

# STATES OF JERSEY



## ***EX GRATIA* PAYMENT: MR. D. TURNER**

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Lodged au Greffe on 1st May 2012  
by Deputy M.R. Higgins of St. Helier

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**STATES GREFFE**

## **PROPOSITION**

**THE STATES are asked to decide whether they are of opinion –**

to request the Minister for Planning and Environment to make an *ex gratia* payment of circa £7,757 to the Turner Family (Mr. David Turner) as compensation for costs incurred in both gathering evidence to enable the Department to prosecute an establishment that persisted in breaking many of their operating conditions and the legal costs incurred in an attempt to ensure that the Department took appropriate enforcement action in relation to the operation of the premises and to alleviate the problems experienced by the family.

DEPUTY M.R. HIGGINS OF ST. HELIER

## REPORT

Abraham Lincoln in his Gettysburg address used a statement which has become synonymous with what good government is supposed to be all about. He talked about “government of the people, by the people, for the people”.

This Proposition deals with a failure of the authorities of this Island, and in particular the Planning Department, to work for the people by carrying out their duties in an efficient and diligent manner, and which has resulted in an individual family incurring expenses of £7,700.00 to gather evidence and seek to alleviate problems affecting not only themselves, but also their neighbours, which should have been dealt with by public servants.

This Proposition should not be seen as a criticism of the Council of Ministers as a whole, it is not; but it is of one particular department which has failed to carry out its functions to the detriment of the people they are supposed to protect and serve. I hope, therefore, that other Ministers will not feel the need to rally around the Department and its Minister in a show of collective responsibility or solidarity, as to do so would be to condone incompetence and inefficiency.

Nor is this proposition a criticism of former Deputy C.H. Egré of St. Peter, who served as the Assistant Minister for Planning in the Department under Senator F.E. Cohen and was responsible for taking action to correct the failings identified in the full account below.

My original Proposition also contained no criticism of the current Minister for Planning and Environment, Deputy R.C. Duhamel of St. Saviour, because he had agreed to fully compensate Mr. Turner and his family (for the cost of equipment and legal costs) as soon as the court case against the restaurant owners for breach of an Enforcement Notice was concluded. Unfortunately, in this Proposition I can no longer do so for the following reasons: firstly, he has reneged on the agreement to fully compensate Mr. Turner; secondly, because he issued a Comment Paper to my original Proposition opposing full compensation rather than the Amendment to it supporting the payment, which the Department told me was their intention; thirdly, because he did not have the courtesy to inform me of what he was doing (I was in the UK and returned within days of the proposed debate and could not produce a report in the time available), which meant that the Proposition had to be re-lodged; and fourthly because I strongly believe in integrity and if one gives their word they should keep it.

I apologize in advance to my colleagues for the length of this report, but I want you and the public to have the full facts so that we can all learn from this appalling saga and strengthen our public service. If the States is to regain the trust of the people of this Island then it needs to admit its failing when the public sector gets it wrong, rather than sweeping it under the carpet, and then it must rectify the faults and compensate where necessary.

### **Financial and manpower implications**

The cost of the proposed *ex gratia* payment is £7,757, which will need to be paid from the existing budget of the Planning and Environment Department. There are no manpower implications.

## Chronology and comments

### 2000

1. Two decades ago the premises that have been the subject of the dispute which has led to this Proposition were used as a retail shop, selling amongst other things antiques and pets.
2. On 5th May 2000, the Planning and Environment Committee approved an application for the change of use of the ground floor from retail to restaurant (reference 10065/1). This permission was subject to only one relevant condition, that being:

“that the opening hours of the restaurant hereby approved shall be 12 midday to 12 midnight on any day and no customers shall be present on the premises outside of these hours”.
3. Although many residents objected to the change of use to a restaurant at that time, their objections were dismissed by the Planning Department and an Indian restaurant, which incorporated a takeaway operation, called the Taste of India, commenced operations in June 2000, following the granting of a Third Category Alcohol Licence by the Licensing Assembly of the Royal Court.
4. Residents then endured 9 years of constant smells, parking problems, noise, anti-social behaviour, rubbish and parking problems which seriously affected the quality of their lives and caused many individual residents real distress and strain.

### 2009

5. Around July 2009 the Taste of India owners ceased trading and the residents regained the quality of life they had lost almost a decade earlier with the complete cessation of most of the anti-social activities listed in paragraph 4.
6. In late 2009, the lease to the property was transferred to new owners, who also planned to open an Indian restaurant on the site, which they called the Bay Leaf. The residents quite naturally were aghast and feared that the tranquillity they had enjoyed for approximately 6 months would end and there would be a return to the anti-social activities that had been associated with the previous restaurant.
7. A public meeting of the First Tower Community Association was held, and those present unanimously objected to a new restaurant and takeaway operation on the site.

## **27th January 2010**

8. On 27th January 2010 a St. Helier Parish Assembly was held and an application for Third Category Alcohol Licence for the Bay Leaf restaurant was heard. The application was rejected by 32 votes to 2, with the 4 District Deputies – Fox, Green, Hilton, and Higgins – and many residents speaking against.

## **15th February 2010**

9. On 15th February 2010 the matter was considered by the Licensing Assembly of the Royal Court: the Bailiff M.C. St. J. Birt and Jurats de Veulle, Le Breton, Clapham, Le Cornu and Marett-Crosby presiding. Advocate A. Begg acting for the applicant.

The residents had great hopes that the Assembly would come to their aid and prevent a return to their experiences under the Taste of India and deterioration in their quality of life. Unfortunately, neither they nor their political representatives realised how restrictive were the Licensing Assembly's procedures or how limited were its powers under the licensing laws.

At this sitting the Assembly took evidence and representations from –

### **9.1 The Residents and Deputies**

The residents' main objections were based on the constant smells, noise, anti-social behaviour, rubbish and parking problems they had experienced over 9 years from the previous Indian restaurant and takeaway – the Taste of India – and their fears that the new business would lead to a resumption of these activities after 6 months of peace and quiet after the previous business closed down and the new business was fitting out the premises. In particular they complained of –

#### *Smell*

Since becoming a restaurant, strong odours from cooking had pervaded the area. This was particularly acute for those in the immediate vicinity who felt unable to open their windows for the smell. The extraction equipment was not effective and was located on a flat roof lower than most of the surrounding buildings which made it difficult for the pungent cooking odours to escape.

