Our ref: CT-GROV-36-4

Your ref: P-23-0036

Date: 30 June 2023

Planning Department
Council of the Isles of Scilly
Town Hall
The Parade
St. Mary's
Isles of Scilly
TR21 0LW

By email to planning@scilly.gov.uk

Dear Planning Department

Objection to planning application P-22-056 – Holgates Green

The above planning application is to be considered by Full Council on Thursday 27h July ("the Application").

We act for the owners of Custom House, being the property immediately next to the site of the Application. The owners are concerned as to the effect on the recreational use of Holgates Green and upon their own amenity.

Our clients have already objected to the application online and has also written to the Council's Members and Planning Officer. We write in addition to those previous representations.

Members will already be well aware of the requirement under s38(6) of the Planning and Compulsory Purchase Act 2004, that the determination of the planning application must be made in accordance with the plan unless material considerations indicate otherwise.

In our view the application conflicts with the development plan and therefore should be refused. We set out some key points below (again for clarity, these are in addition to the points already made).

We point out that an identical application was made last year (P/22/056/COU) (the 'Previous Application'). Members refused the Previous Application for the following reasons:-

- Reason 1 for the refusal of the Previous Application was the harm to the historic environment and visual harm to the public open space within the Conservation Area.
- Reason 2 of the decision relates to highways matters.

The Application uses the same plans and photographs – the application is therefore identical save for the proposed opening hours.

There will still be harm to the historic environment and visual harm to the public open space within the Conservation Area. There will still be the same number of traffic movements as in the refused application. Therefore the Council (be it Officers or Members) cannot rationally come to a different decision on the same application on the same facts as before.

'Loss', or prejudice to the use, of recreation space

Policy SS4(3) states:-

> *Development that would result in the loss, or prejudice the use of a recreational or sporting facility, as defined on the Policies Map, or other community or cultural service or facility, will not be permitted unless it can be clearly demonstrated that:*
>
> *a) there is no longer a need for the specific facility or service by the community, including over the longer term; and*
>
> *b) a need for other permitted uses or other facilities and services has been explored and is not required; …*

The supporting text at para 113 warns of amenity issues – "*Fixed traders must not give rise to amenity issues through, for example, noise or smells, and must ensure that pedestrian and highway safety is maintained when trading is in operation, in accordance with Policy SS4*".

The proposal to site two vehicles cause a loss (or prejudice) of that recreational space during the period which it is sited, contrary to Policy SS4(3). As before, the recreational space is lost or prejudiced by the presence of the vehicles, the policy cannot be ignored because the use of the land is "reversible", all uses of land are 'reversible'. The Policy does not refer to 'reversible' losses being acceptable, it simply refers to loss of prejudice, which occurs here. Further, the prejudice is clearly not reversible because those wishing to enjoy the full extent of the green will be unable to do so. It is absolutely clear that with the vehicles present persons wishing to enjoy that part of Holgates Green as open recreational space will be unable to do so – the recreation space is therefore lost or prejudiced.

As a reminder, the Application area, which is to be used by the vehicles and for queuing space and customers is >20% of the green. This is not a *de minimis* use of the land. Policy SS4 applies and the development is contrary to it. Not having proper regard to development plan policies, or failing to interpret them properly, is a surefire way to make any decision of the Council susceptible to challenge by way of Judicial Review.

In the case of *Tesco Stores Limited v Dundee City Council*[1] Lord Reed stated "*planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean*". Officers and Members cannot choose to ignore the Policies in the Development Plan or to twist the interpretation to suit their own needs (e.g. to grant planning permission for something that another arm of the Council has discussed with the Applicant).

In the report on the Previous Application Officers sought to make the development plan mean something that it did not mean by referring to a *"complete loss of or a significantly prejudicial impact on the use of Holgates Green*". These words are not to be found within the text of the Policy.

