boundary of the site, bordering the rear plot of a neighbouring dwelling, Sion Villa. Beyond this hedge to the east the ground level falls away, so that the rear garden of Sion Villa is about 1.5 metres lower than the rear part of the appeal site. Next to Sion Villa to the east is another dwelling, Rose Cottage.
11. The property occupied by the appellants, The Chase, is on the opposite side of the road from Le Fresnais. The house there stands back from the road in a position which is higher than road level. A curved driveway leads up towards the house from the road.
12. The road carriageway here is about 4 metres wide. There is a thick hedge of mature Leylandii species about 4.5 metres high along the roadside boundary of The Chase's plot. In a few places some of the hedge shrubs have apparently been affected by ivy growth, have turned brown and appear to have died. Within the plot of The Chase between the front boundary and the house there is a lawned area, mature trees of palm-type species and a willow tree near the driveway entrance. The house has ground floor French doors and windows, and first floor rooms with windows and a balcony facing towards the front. There is also a patio area in front of the house. Some barbecue equipment was positioned nearby.

Case for Appellants

Main Case

13. The appellants contentions against the proposal are on seven main grounds: the effect on privacy and amenity of The Chase; errors in measurements when the application was decided; failure to consider the effect of hedge removal; failure to undertake a site visit to The Chase; overbearing development; presumption against development; precedent and impact on the Island Plan.
14. The privacy issue arises because although the decision now subject to the appeal would have required obscure glass to be installed in two windows to safeguard the privacy and amenity of nearby properties, that did not apply to the middle window of the three first floor front windows. This was inconsistent and absurd.
15. The planning officer mistakenly believed that The Chase was 30 metres from Le Fresnais. This assessment was inaccurate by about 50%. Also the distance from Le Fresnais to the primary outside amenity area of The Chase starts from 4 metres. This amenity area is directly in front of all three proposed first floor windows. The requirement to install obscure glazing would anyway not be satisfactory and would be difficult to enforce in perpetuity.
16. The hedge along the roadside boundary of The Chase has died in many places and fencing would be limited in height to 2 metres. Any new hedge would take many years to grow enough to provide sufficient screening. So Le Fresnais would have a direct line of sight to the private barbecue area, the main living area, the children's bedroom and the private balcony at The Chase, causing significant negative impacts. The planning officer did not approach the owners of The Chase when a site visit was made, and so was not able properly to consider the impact of the proposal and the extent of the objection.

17. The over-development and overbearing nature of the proposal has not been considered. The site is close to a public footpath. The elevated position of Le Fresnais is not mentioned in the planning officer's report. The report also failed to take into account the natural beauty of the area.
18. The proposal is contrary to the presumption against development in the Green Zone under policy NE3, a factor which should have made it necessary for the application to have been determined at committee. Policy NE3 appears to have been ignored and the planning authority's decision was bereft of reasoning or justification for the departure from the Island Plan. As was found by the High Court in the case of *PEC v Hobson* [2014] JCA 148, a failure properly to understand and apply policy (or depart from its terms) is an error of law and the decision so made is susceptible to challenge and may be struck down.
19. There is a danger that precedent will be created. The officer's failure to consider the relevant part of the Island Plan will lead to similar disregard in future cases. Permitting the development would set an undesirable precedent which would compromise the Minister's discretion on grounds of consistency (*Caesar Investments v PEC* [2003] JLR 566).
20. The appellants conclude that because of the breach of policies, the errors made by the planning authority when considering distances, the failure to acknowledge the impact of the removal of the hedge and the failure to safeguard the amenity and privacy of The Chase, the decision to permit the development was unreasonable and not lawful.

Rejoining Comments

21. Concern about the window glazing is not the primary concern. But to the extent that the planning officer has accepted this point the planning authority has conceded the appeal. Policy wording is open to different interpretations and selective quoting. The floorspace calculations show an increase which may be significant. Other comments by the applicants are subjective and speculative. The comment about possible removal of the hedge causing The Chase to be open to view is unhelpful given that a replacement to the hedge would not screen first floor level views. Existing overlooking is not over the primary amenity areas of The Chase, and any existing overlooking should not be aggravated. The applicants' contention that the proposal accords with the Island Plan is not supported by quoting any part of the plan. The view expressed to the appellant by the planning authority that nothing could be done to correct the error about obscure glazing was clearly incorrect.
22. Using the appeal process to repair a decision is arguably an abuse of process. The planning officer's report relied on misjudgement of distances and only mentioned the use of aerial photographs after the event. The officer's report failed to mention that the hedge might not remain. It is difficult to see why the officer did not view the application site from the windows or amenity space of the property which would be overlooked. There is no explanation of how policy was applied. The planning authority's reference to generous distances between the properties is incorrect and anyway has no objective meaning.
23. The officer's report shows that the case was decided by one person, was subjective and based on mistake and miscalculation. The proposal is contrary to the Island Plan as a matter of objective fact rather than subjective assertion. The statement that no precedent was set is a circular and possibly absurd argument. The officer has stretched policy and procedure to approve the application. The overriding methodology of the decision is defective as it appears to have been on

the basis that the planning Minister is obliged to permit the development in the absence of reasons to the contrary, despite the zoning and other considerations.