#### *Noise and disturbance*

The noise and disturbance came from 2 sources: customers of the restaurant's takeaway service and the extraction fan. A significant minority of the restaurant's takeaway customers emerged from nearby public houses the worse for drink and went to buy takeaway food at the premises. Having purchased their food they then tended to congregate in the area eating it. They were often noisy, aggressive and threatening. They frequently vomited and urinated in the doorways of

neighbouring houses, and responded aggressively and threateningly if any protests were made by house-owners. They left rubbish in the area which had to be constantly cleared up next morning, and tended to shout and talk loudly making it difficult for residents to sleep.

The extractor noise was particularly acute for Mr. and Mrs. Turner, whose balcony is immediately adjacent to the extraction unit on the flat roof of the restaurant (see pictures in Appendix 2).

#### *Illegal and inconsiderate Parking*

There have been considerable problems with parking in Paris Lane and in the cul-de-sac which runs off Paris Lane behind the restaurant and in which garage parking for a number of the residents is situated.

Paris Lane runs between the Inner Road and Victoria Avenue. There is a "No Entry" sign at the Victoria Avenue end, and there is a sign at ground level on the Inner Road end indicating "No Entry save for access to premises and cycles". It appears that that these notices are routinely ignored (see Appendix 1).

Customers of the restaurant regularly parked in Paris Lane and the cul-de-sac, thereby making it very difficult, if not impossible, for residents to gain access to their garages or parking spaces. On one occasion a customer of the restaurant had refused to move in order to make way for an ambulance.

- 9.2 Advocate Begg, who represented Mr. Kahn, the owner of the Bay Leaf Restaurant.

Advocate Begg submitted:

- 9.2.1 that the objections of the residents were to the presence of a restaurant and argued that this was not a matter for the Licensing Assembly but was a planning matter for the Minister for Planning and Environment;
- 9.2.2 that if his client was not granted a Third Category licence the premises could still operate as a restaurant with a takeaway business anyway under the Places of Refreshment (Jersey) Law 1967, and that without the sale of alcohol to their restaurant customers, his clients would have to place a greater emphasis on takeaways, thus exacerbating some of the problems described by the residents.

Advocate Begg acknowledged:

- 9.2.3 that the noise and disturbance [in the past] had been caused by people eating takeaways in the vicinity of the restaurant late at night, sometimes under the influence of drink, and that in order to deal with these problems the applicant proposed that its takeaway business should be strictly limited; and in particular that:

- (a) no orders would be taken in person, [as] customers would have to telephone their orders;
- (b) no customer would be able to pick up any food at the restaurant, service would be by delivery only;
- (c) vans would deliver food from the restaurant to the address given by the customer; and
- (d) that because of (a) to (c), customers would not be loitering in the area eating their food and generally making a disturbance.

Advocate Begg on the issue of parking:

9.2.4 Advocate Begg argued that there was parking nearby along the Inner Road by the Earl Gray Public House and opposite First Tower School until this was contradicted by the Deputies, who in their evidence pointed out that there was not, and that this part of St. Aubin's Road was a dangerous choke-point for traffic approaching the traffic lights near First Tower. [The only parking available is in the laybys along Victoria Avenue and the multi-storey car park on the road leading to the Bellozanne incinerator.]

9.2.5 He also stated that:

- (i) customers would be told not to park in Paris Lane;
- (ii) a member of staff would be placed at the front door of the premises to ensure that drivers did not park outside the restaurant; and
- (iii) the removal of the possibility of customers picking up takeaway food from the restaurant would drastically reduce the parking problem, which had largely been caused by customers wishing to park simply for a few minutes whilst they took delivery of their food.

9.3 The Connétable of St. Helier:

The Connétable:

9.3.1 confirmed the he was aware of, and was sympathetic to, the issues raised by the residents;

9.3.2 stated that he believed that much of the illegal parking previously experienced by residents was caused by the takeaway business; and

9.3.3 urged that, if the Assembly felt that it had no alternative but to grant a licence it should impose strong conditions to alleviate the concerns of the residents so far as possible.

9.3 In its decision the Licensing Assembly stated:

- 9.4.1 that the views of the three objectors (residents) who addressed the court were representative of the views of many other residents of the area;
- 9.4.2 that they sympathised with the residents;
- 9.4.3 that much of the problem of the noise, disturbance and anti-social conduct by customers is due to the existence of a takeaway business
- 9.4.4 that they had limited powers in the matter before them, i.e. “the sole issue for us is whether a liquor licence should be granted for the business”;
- 9.4.5 that whether the premises should be used as a restaurant is a planning issue and not a matter for the court as it was not part of its remit;
- 9.4.6 that its present use as a restaurant was permitted by virtue of the planning decision reached some 10 years ago;
- 9.4.7 that if they refused the applicant a liquor licence the premises could quite properly be run as a restaurant in accordance with the Places of Refreshment (Jersey) Law 1967;
- 9.4.8 that if they had granted a 3rd Category Licence they would have considered imposing a number of conditions with a view to alleviating the problems suffered by the residents.

9.5 In the event, the Licensing Assembly rejected the application for a 3rd Category Licence because there was uncertainty as to the form of extraction equipment and that the Assembly required to be satisfied that the applicant had taken all reasonable steps open to him to minimise the level of odour and noise.

**19th February 2010**

10. Following the Licensing Assembly’s refusal to approve the 3rd Category Alcohol Licence until the extractor fan was approved by the Minister for Planning and Environment, the Bay Leaf Restaurant applied for retrospective planning permission to install an extractor fan on the roof of the restaurant.

**22nd February 2010**

11. Advocate Dorey wrote on behalf of her clients Mr. & Mrs. Turner to Le Gallais Estates, the managing agents for the Anderson family, who owned Brixton House, the premises occupied by the Bay Leaf Restaurant. The correspondence related to Magnolia Cottage which abutted the restaurant and their property; problems they had faced in the past with the Taste of India



restaurant and some parking problems they were beginning to have with the new restaurant.

In particular she addressed:

- 11.1. nuisance, by way of excessive noise, particularly late in the evening/early in the morning, pointing out that Mr. & Mrs. Turner are elderly and Mrs. Turner has a heart condition;
- 11.2. car parking in the cul-de-sac behind the restaurant which made it impossible for them to come and go to their property and forced them on occasion to have to park their own car elsewhere. This she pointed out was an infringement of their right of way to the rear of their property, garage and parking area.

The purpose of the letter was merely to draw these matters to their attention and in order that they could, similarly, draw them to the attention of any potential tenants of the cottage.

### **3rd March 2010**

12. A second St. Helier Parish Assembly took place on 3rd March 2010 to consider a further application for a Third Category Alcohol Licence by the Bay Leaf Restaurant. It was again rejected by the Assembly, the vote being 8 in favour and 26 against.