[1] [2012] UKSC 13

The issue is also considered in para 119 of the supporting text to the Local Plan "*the loss of a facility or service that supports the islands' community, including open space, sport and recreation, will be resisted unless it is adequately demonstrated that it is no longer viable, suitable or needed. Any proposals for the change of use of a community facility or service should provide evidence to demonstrate that there is no longer a need for the specific service or facility in the longer term*"

The text of the Local Plan was carefully thought through, was subject to public consultation, was examined by a Planning Inspector, and then adopted by the Council. It is not acceptable to now start to seek to amend the meaning of a policy by adding words to it at this stage and the supporting text makes clear what the expectation was when the Policy was consulted upon, examined and adopted.

There has been no attempt to demonstrate that the recreational space is not viable, suitable or needed – nor could there be.

Further, we again warn Officers and Members of the perils of accepting such an approach. If the Council were to take a *laissez-faire* approach to the wording of the Policy here, then the Council should expect this to be the 'thin end of the wedge' and for developers to seek to rely on similar interpretations of planning policy wording when they wish to develop other protected areas. Will Officers and Members consider it acceptable in future for developers to say that their proposals are not 'significant' and are only preventing use of 20% of a recreational site? Officers and Members may be assured that developers will be following the Council's decision on this site very carefully and if this application is approved it undoubtedly will be cited by developers in the future (including potentially on appeals to the Planning Inspectorate). It will not be acceptable for the Council to suggest that it is acceptable to take a lax interpretation of policy when it is the Council's land, but not when land is privately owned.

Policy SS4(3) is the most important policy when considering the Application. Hence, notwithstanding the below, the Application cannot reasonably be said to be in accordance with the development plan where there is loss or prejudice to the protected recreation space.

In addition to the above, we raise the issue of the vehicles regularly driving over the green. The churning up of the grass, or it becoming worn are issues which do of course relate to Policy SS4. When these consequences (inevitably) occur, then the use of the recreation space is further 'lost' or prejudiced and will further harm the user's experience of Holgates Green. It must be noted that the application is to use the green all year round, rather than a seasonal use.

We would also point out that Policy SS4(5) is not relevant for this determination because the Application is for a *sui generis* use, which is not included within Policy SS4(5). Again, this part of the policy was drafted by the Council, consulted upon, examined and adopted – it is not appropriate or acceptable to seek to change the drafting (or interpretation of the drafting) outside of the appropriate statutory procedure.

Noise, smells and highways issues relevant to Policy SS4 are addressed below.

<u>Noise and Odour</u>

Policy OE3(1) requires that "*a development proposal that has the potential to generate pollution, including of ground, water, noise, vibration, light or air, will only be permitted where*

it can be demonstrated that there would not be any adverse impact on human health, the natural environment or general amenity".

It is abundantly clear (and was accepted in the report for the Previous Application) that the proposal has the potential to generate noise and odour pollution. In fact, occupants of Custom House have made complaints in respect of the noise and odour whilst the mobile hot food takeaway unit is in operation.

The NPPF introduced the 'agent of change' principle, i.e. it is for the Applicant for planning permission to demonstrate that to provide suitable mitigation and to show that there will not be a significant adverse effect on existing land uses.

The NPPF also addresses noise and odour, stating that Planning Policies and decisions should "*ensure that new development is appropriate for its location taking into account the likely effects (including cumulative effects) of pollution on health, living conditions and the natural environment, as well as the potential sensitivity of the site or the wider area to impacts that could arise from the development. In doing so they should:*

a) *mitigate and reduce to a minimum potential adverse impacts resulting from noise from new development – and avoid noise giving rise to significant adverse impacts on health and the quality of life;*
b) *identify and protect tranquil areas which have remained relatively undisturbed by noise and are prized for their recreational and amenity value for this reason;*"

The PPG also advises that noise must be properly considered and refers to the noise policy statement for England.

The Applicant has not provided any form of noise or odour assessment. For that reason alone the Application should be refused – the Council has no sound evidential basis to conclude that the use of the land will not cause harm to those living in the vicinity and using the green for recreational and amenity purposes. It is clear that the proposal will be above the LOAEL threshold and therefore a noise report should be provided.

No attempt has been made to show compliance with the Local Plan, the NPPF, the PPG or the noise policy statement for England. These documents cannot simply be disregarded. Without a sound evidential basis for determining that there will be no harm to residents and users of the green, any decision to grant planning permission will be liable to be quashed in the High Court through an application for Judicial Review – it is simply not open for Members to proceed without evidence on which to find compliance with the Local Plan and the NPPF.