Case for Planning Authority

Main Case

24. The application was assessed under Island Plan policies. The site is in the Green Zone and Eastern Cycle Route corridor.
25. The condition requiring obscure glazing of the bathroom windows was imposed as bathroom windows are more likely to be obscure glazed than other windows. The department would not object to the condition being applied to all three proposed first floor windows.
26. The distances between the appeal site and the appellant's property were assessed by a planning officer during a site visit and by viewing aerial photographs. This provided sufficient information to judge the impact of the proposal on The Chase including the potential future removal of the hedge. The case officer did not make any approach to the appellants when the site visit was carried out as the officer had sufficient information to judge the impact of the proposal without doing so. The officer's report considered whether the proposal would be overbearing in terms of outlook, privacy and light.
27. Policy GD1 requires that development would not have an unreasonable impact on the amenities of adjoining properties. In this case the impact would not be unreasonable for the reasons stated in the report on the application, relating to the distance between the two properties, the siting of the proposed extension and the dwelling set-back from the road.
28. The site is in the Green Zone where policy NE3 of the Island Plan applies. This states that development must protect or improve landscape and seascape character. The proposal would be subservient to the existing dwelling. The design, size and materials are considered acceptable and would be in keeping with the character of the area.
29. Development proposals are only required to be considered at planning committee if six or more objection letters are received. Two letters of objection were received, and the application was decided under delegated powers.
30. Policy NE3 was referred to in the officer's report, but the conclusion reached was different from that of the appellant. The decision did not set a precedent. The decision was reasonable and in accordance with the 2002 Law.

Rejoining Comments

31. The Department consider that the proposal would meet the requirements of policies NE3 and H9. Whilst there is a presumption against development outside the built-up area under Policy H9 this is not a moratorium. The development would not disproportionately increase the size of the dwelling. The extension would be subservient to the dwelling and the visual impact would be modest.

Case for Applicants

Main Case

32. The applicants have stated that they are not in a position to respond to all of the points raised by the appellants and some will be for the planning authority to address. It has never been the applicants' intention to upset any neighbours. As regards the north-facing windows, Le Fresnais is orientated towards the south

and the applicants are content for all three windows to the first-floor bathrooms and the dressing room to be obscure-glazed.

33. For Island Plan policy purposes, the house is in the countryside where under policy H9 proposals for residential extensions will not be supported except in specified circumstances. The policy includes various circumstances where development may be supported. One is where an extension to a dwelling remains subservient to the existing dwelling and does not disproportionately increase the dwelling's size, gross floorspace, footprint or visual impact. The proposal would be in accordance with those points.
34. The proposal would increase the gross floorspace of the house by 17% from 199 square metres to 239 square metres. The footprint of the dwelling would increase by 4% from 150 to 160 square metres. As regards visual impact, the extension would fit within the existing built form and would have a minimal visual impact. The tests relating to policy GD1 on neighbour impacts would also be met.
35. The hedge on the north side of the road is a significant visual and physical barrier which would not be affected by the development. Any loss of the hedge would leave the garden of The Chase open to the whole public, but that situation would be unaltered by the application proposal. There is also some degree of overlooking from the existing landing window at Le Fresnais and from neighbouring properties.
36. In conclusion the applicants consider that with the addition of obscure glazing in the proposed dressing room, the proposal would be in accordance with the Island Plan and should be granted planning permission.

Rejoining Comments

37. It appears that the key concern to the appellants is about obscure glazing to the dressing room window. The applicants would be happy to provide updated plans showing this change. Approval of the extension is within current Island Plan policies. Surface water drainage and sewerage would be dealt with under Building Control procedures. This is a modest application which accords with the Island Plan.

Representations by Other Parties

38. Three written representations objecting to the proposed development were submitted to the planning authority at application stage. Two of these were from the appellants and the main points made are covered in the case summary above. The other representation was from Ms Sharon Clarke, who is apparently a neighbouring resident. Her comments are summarised below.
39. The proposed office would be located close to the boundary with Sion Villa. This property is a Grade 3 listed early 18th century building, as is the adjoining property Le Petit Jardin. The elevated position of the office room would mean that the neighbouring properties would be overlooked and the skyline would be dominated by this structure. The proposal would include first floor development affording elevated views towards Sion Villa and Le Petit Jardin causing potential loss of privacy. The hedge along the boundary may not be retained and there would be significant loss of privacy for occupants of Sion Villa and Le Petit Jardin.
40. The property deeds forbid any commercial business operation at the property and any planning permission should be sympathetic to the terms of the deeds to protect neighbours' interests. Le Fresnais is already in a dominant and

overbearing location above the 18th century dwellings to the south-east. The oversize scale, bulk and design of the proposal would constitute unsympathetic and incongruous development harmful to the street scene in this rural area and contrary to policies GD1 and GD6 of the Island Plan.