### **7th May 2010**

13. A Planning Officer reviewed the application for a retrospective planning permission for an extractor fan on the roof of the Bay Leaf Restaurant and recommended approving it. He noted:
  - 13.1 that the Parish had received considerable representation against the application due to its size, visual impact and anticipated extract smells and that whilst it was outside the scope of the Roads Committee the Parish could not support an application which has a detrimental impact on the quality of life of the St. Helier residents;
  - 13.2 that the restaurant possessed a valid planning permission granted in 2000 which represented a legitimate “fall back” position, i.e. so that if the remodelled extraction unit was found to be unacceptable the existing unit could be put back under the May 2000 permission;
  - 13.3 that the assessment, therefore, related solely to the revised extraction system;
  - 13.4 that a key consideration is whether the amenities of the neighbours (primarily in relation to odours) will be unreasonably harmed by the operation of the new extraction system;

13.5 that the Island Plan contains no specific policy to cover the installation of the extraction equipment but that Policy G2 contains the requirements that applicants need to demonstrate that the development:

(ii) will not have an unreasonable impact on neighbouring uses and the local environment by reason of visual intrusion or other amenity considerations;

(x) will not have an unreasonable impact on public health, safety and the environment by virtue of [selected extracts] noise, vibration and odour;

13.6 that the extraction system is relatively substantial – appearing as an incongruous element of “engineering” on the flat roof to the rear of the building. The design is purely utilitarian and no other case has been made for its form. The current application does not propose a particularly aesthetically attractive solution, [but] it is not materially different (in terms of its visual impact) than the original system;

13.7 that Health and Social Services (Health Protection) advised that if permission was to be forthcoming, additional conditions about hours of trading and use of the rear yard should be considered. [The officer concluded, however, that given the scope of this application relates solely to the extraction unit, these additional conditions would go beyond the scope of this application and therefore would be difficult to justify];

13.8 taking account of this advice, and bearing in mind the fall-back position, the Officer concluded that the impacts on amenities of the neighbours are not considered to be unreasonable.

14. The Officer recommended the application for approval, subject to conditions which didn't include anything about screening the unit, the hours of operation or the rear yard.

#### **20th May 2010**

15. The Planning Applications Panel met to consider the grant of a retrospective planning application for the extractor fan on the flat roof of the restaurant.

#### **25th May 2010**

16. On 25th May 2010, the Planning and Environment Department issued retrospective planning permission to the Bay Leaf Restaurant [Application Number R.(2010) 0192 for the installation of an extractor fan on roof.

There were 3 conditions attached to the permit, two were concerned with minimising cooking odours, and the third to do with screening the extractor fan. The conditions were:

- 16.1 Unless otherwise agreed in writing by the Minister for Planning and Environment, all cooking odours shall be vented through the extraction system hereby approved, which shall consist of one canopy filter, 3 pre-filters and 3 active carbon block filters, as specified in the letter from the agent of 22nd March 2010.
- 16.2 Prior to first use of the extraction system hereby approved, a Schedule of Maintenance and Servicing shall be submitted to and approved in writing by the Minister for Planning and Environment, with the scope of work to be first agreed by the Health and Social Services (Environmental Health), to ensure the efficient operation of the extraction system, with the agreed Schedule of Maintenance and Servicing to be thereafter fully implemented in perpetuity.
- 16.3 Prior to the first use of the extraction system, details shall be submitted to and approved in writing by the Minister for Planning and Environment to show a vertical screen to the top of the flat roof, **to reduce views of the structure from Paris Lane**, to be thereafter implemented within 30 days, and maintained in perpetuity.
17. The condition contained in paragraph 16.3 was stated by one member of the Planning Applications Panel to have been included to screen this unsightly unit from the restaurant's residential neighbours. Whether or not this is correct gives rise to a number of questions:
- 17.1 If this was for the benefit of the neighbours, the condition on the permit was badly drafted by the Department because it only states that a vertical screen is required to reduce the views of the unit from Paris Lane, which is to the west of the unit. There is nothing about screening it from the neighbours to the east who in fact have the best view of the extraction unit, as can be seen in the photographs of the unit from their balcony (see Appendix 2).
- 17.2 Again, if it was to be screened from the neighbours, why was the fact it only screens the unit from view to the west and not the east picked up by the Officer evaluating the details which the applicant had to submit in writing and have approved prior to its first use or by the Officer who examined the unit structure and screening after construction (if indeed it was inspected) to ensure that it conformed with the submitted plans in all respects.
- 17.3 If the condition was not to screen it from the neighbours, this was a serious omission on the part of the Department, as it shows a total disregard of the neighbours' views and interests and would seem to be a direct contravention of Policy G2(i) of the Island Plan which is stated in paragraph 13.5 above.
- 17.4 What other justification could there have been for the screening condition?

## 1st June 2010

18. On 1st June 2010 the Third Category Alcohol Licence was again considered at an Extraordinary Licensing Assembly of the Royal Court, with the Deputy Bailiff William Bailhache and Jurats de Veulle, Clapham, Le Cornu, Marett-Crosby and Nicolle presiding. Advocate A.P. Begg for the Applicant.

18.1 The 3rd Category Licence was granted subject to the following conditions:

- (a) The filters installed within the cooking extraction system must be subject to the manufacturer's required routine maintenance and replacement schedule. This must be undertaken by contract by an authorised contractor approved by the Health Protection Department.
- (b) The doors to the rear of the premises must remain closed while cooking is in progress.
- (c) The licence holder is required to keep a record of the regular maintenance of the extractor filters and provide such record for inspection by the Health Protection Department on request.
- (d) The permitted opening times shall be between 9 a.m. and 11 p.m., such that all customers must be off the premises by 11 p.m.
- (e) Background music only can be played.
- (f) If any door staff are employed, they must be members of the Jersey Door Registration Scheme.
- (g) That the number of persons permitted to be on the premises shall at no time exceed 55, excluding members of staff.

18.2 The Licensing Assembly:

18.2.1 reiterated the sympathy that had been expressed by the First Licensing Assembly on 15th February 2010 for the impact upon the quality of life of the residents stemming from the decision of the Planning Committee of the day to allow a change of use to a restaurant 10 years ago, and then added its own;

18.2.2 explained the legal powers of the Assembly under the Law and how because of the decisions of the former Planning Committee and the Places of Refreshment (Jersey) Law 1967 its ability to alleviate the residents' concerns about the smell, parking and anti-social behaviour was limited;

18.2.3 stated further that as the Planning Authorities were not before them, it would not be appropriate to make a comment about the propriety of that decision, but that” at first glance it may appear a surprising one”;

18.2.4 repeated that the Licensing Assembly is not the Planning Authority and that it is not for the Licensing Assembly to attempt to put on conditions which could have been imposed by the Planning Committee of the day, or might yet be required by the Planning Minister.