The proposal involves running a generator for many hours each day at a distance less than 10m from a residential property. It is undeniable that the proposal will also generate odours whilst operational, again, a matter of metres from a residential property at a time of day where residents should be able to relax in their property or garden without being subject to unreasonable odour and noise. No odour mitigation is being applied. The sound attenuation is untested and there is no professional noise report to indicate whether the noise experienced at Custom House is within acceptable noise limits. There is no information to inform the Committee as to whether noise limits should be applied to the operation of the unit.

The EHO's response is woefully inadequate (as it was in the Previous Application). A suggestion that no one has complained to the Council to date is not a basis on which to make a finding that the proposal is in accordance with the Local Plan and the NPPF. It is extremely concerning that the EHO would suggest such a threshold for nuisance without reference to the Local Plan Policies or the NPPF.

Technical standards and guidance exist to test the impact of noise on human health, yet there has been no attempt to measure, quantify or assess the effect of the proposals on the nearest dwelling (a sensitive receptor) which is less than 4 metres away from the proposed development boundary.

There is nothing on which the Council can come to a satisfactory conclusion on Policy OE3(1). Suggestions that research has been conducted into "*finding a very quiet generator"* does not discharge the burden of meeting the development plan policy and the NPPF. There is nothing to confirm that the application meets the requirements of Policy OE3(1) and there is no sound basis upon which to conclude the development is in accordance with the development plan. Similarly, there is no empirical evidence that "*the presence of an existing mature hedge would have the effect of minimising significant harm*".

Persons on the green have a choice whether to remain subject to the noise, or to leave, the occupants of Custom House does not, they will be subject to the noise for the entire period of operation – and they will be closer to the noise than the majority of users of the green. Further, British and WHO standards and guidance provide a distinction between passers-by and residents. What may be acceptable to the public at large may not be acceptable to dwellinghouse residents.

In order to make a decision which is not at risk of challenge, it should be made on the basis of evidence rather than subjective supposition.

Ordinarily, the requirement to provide noise data is a requirement of the applicant so as not to cause additional expense to the Council and taxpayer, given the Applicant's confidence that the generator is "*very quiet*" it is surprising that the Applicant has not sought to justify their proposal with a rigorous and robust professional noise report to the appropriate standards and appears to be happy to rely upon the Council making a decision in a vacuum of evidence, which would make any permission liable to a challenge by way of Judicial Review.

As stated by our client previously, complaints have been already made about the noise.

Further, the consideration of noise to date only relates to noise from the generator. No consideration has been given to the setting up or operation of the development. For example, during operation there is likely to be noise (additional to, closer to and at higher dB, than ordinary users of the green) – this may be from persons queuing for food, or the cooking operations themselves. In order to assess compliance with Policy OE1 it is necessary for there to be consideration of the total noise experienced by occupiers of Custom House – and hence the noise information, required to make a lawful decision, is incomplete.

Whilst the above should be sufficient for the Council to appreciate that the proposal is not based upon any relevant technical standard, but upon a subjective view, the point is reinforced by the fact that the Officer referred to a temporary permission for 1 year on the Previous Application – i.e. a 'suck it and see' approach. This was clear evidence of a lack of confidence in the noise position presented and concern that the development may not in fact be acceptable.

Permission must not be granted unless a professional noise report clearly shows the noise to be in accordance with the appropriate standards.

Further, the introduction of this noise and odour generating use interferes with the tranquility of Holgates Green which is (rightly) prized for its recreational and amenity value for this

reason. NPPF para 185(b) requires that decisions taken by the Council must identify and protect such areas.

Air pollution

The proposal is to site a generator within a recreation space and a few metres from residential property. No consideration has been given in the Officer's Report as to the air pollution from the proposed development.

From a simple common sense standpoint, siting a fossil fueled generator in a recreation space and next to a dwellinghouse can only be a bad idea.

Supporting text to the Local Plan states (at para 184) "*The impact of pollution is a material planning consideration, as it can result in environmental damage as well as health issues*".