Assessment and Conclusions

41. The main issues raised by this appeal are the effect of the proposal on the residential amenities of neighbouring properties, particularly in respect of possible overlooking effects on privacy, and whether other aspects of design and appearance would be satisfactory. These points have to be considered having regard to relevant planning policies.
42. During my inspection I established that the dimensions shown on the annotated aerial photographs in the appellants' statement are broadly correct. In particular, the distance between the fronts of the houses at Le Fresnais and The Chase is more than 20 metres, though because of the angled siting of the houses the precise distance will vary depending on which parts of each property are taken as the measuring points. The statement by the appellants that "the distance from Le Fresnais to the primary outside amenity area of The Chase, from the lawned area to the closer private patio and BBQ area starts from 4 metres" is potentially misleading. As recorded in my site description, the 4 metre dimension is the width of the road carriageway, that is to say the distance between the forwardmost boundaries of the house plots. Allowing for the siting of the proposed development and the presence of vegetation, the separation distance between these properties would be sufficient to meet normal standards of privacy.
43. Part of the front garden of The Chase would be at a closer distance than that quoted above, but would be quite well screened by the intervening trees and other vegetation. The statement by the appellants that the front boundary hedge at The Chase has died "in many places" is exaggerated, but even if the hedge ceased to exist (and there is no good reason to make any such assumption) the dwelling-to-dwelling distance would be sufficient for privacy purposes and the property as a whole would retain a reasonable standard of privacy.
44. The use of obscure glazing in the front bathroom windows of the proposed extension would be an added safeguard. I doubt whether the addition of obscure glazing for the proposed dressing room at Le Fresnais would be really necessary; moreover the presence of three obscure-glazed windows facing the road here would give the house a rather blank-looking frontal appearance. But the applicants have evidently agreed to install obscure glazing to the dressing room, and that would minimise any feeling of reduced privacy in the front garden of The Chase. There are different grades and types of obscure glazing, and it seems to me that a reasonable outcome on this point would be to allow the glazing to be subject to control by condition. The degree of obscurity need be only moderate and the specific design could be such that the front windows, or at least one of them, would not have an unattractively blank external appearance.
45. Taking these factors into account I consider that the proposal would not materially harm the privacy or related amenity of The Chase.
46. The first floor room labelled as Bedroom 3 on the application plans would have a side window in the west elevation. The main window to this bedroom, with normal glazing, would face towards the rear. The application plans do not show the side window as obscure glazed, but the applicants indicated during my inspection that such glazing is intended, and obscure glazing would help to

safeguard privacy for occupiers of the dwelling to the west. In those respects it seems that the application plans are incomplete or not properly labelled, since as far as I could tell from my inspection, some aspects of what the applicants are expecting from the development regarding glazing details are not shown on the drawings.

47. The upper part of the proposed "garden office" in the south-east corner of the appeal site would be visible from places within the plots of the dwellings to the east; but in my judgment the visual impact of this outbuilding would not be so great as to cause significant loss of amenity for occupiers of those properties, especially given the screening effect of the intervening hedge. Nor would the setting of the nearby houses as listed buildings be materially affected. The neighbour's concern about potential commercial use of this outbuilding would be adequately safeguarded by the condition which would have been imposed by the original permission, preventing any such use.
48. The application plans show this outbuilding as having a glazed doorway facing east.⁴ The building's shape and location in relation to the boundary hedge is also depicted differently on the 1:250 scale "Proposed Site Plan" (Drawing 987-007) compared with other drawings (Proposed Office Plans & Elevations, Drawing 987-006 Revision A).⁵ The discrepancies appear to stem from carelessness rather than any deliberate attempt to mislead; nevertheless they raise concerns and could cause problems if planning permission were to be granted without considering them, especially bearing in mind the need to have a reasonable set-back distance from the side boundary so as to help limit visual impact in that direction.
49. I also consider that this part of the proposal would be more satisfactory if the glazed door were to be positioned in one of the elevations facing towards the garden of Le Fresnais rather than to the east, close to the boundary with the neighbouring property. It might just be possible to achieve a satisfactory situation if the extent of glazing in the door were to be changed, but I think a more suitable option would be to re-position the door in the north or west elevations.
50. The appellants mention various Island Plan policies in support of their objections, but some of these references are selective. Policy NE3 states that proposals which could affect the Island's landscape or seascape character, but do not protect or improve it, will not be supported unless specified criteria would be met. This is not the same as the "general presumption against all forms of development" in the green zone which formerly applied through Policy NE7 of the now superseded 2011 Island Plan. I judge that the proposal would meet the criteria in Policy NE3 of the current Island Plan.
51. Much the same applies to Policy GD1, under which development should not unreasonably harm the amenities of nearby residents. In my judgment any such harm would not come into the category of being "unreasonable". Policy H9 sets out various criteria against which development proposals outside built-up areas will be judged. The planning authority appears to regard these criteria as a

⁴ These drawings are unusually labelled with numbered elevations. When interpreting them it is necessary to translate the numbers into normal compass-point labels.