18.3 Although the residents were naturally disappointed that the Assembly took no action to ban or condition the home delivery/takeaway operation with its attendant impact on parking and anti-social behaviour, the following comments made in the Assembly’s written decision are highly relevant to the subsequent actions of the Police and Planning Department, both of which have failed the residents:

18.3.1 **“those using the takeaway service would not be entitled to consume alcohol as they would not be having a meal”;**

18.3.2 “as far as the applicant is concerned [a delivery or takeaway] service was in his view essential to the viability of the restaurant. We were told that it was expected that 50% of the turnover might come from the takeaway service and 50% from the restaurant itself”

18.3.3 **“. . . we can certainly see if the turnover at the restaurant is such that the majority is a takeaway trade rather than a sit down restaurant trade, there may well be a case for asserting that a different use class would apply to the premises in question, and adequate objection be made to the planning authorities”.**

[It was interesting to note that the Bailiff, during the first Licensing Assembly on 15th February 2010, suggested that a company whose takeaway activities did not exceed 50% could also be considered more than “ancillary” to its sit-down restaurant service and lead, depending upon the circumstances, to a requirement for an application to the Planning Department for a change of use.]

#### **5th June 2010**

19. A meeting was held at the Bay Leaf Restaurant between the owner Mr. Kahn, the residents and Deputy Green, at which issues were discussed and action points were agreed.

#### **6th June 2010**

20. The residents followed up their meeting with Mr. Kahn, the owner of the Bay Leaf Restaurant.

20.1 The letter ref: Bayleaves Indian Restaurant meeting between First Tower residents and Mr. Khan on 5th June 2010 stated:

Thank you for meeting us, we understand you have other pressures at the moment so appreciate you taking the time yesterday.

We said we would put together an action list for you, containing all the points we discussed and agreed, as follows:

20.2 *Fan*

\* **You will complete the screening to cover the easterly aspect of the fan from view on Monday next.**

\* You agreed to instruct your staff to keep the fan at a low level to eliminate noise – we have asked for it to be run at 140; we had hoped this would be done immediately but last night the fan was run on the highest and loudest setting. I understand Mr. Turner rang you and it was lowered – but only for a few minutes, subsequently it was turned up again. This is unacceptable and upsetting for the older residents.

\* Apparently when the fan is turned up residents are experiencing a smell, not of food but of burning metal. Perhaps you should check it out.

20.3 *Noise*

\* Late night noise – we asked for a notice on the door/wall to request restaurant customers to leave quietly and not to congregate outside.

\* You agreed to speak to the staff in the cottage to put an end to the late night noise we have experienced already.

\* Staff are going to the garage to collect stock and slamming the door. You agreed to tell them to close the door quietly.

\* Last night the delivery drivers were talking loudly outside the restaurant. Could you inform them that this is a heavily populated residential area and high levels of noise are not acceptable.

20.4 *Parking*

\* **No parking in Paris Lane at any time. You agreed to put notices up to that effect on your emergency exit, and could you ask your staff to instruct anyone who does leave a car there to move it immediately please as there is adequate parking on Tower Road car park;**

\* **Parking only in designated spaces in the cul-de-sac of Paris Lane at the back of the restaurant; it will never be acceptable to leave a car parked there even for a few minutes as the garages are in constant use;**

- \* We will put a chain across the entrance to the cul-de-sac: we need a little more discussion to decide whether it is to have a lock and key or if a chain will be deterrent enough:

20.5 *Misc*

- \* Another box for cigarette ends should be put next to the emergency exit at the rear of the restaurant to stop customers throwing them on the ground.

We would be grateful if you would address these points immediately as we feel strongly that our quality of life is being eroded by the presence of the restaurant and its associated problems.

(See Advocate Begg's response from Mr. Kahn at paragraph 31.)

**6th June 2010**

21. The residents wrote to Le Gallais Estates, the managing agent for the owners of Brixton House, the Anderson Family, who lease the premises to the Bay Leaf Restaurant, and asked them to pass on the letter to the owners.

The letter itself:

- 21.1 discussed some of the problems the residents had experienced when the building was occupied by the Taste of India;
- 21.2 stated that when the Taste of India's lease came to an end they felt that they could reclaim their lives, open their windows, sit on their balconies, move cars in and out of their garages, and live without the fear of abuse from takeaway customers parking illegally or eating (and worse) on their doorsteps;
- 21.3 reminded them that when the lease ended a number of residents had asked the owners not to put another restaurant in the property but to turn it into a private residence because the site was unsuitable for a restaurant and because of the effect it was having on the residents quality of life and value of their properties, which had been devalued over the years because of the presence of the takeaway/restaurant and its associated problems, but that they and the landlords had ignored their request and all the old problems were re-emerging together with some new ones;
- 21.4 explained that although they had met Mr. Kahn, and he had undertaken to resolve some of the issues immediately, "last night was no better, and as he has a number of interests in Jersey he is not here to police the problems. We have no faith in either his authority over the staff or his availability when problems occur". [They enclosed a copy of the letter to Mr. Kahn (stated in full in paragraph 20 above);

- 21.5 expressed concerns about the tenants of Magnolia Cottage (the cottage immediately adjacent to the restaurant) which according to Mr. Kahn was now occupied by four of his staff, stating in particular that they were concerned about their security as more than 4 people were seen coming and going regularly from the property at all times of the day and night and that the police had called at the cottage on at least 3 occasions in the few weeks and have asked questions of some of the residents as to the whereabouts of the tenants;
- 21.6 pointed out that some of the elderly residents were at breaking point over the recurrence of the problems;
- 21.7 asked the Anderson family to come to First Tower and meet with the residents and inspect the immediate area and tell them honestly whether they could endure the conditions they had imposed on them.
22. Although the e-mailed letter was acknowledged by Le Gallais Estates on 7th June 2010 no reply was received from the owners. The residents chased up a reply on 16th August 2010 on which date Le Gallais Estates acknowledged that the original letter had been received by the owners. In the event, the residents did not receive a response to their letter from the owners but Advocate Begg, acting for the restaurant owners, did respond to their letter to the owners in his correspondence of 20th August 2010 (see paragraph 31). One wonders how he obtained a copy of it?