Not only is it a material consideration, but it also forms part of the development plan by way of Policy OE1 (cited above) which applies to air pollution as well as noise. No assessment of air pollution has been carried out.

In addition to the air pollution issue, para 83 of the supporting text to the Local Plan states "*Climate Emergency At the Full Council meeting in October 2019 the Council of the Isles of Scilly signed up to a declaration of a 'Climate Emergency' with a commitment for the Authority to be carbon neutral by 2030. The Council is therefore committed to encouraging and engaging with its partners and other local businesses and organisations to adopt similar ambitions to become carbon neutral by 2030.To reflect this commitment it is important that development proposals demonstrate a sustainable approach in terms of design, construction and occupation on a proportionate basis*".

At para 120 of the supporting text to the Local Plan it is stated "*Physical Infrastructure The islands are recognised as being carbon- intensive, due in part to outdated and inefficient infrastructure, and heavy reliance on imported fossil fuels and electricity to meet the community's needs, as identified in the Energy Infrastructure Plan. This high carbon intensity contrasts with the opportunities for self- sufficiency presented by the islands' location and natural environment. In recognition of a 'climate emergency' the Council have made a commitment to seek to achieve carbon neutrality by 2030, through its own activities and operations*".

These paragraphs of supporting text indicate that the Council wishes to reduce reliance upon fossil fuels and encourage businesses to be carbon neutral. Support for a proposal which introduces a fossil-fueled generator would be entirely contrary to the Council's position.

Validity

The Application is invalid and should not have been registered.

Article 7(1) of the Town and Country Planning (Development Management Procedure) (England) Order 2015 requires:-

> (2) Any plans or drawings required to be provided by paragraph (1)(c)(i) or (ii) must be drawn to an identified scale and, in the case of plans, must show the direction of North

The Block Plan, which is presumably intended to meet para 1(c)(ii) is not to an identified scale and does not show the direction of North. It is possible that this deficiency has led to the overlooking of the effects on Custom House.

Other Matters

Section 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 requires that the Council pay special attention to the desirability of preserving or enhancing the character or appearance of the Conservation Area. There is nothing about this proposal which preserves or enhances the Conservation Area.

Section 85 of the Countryside and Rights of Way Act 2000 places a duty on the Council to have regard to the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty. There is nothing about this proposal which conserves or enhances the AONB.

The Applicant seeks to argue that the lack of one mobile food provision is going to result in "irreparable damage" to the Scilly's tourism offer, that is somewhat overstating the position and the same argument was made in the Previous Application.

In the licensing application the Applicant sought to suggest that the Council had misled them and that by entering into an agreement with the Council there would be no issue with licensing and planning matters. It was of course the Applicant's responsibility to check the licensing and planning positions and to ensure compliance with licensing and planning policy. There is no need for the Council to bend planning policy to suit the Applicant.

The most astonishing thing about this Application is the decision to site this takeaway on land which is immediately next to a residential property. There are many other locations within St Marys that would not offend development plan policies, but instead the Application has been made for the takeaway to be sited within metres of Custom House, it is hard to see how an application could have been made closer to a residential property.

Our client has made Freedom of Information/EIR requests to the Council which concern this application. The statutory deadline for a response expires before the Committee meeting, therefore it may become necessary to add to this objection upon receipt of the Council's response.

Conclusion

The proposed development is clearly contrary to the most relevant policies and hence contrary to the development plan. In accordance with s38(6) the Application should be refused.

1. The application results in the loss or prejudice of a protected recreational facility, contrary to Local Plan Policy SS4(3);
2. The application has not demonstrated that there would not be any adverse impact on human health, the natural environment or general amenity, as a result of noise and odour, in particular to residents of Custom House and users of Holgate's Green, contrary to Local Plan Policy OE3(1) and contrary to the 'agent of change' principle within the NPPF;
3. The application has not demonstrated that there would not be any adverse impact on human health, the natural environment or general amenity, as a result of air pollution,

in particular to residents of Custom House and users of Holgate's Green, contrary to Local Plan Policy OE3(1);

4. The application's reliance on fossil fuels is contrary to the Council's declaration of a 'Climate Emergency' and is contrary to Local Plan Policy SS1.

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