⁵ The outbuilding is shown as a square shape about 4 metres by 4 metres on Drawing 987-006A but rectangular in shape with dimensions of about 2 metres by 2.8 metres on Drawing 987-007. Normally the larger scale drawing would be given precedence but the discrepancies here could affect the building's siting and distance from the boundary.

presumption against development outside built-up areas⁶; but here the authority is misinterpreting its own policy. The supporting text to this policy explains that it would be unreasonable to resist all forms of development to improve people's homes outside the built-up area; and in this instance I find that the proposal would not disproportionately increase the size of the dwelling in terms of gross floorspace, building footprint or visual impact.

52. The proposed extension is unlikely to win an award for architectural merit, but it would reflect the layout, form, scale and materials of the existing house sufficiently to comply with Policy GD6 on design quality. Nor would the effect of the development on the street scene be so harmful as to justify refusing permission - the shape of the house when seen from the road would be changed and given a bulkier appearance, but this would be partly offset by the proposal to replace the existing flat roof above the front projection with a sloping roof which would be more in keeping with the rest of the house.
53. The claims by the appellants that the proposal would be "overdevelopment" and overbearing are exaggerated, as is the description of Le Fresnais as being in an elevated position - a claim which does not acknowledge that the house at The Chase stands above the level of the road between these properties. The argument that the application should have been considered by the planning committee is also unfounded, for the reason explained in the planning authority's statement relating to the limited number of objections.
54. The appellants' criticism of the planning authority's assessment of the distance between the houses at Le Fresnais and The Chase is partly justified, but greatly overstated. Similarly, any impact of the proposal on users of the nearby public footpath mentioned by the appellants would be very limited.
55. In my view the court judgments quoted by the appellants do not provide decisive guidance either way in this case, as they largely confirm established principles such as the need to understand and apply policy - and when applying current Island Plan policies it is necessary to consider many nuances.
56. My overall conclusion is that the planning authority's original decision to grant planning permission should be confirmed. However, as well as the modifications mentioned above there are discrepancies and flaws in some details shown in the application plans. I judge that appropriate corrections and adjustments can be achieved by imposing conditions on a permission, on the basis that the changes would be enough to make the development satisfactory and to provide suitable controls without causing the need for a fresh application.
57. If you as Minister agree with this approach, I suggest that the opportunity should also be taken to correct the textual or grammatical errors in the planning authority's decision notice which are not covered by the amended conditions.
58. It is not clear why the planning authority considered it necessary to impose Condition F of the permission subject to appeal, requiring details of "occupancy numbers" to be submitted for approval, given the modest increase in size of the dwelling; but no objection has been raised to this condition so I am including it within the recommendation.

⁶ Source: Paragraph 4 of the authority's "second response" statement.

Recommendation

59. I recommend that the appeal be dismissed and that planning permission be granted, subject to the following conditions, in addition to the standard conditions A and B relating to the start of development and compliance with plans.
1. No development shall be carried out until revised details of the following matters have been submitted for the planning authority's approval, and have been approved by the authority in writing. If approved, the development shall not be carried out other than in accordance with the approved details, the specifications of which shall be retained in the event of any future replacements.
 - (a) The type of glass and type of opening mechanism (including extent of opening) to be installed in the windows of the proposed first floor bathrooms and dressing room, and in the side window of proposed bedroom 3.
 - (b) The position of the proposed outbuilding, with particular reference to its distance from the east boundary of the site and its size and shape as shown on different drawings.
 - (c) The design of the proposed outbuilding with particular reference to the position of the door.
 2. The existing boundary hedge along the eastern site boundary shall be retained at or above its existing height unless otherwise agreed in writing by the planning authority.
 3. [As per Condition E of the original permission – to restrict the use of the outbuilding to purposes ancillary to the main dwelling.]
 4. As per Condition F of the original permission relating to foul and surface water drainage details, except for amendments so that the condition reads:

“No part of the development hereby approved shall be commenced until details in respect of occupancy numbers and confirmation of foul and surface water disposal for the property have been submitted to and approved in writing by the planning authority.”

G F Self

Inspector
23 July 2023