#### **11th June 2010**

23. Deputy Jacqueline Hilton sent an e-mail to Senator Freddie Cohen, the Minister for Planning and Environment, on 11th June 2010 concerning the Bay Leaf Restaurant.#

- 23.1 It read as follows:

We had a discussion about the above on Tuesday when I asked you about the process to follow in light of the remarks made by the DB when he gave permission for a 3rd Cat. Licence during the Licensing Assembly last week.

Just to remind you, It came out in submissions during the hearing that 50% of the business would now be home delivery/takeaway as opposed to the sit-down restaurant a permit was originally granted for.

We are still waiting for the judgement but I would like some clarification as to the process you intend to adopt in order this matter can be addressed. I do not need to remind you the lives of residents have deteriorated substantially since the restaurant started trading last week with all manner of people leaving vehicles where they should not, loud noise and the incessant noise from the extractor fan.

I am aware the restaurant will always need the extractor fan but coupled with the other problems encountered it just makes life intolerable for them.



I look forward to hearing from you.

It is believed that Deputy Hilton did not receive a reply to this email from either the Minister or Officers of his department.

### **15th June 2010**

24. On 15th June 2010 the residents wrote to the Bailiff. In their letter they:

24.1 expressed concern about evidence that was submitted by a witness for the applicant to the Licensing Assembly on 1st June 2010.

This evidence was given by a Mrs. Lorraine Hill, who stated: that she had no concerns over noise or congestion but who had in fact signed the original petition that was presented to the Town Hall which complained about these very issues; and who had stated that she had lived in the cottage for 2 years when in fact it was 1 year during most of which time the previous restaurant was closed.

24.2 questioned whether Mrs. Hill's evidence should have been heard by the Licensing Assembly as she had not spoken at the St. Helier Parish Assembly that had considered the 3rd Party Licensing Application.

What concerned the residents was that Mrs. Hill had been opposed to a new restaurant/takeaway being reopened, had signed the petition, complained to Le Gallais Estates, been re-housed by them and the cottage she lived in was taken over by the Bay Leaf restaurant, and then without telling the residents she was now supporting the applicant. She came into the hearing late, sat down apart from the rest of the residents, maintained no eye contact whatsoever with her former neighbours and then left immediately after giving her evidence in support of the restaurant.

Although they did not express this fact in their letter the residents also felt that the Licensing Assembly procedure is flawed in that there is no right of cross-examination of witness statements or any mechanism to challenge evidence which they felt was blatantly untrue. If there were the Assembly would be better able to judge the quality of evidence and motivation of the witnesses.

24.3 informed the Bailiff that their worst nightmares had been realised and that whilst they thought the last restaurant owners were bad they were angels compared to the current owners and staff. They said that the restaurant had only been open 11 days but that it had been hell.

They gave the following examples:

(a) "we are subjected to a noise (from the ventilation unit) so loud we have to shout to be heard above it, and the smells of Indian food increase as time goes on";

- (b) “This in its self is bad enough, but the owners have also taken over the cottage where 4 of their staff live, we experience screaming and shouting, loud mobile phone use, cars in and out until the early hours, in addition blocking of our access to our property. To add insult to injury these people just drop their cigarette ends outside our doors and on our drive as well as regularly spitting. It’s disgusting! No-one should have to live like this”.
  - (c) “We have called the Police (once at 01.00hrs) and they have visited the cottage on several other occasions”.
- 24.4 informed the Bailiff that in order to sort some of these issues out they (along with District Deputies) met with Mr. Kahn and expressed their concerns, in what they thought was a constructive meeting which came to an understanding on a number of issues (a copy of them was attached to the letter) but that not one of these agreed terms had been complied with and that on the very first evening everything was forgotten;
- 24.5 pointed out the stress of living in this unhealthy and unacceptable environment, which was affecting the residents’ mental and physical health;
- 24.6 stated that apart from the District Deputies no one listens to or takes their complaints seriously, stating further that they had made a formal complaint to Health and Protection under statutory nuisance but that they had been slow to act and had wanted to fit a totally inadequate manual, as opposed to automatic, noise monitor that someone had to get up and switch on every time there was a problem;
- 24.7 stated that they awaited the [final] judgment and in particular the guidance on the proposed takeaways and home delivery pointing out that this side of the business was already being operated and since starting the traffic down Paris Lane was at times either like a race track or blocked with customers and staff parking on the pavements;
- 24.8 urged the Bailiff to help them [The residents also copied this letter to the Ministers of Planning and Environment, Economic Development, Health and Social Security, the Constable of St. Helier, and the District Deputies].

**17th June 2010**

25. On 17th June 2010 the residents received a letter from the Bailiff’s Chief Officer who thanked them for their letter and said he had been asked to respond by the Deputy Bailiff.

In this letter he said:

- 25.1 I am asked to say that the Licensing Assembly has power under Article 6(4) of the Licensing (Jersey) Law 1974, in its discretion, to permit any person who has given at least seven days written notice to the Greffier, to address the Assembly. On this occasion, Mrs. Lorraine Hill had given such notice and the Assembly considered it was appropriate to hear from her. The Assembly was aware from what was said before it that it had been asserted that Mrs. Hill had signed the petition which is mentioned in your letter.
- 25.2 The reasons for the Licensing Assembly's decision were given on 17th June. I am asked to say that the matters which you raised in your letter are not matters for the Licensing Assembly, and you would be right to address your attention to the Minister for Health and Social Services and/or the Minister for Planning and Environment. It is obviously open to you to take such other political steps with the Constable and District Deputies as you think fit.

### **1st July 2010**

26. A meeting with Planning Officers took place at St. Helier Town Hall on 1st July 2010 to discuss the Bay Leaf situation. It was attended by 2 officers from the Planning and Environment Department (the Chief Executive and an Enforcement Officer), residents and Deputy Higgins. Deputy Higgins outlined the problems that were occurring in and around the restaurant and express his fears that it was having a detrimental effect on elderly and unwell residents. He expressed the view that if a seriously ill resident died it would be directly attributable to the stress induced and the failure of the Planning Department to take any action. The Enforcement Officer's letter dated 7th July 2010 refers to this meeting [see paragraph 30].

### **4th July 2010**

27. On 4th July 2010, the Enforcement Officer, for Planning and Environment wrote to Mr. Miah, the manager of the Bay Leaf Restaurant. His letter is set out in full below with the text broken down into numbered paragraphs and certain statements highlighted in red ink.

- 27.1 "Dear Mr. Miah

**Re: Operational conditions of permit Bayleaf (Brixton House),  
La Grande Route de St. Aubin, First Tower, St. Helier, JE2 3LL**

I write in connection with the above matter and the ongoing concerns regarding the operation of the restaurant and takeaway business at the premises and the inconvenience and impact it is having on local residents.

- 27.2 The intention of my letter is not only to remind you of the conditions of your permit and **Places of Refreshment Licence** but to appeal to your good nature in order to allay the concerns of local residents who fear a degradation of the area arising from the operation of the home delivery service part of the business.

- 27.3 I would like to emphasise that the Planning Department is not here to harass you in conducting your business, far from it. We seek to balance your success with the needs of residents in the immediate area. Occasionally, it is difficult to achieve a balance whilst trying to please all parties and **sometimes it takes a display of good will to soften the minds of the intransigent.**
- 27.4 I am therefore seeking your good will in order that I don't need to keep returning to you with the same problems in the future. I would invite you therefore to adhere to the conditions of both your Operational Permit and the **Places of Refreshment Licence** and invite [you] to make that move to display your concern to the local residents.
- 27.5 For clarification the conditions of concern include:
1. **The proprietor/manager is responsible for the collection and disposal of all litter within the immediate surrounding area of the premises.**
  2. The permitted times of opening shall be between 9 a.m. and 11 p.m. With no cooking beyond this time.
  3. **The doors to the rear of the premises to remain closed whilst cooking is in progress.**
  4. **A 'walk in takeaway service' will not be permitted at any time from the premises, although a home delivery service will be permitted for telephone/email/internet orders.**
  5. **No home delivery vehicles are to be parked at the rear of the premises or in Paris Lane.**
- 27.6 These conditions are quite clear and require no further explanation by me. I trust that you are honouring them, though **I am informed that with regard to the vehicles parking at the rear of the restaurant and in Paris Lane that this remains problematic, as does the open doors which allow noise from the restaurant to cause disturbance to local residents.**
- 27.7 I would ask that if you have not already instructed your drivers not to leave their vehicles in this area then please do so immediately. **I am confident that during the hours of the home delivery service your drivers can find alternative and legal parking within the near area, rather than cause obstruction in Paris Lane and to the rear of the restaurant.**
- 27.8 I would add that, I appreciate that actually managing your drivers every second of the day is almost impossible. Therefore, can I suggest with your agreement of course that you put a chain or other temporary barrier across access point to prevent your drivers from transgressing? The chain does not need to be locked, but it would serve as a reminder

to them not to deposit their vehicles there even for only a second. Disturbingly, I am informed that some residents have had to park elsewhere when unable to gain access to their own garage. This is unacceptable.

- 27.9 On the matter of the noise and smells, I would remind you to keep the doors closed. I appreciate that the heat experienced by your staff in the kitchen is of a concern to you. However, the noise and smells that escape the restaurant when the doors are open cause great disturbance and stress to nearby residents.
- 27.10 **The conditions of the permit are what they are and if they are not being complied with then enforcement action might be the only route to take. I wish to avoid that option and want to work with you, not against you, so I appeal to your good will and support on this matter.**
- 27.11 On the matter of the extractor unit on the roof of the kitchen, **I would ask if it were possible to put a screen on the side of the unit facing the garages, much as you have done on the Paris Lane side. This would go a long way to showing the residents that you are willing to compromise with their needs and are considerate of their concerns. The image of the unit from the garage side appears unsightly to some residents and again underpins their concerns of a degradation of the area in which they reside.**
- 27.12 I am also advised that people have been seen purchasing and drinking alcohol outside of your licensing hours. **I must inform you that I am liaising with the States of Jersey Police Licensing Unit to clarify your permitted hours and on this matter I will get back to you.** However, you should know exactly what your licensing hours are and when you are forbidden from selling alcohol and I would suggest that you do not want this department with the police and other departments to consistently visit this subject.
- 27.13 In conclusion, I am appealing to you to show some goodwill to the people who reside in the area who feel that their rights are being eroded by the alleged bad practices' of the staff at your restaurant.
- 27.14 I think it is in all of our interests that we try to find solutions to the concerns these people harbour. To do that we need to show good will. By doing so it keeps the various interested States Departments at bay.
- 27.15 I would suggest that the last thing you need whilst trying to build your business is the constant interference from the Police, Planning Department, Regulations and Undertakings, Environmental Health et al who might continue to have concerns regarding your compliance with the various laws.

- 27.16 By taking some positive and obvious steps to show your willingness to comply and your consideration and concern for how certain people feel you will achieve some harmony and greater acceptance. After all such a situation can only improve business.
- 27.17 I will obviously be kept up to date with how things are developing in the future and no doubt I will learn if any breaches of the law are being committed. If so I will have to re-visit these problems and possibly implement enforcement proceedings, I hope not.
- 27.18 For your information I will be copying this letter to Mr. Sayad Hussain, The States Police Licensing Unit, and Economic Development regarding your 'Places of Refreshment Licence' and Environmental Health for their records.
- 27.19 If you have any problems with the matters discussed above please feel free to contact me to discuss further. Thank you in advance for your good will and cooperation in this case.
28. In his letter to Mr. Turner on 7th July 2010, set out in full in paragraph 30 below, the Enforcement Officer wrote in paragraph 30.4 that:

"I will write to Mr. Kahn and Mr. Miah in the first instance to remind them of their obligations in terms of the original planning permit. Before that I need to research the original permit conditions to confirm what is enforceable and what is not or which if any of the above 6 concerns were not addressed in the original permit"

An examination of the letter above shows that the Enforcement Officer did no such thing. The letter is not only inaccurate as it contains conditions that do not exist and which, therefore, would be unenforceable it also shows a lack of competence and genuine concern for the plight of the residents. The conditions did not exist because no Places of Refreshment conditions were in place because the restaurant had received a 3rd Category Liquor Licence from the Licensing Assembly and therefore had no need of a licence from the Economic Development Department. Nor did the Licensing Assembly judgment state, as he states in paragraphs 27.5.4 and 27.5.5 that a walk-in takeaway will not be permitted or that home delivery vehicles could be parked at the back of the premises for which there were two parking spaces.

29. It is also noted that in paragraph 27.11 he asks Mr. Miah on the matter of the extractor unit:

"if it were possible to put a screen on the side of the unit facing the garages, much as you have done on the Paris Lane side. This would go a long way to showing the residents that you are willing to compromise with their needs and are considerate of their concerns. The image of the unit from the garage side appears unsightly to some residents and again underpins their concerns of a degradation of the area in which they reside".

This again reinforces the failure of the Planning Department to properly condition the screening of the fan in their 25th May 2010 permit (paragraph 16 above) and also shows the Enforcement Officer's lack of appreciation of the site and the problem. The area he is asking to be screened from, i.e. the garages, have no residential windows facing the fan and therefore is not visible to residents but to the east of the fan is the balcony of the Turner residence which has a direct view of the unit as can be seen in the photograph in Appendix 2. There was also no follow-up on the screening, as the view seen in the photograph remains the same to this day.

### **7th July 2010**

30. On 7th July 2010 a letter was sent by the Planning Department Enforcement Officer to Mr. D Turner, Jr. This letter is set out below with the text broken down into numbered paragraphs and certain statements highlighted in red ink.
- 30.1. "I write in connection with the above matter. Firstly, I would like to express my gratitude for attending the meeting at the Town Hall on Thursday 1st July 2010. It was very beneficial to gain your perspective of the various problems you and your family are experiencing from the operation of the restaurant.
- 30.2 Secondly, the purpose of my writing to you is to explain what I can do as an enforcement officer to try and help you with those problems and to explain what if anything appears to be outside of my remit of operation.
- 30.3 As I see it the main contentions are:
1. Take away service and traffic resulting.
  2. Access Issues, Mr. Turner sometimes has to park at Bellozanne because he cannot gain access to his garage.
  3. Hours of operation of existing use.
  4. Noise caused by open doors, staff behaviour. Open doors are a breach of permit condition.
  5. Smells emanating from restaurant and extractor fan.
  6. Licensing Issues regarding after hours serving.
- 30.4 I will write to Mr. Kahn and Mr. Miah in the first instance to remind them of their obligations in terms of the original planning permit. Before that I need to research the original permit conditions to confirm what is enforceable and what is not or which if any of the above 6 concerns were not addressed in the original permit.
- 30.5 I will also be asking Mr. Khan and Miah to put a chain across the entrance to the garages during operational hours so as to prevent access by unauthorised drivers He might choose not to do this, after

all I cannot force this point; but I will try and convince him that it is in his interests to show some good will. I can't imagine that he will relish Planning, Environment and the Police constantly on his back fighting these issues. A chain would not prevent legitimate access and egress by residents, but with the correct management of Mr. Miah to his drivers would go some way to ensuring that the route remains unblocked by parked vehicles.

- 30.6 There are other methods that I would rather not discuss with you that I might be able to use to force compliance with the conditions, the above is merely a starter in the hope that some good will is expressed.
- 30.7 I will keep you updated with developments. In the meantime if I can be of any further assistance to you please do not hesitate to contact me”.

### **20th August 2010**

31. On 20th August 2010 Advocate Begg wrote to the residents of First Tower in response to their letter of 6th June 2010 which had been sent to the Anderson family, via Le Gallais Estates.

His letter is set out below in full, with numbered paragraphs and certain elements highlighted in red ink.

- 31.1 I refer to your email of 15th June to . . . of Le Gallais Estates chasing up a reply to your letters to them of 6th June, one to the Anderson family, c/o F. Le Gallais & Sons, and one to Mr. Khan of Bay leaf Restaurant.
- 31.2 As Mr. Khan of my client company has repeatedly said, he is anxious to demonstrate that, given the chance, he, as a professional restaurateur, will run an orderly premises and do his best to ensure that it proves itself to be an asset, and not a detriment, to the community. Notwithstanding the vociferous and repeated objections of you, and the other persons on behalf of whom your letters of 6th June were written, as well as the Deputies to whom your letter to . . . was circulated, Bayleaves Restaurant Limited was, of course, ultimately successful in its retrospective Planning application and a Liquor Licence application.
- 31.3 It would appear, however, that, having “run the gauntlet” of two Parish Assemblies, two Licensing Assemblies and a public Planning Panel hearing, you and the other local residents remain unsatisfied and are determined “draw blood” by pursuing your objections still further.
- 31.4 Indeed, I understand from Mr. Khan that, at his meeting with you/the Deputies on 5th June (to which you refer in your letter to him of 6th June), there was talk of (or, as Mr. Turner might put it, a threat to) pursue an Appeal against the Planning Panel decision. As I observed at the Licensing Assembly, **I would have been very surprised if such an Appeal, if pursued, had been successful, having regard to the**



limited grounds upon which it could be made (i.e. that no reasonable Panel could have come to that conclusion).

- 31.5 As you will be aware, even if the Appeal had been successful, the consequence would have been that, although the retrospective Planning application would fail, as the Chairman of the Panel explained at the Panel hearing, my client company would be perfectly at liberty to put back the ducts in their original position (as per the original Planning Permit, issued ten years ago) and there would then be absolutely nothing that you or the other residents could have done about it.
- 31.6 The points which you set out in your letters of 6th June substantially repeat the issues which have been raised (frankly) ad nauseam (by you, the objectors on behalf of whom you have written and the Deputies whom you have copied in on your e-mail and letter under reply) at the two Parish Assemblies, two Licensing Assemblies and the Public Planning Panel hearing to which I have already referred – not forgetting, of course, the written objections lodged to the Retrospective Planning application itself.
- 31.7 Whilst willing to engage in reasonable dialogue with a view to appeasing the reasonable concerns of local residents as far as possible, my client company, understandably, I think, is reluctant to become embroiled in never-ending correspondence with you and those on whose behalf you write. **In particular, you can't reasonably expect to be able "write a wish list" and expect my client to satisfy every single item without demur!** Accordingly, whilst I am instructed, on this occasion, to reply to (both) your letters, the hope and intention is that this letter will be comprehensive and conclusive and will be the end of the matter as far as my client company is concerned: **as I have said, it has its Planning Permit, it has a Liquor Licence and is entitled, therefore, to run its restaurant business.**
- 31.8 There will inevitably be a period of settling down as things fall into place. To take but one example, there needs to be a certain amount of experimentation with the fan to balance the respective levels of noise/odour. As I am sure you will appreciate, as the speed of the fan is increased, thus drawing odours through the filtration system and neutralising them as far as possible, the noise inevitably increases.
- 31.9 I also think you need to bear in mind that we are going from a situation where you've had the restaurant empty for nine months to a situation where a fully-fledged restaurant business is up and running – so there is bound to be more activity than that to which you have recently been used.
- 31.10 Whilst, as you will be aware from extracts of the reports read out at the Parish Assembly, the Licensing Assembly and the Planning Panel hearing, everything which it is reasonably possible to do, at reasonable expense, has been done to minimise levels of odour and noise, it is impossible to eliminate either totally; and it can safely be

assumed that the possibility of their being some noise and some smell generated by an Indian restaurant would have been considered when Planning originally considered, and granted, a Permit – some ten years ago.

- 31.11 Turning now to the substance of your two letters, I refer, first, to your letter of 6th June, addressed to the Anderson family (c/o Le Gallais & Sons). Whilst I appreciate that the letter isn't addressed to my client company, it nevertheless refers to matters which concern my client company and on which I therefore consider my client company is entitled to "have a say" – by responding to the points which you raise.
- 31.12 The problems which you summarise in the second paragraph of your letter to the Anderson family (i.e. the problems which were encountered with the previous Lessee over late-night noise, cooking odours, illegal parking in Paris Lane/the garage cul-de-sac, litter, and disorderly (and abusive) behaviour) have all been raised at the Parish and Licensing Assemblies and in the objections lodged with Planning in relation to the retrospective Planning application – and, indeed, at the Planning Panel hearing itself.
- 31.13 As you and the other residents have been told before (by the Bailiff and Deputy Bailiff and by the Chairman of the Planning Panel), the fact of the matter is that Planning permission was given in (about) 2000 for the premises to be changed from residential to commercial (originally, I believe, to use as an Antiques shop; and thereafter to a restaurant). That was the time for any objections to be made. It is too late, now, all these years later, to object to the building being used as a restaurant.
- 31.14 As I said at both the Licensing Assemblies, and as I'm sure would have been taken into account by Planning in its considerations, one only has to look around the immediate vicinity to see how many other restaurants/takeaways there are (Kingfisher, Lotus House, Pinocchio's, the Old Bake House, to name but four); and the same is true of any restaurant or takeaway in St. Helier. Restaurants need to be situated somewhere; they need to be housed in a building; and, unless one has a whole block of restaurants in one building, therefore, it is inevitable that the restaurant is going to be in the vicinity of residential premises, bearing in mind that, like all animals, humans need to eat! Indeed, in many modern developments (including hotels and blocks of flats: take the Waterfront development, for instance), one finds restaurants incorporated into hotel and flat developments where they are regarded as a positive benefit to the residents and it is considered a selling point by estate agents.
- 31.15 Needless to say, the appropriate precautions need to be taken (in terms of minimising noise, smell and antisocial behaviour) but I think it will be apparent from the reports issued by Environmental Health, the permit issued by Planning and judgment of the Licensing Assembly, that each of these bodies, in turn, was satisfied that all reasonable precautions which could have been taken have, indeed, been taken.

- 31.16 I am bound to say that it is disappointing that, having had a meeting with Mr. Khan on 5th June and having written to him at some length listing all the things to which you expect him to attend, you should write, the very same day, to the owners of the premises, objecting that matters haven't improved.
- 31.17 That said, I'm glad to note your acknowledgment that Mr. Khan is "... not here to police the problems as they arise". That is true: he is not, and was never intended to be, manager of Bay Leaf Restaurant.
- 31.18 What he has said all along is that he is a responsible restaurateur and will take reasonable steps to run his premises in an appropriate and considerate way. Whilst he has been, and will continue to be, receptive to the concerns of the residents, as I have said above, it is hardly reasonable to compile long "wish lists" and expect him to remedy the situation instantly.
- 31.19 As you heard at the Parish Assemblies and Licensing Assemblies, it is impossible to totally eradicate the smell of cooking: the most one can do is to minimise it. The way to minimise smell (as was explained at the Planning Panel hearing) is to filter the air through a series of charcoal, and other, filters. In order to do that, it is necessary to have a fan; and in order to work, that fan needs to turn for which purpose it needs a motor. Regrettably, to repeat what I have said above, the motion of the fan revolving creates a noise so it is totally unrealistic and unreasonable to complain, on the one hand, of the smell and, on the other hand, of the noise: if the extractor isn't running fast enough, the fumes won't be "pulled through" the filters and thereby minimised!
- 31.20 As far as concerns the number of tenants in Magnolia Cottage that, with respect, is nothing at all to do with you or the other residents and certainly nothing to do with Licensing issues or the running of the restaurant business! If you are suggesting that there has been a breach of the Housing Law, you are, of course, free to make the appropriate representations to the Housing Department/Population Office. I do not know what you mean by "security concerns" but I respectfully suggest that there's no more need for you, or any of the other residents, to have security concerns about who occupies Magnolia Cottage than there is for you to have concerns about any other residential house or apartment in the First Tower area. **I fear that your concerns are bordering on the racially prejudiced.**
- 31.21 Neither is it any business of yours who "belongs" there and who doesn't: subject always to the provisions of the Housing Law, that is a private matter for Bayleaves Restaurant Limited and its staff. Bayleaves Restaurant Limited might just as well say that it has concerns over who lives at [the letter writers home] and who "belongs" there and who doesn't! I am sure that your reaction would be the same!

- 31.22 That said, perhaps I should briefly explain the arrangements with regard to Magnolia Cottage. The restaurant itself comprises a dining area, a kitchen area and cloakrooms. In other words, there aren't any staff changing/relaxing areas to speak of – so there is nowhere for the staff to change (other than in the guest cloakrooms). The advantage of Bayleaves Restaurant Limited renting Magnolia Cottage, as well as renting the restaurant premises, is that Magnolia Cottage can conveniently be used by members of staff for changing. As you are aware, under the terms of the Liquor Licence, the restaurant has to be closed at 11.00 p.m. which, the Licensing Assembly explained, meant that customers had to be out by 11.00 p.m.: it doesn't mean that the restaurant has to stop functioning by then. Depending on how busy the restaurant has been in anyone evening, clearing up takes place following closure: the whole of the kitchen and the restaurant has to be cleaned in order to maintain high standards of hygiene. Once that has been completed to my client company's exacting standards, the staff are off duty; and they go into Magnolia Cottage to wash, change and relax. I am sure that you can imagine that, when five or six Indian-speaking staff, who have been on duty all evening and who, therefore, have had little opportunity to talk, finally get an opportunity to do so, they naturally want to make the most of it. The situation would be exactly the same if the restaurant itself were situated in the centre of St. Helier and Magnolia Cottage happened to be the residence outside the centre of town where the restaurant staff were "billeted": it is likely in that, in that situation, there would still be noise of excited (foreign) chatter late in the evenings. That is a normal use for residential accommodation – and, providing, of course, the noise does not become excessive to as to become an actionable nuisance, I respectfully suggest that you have no cause for complaint.
- 31.23 As far as concerns the Police calling at the Cottage "on at least three occasions in the last few weeks and [asking] questions of some residents as to the whereabouts of the tenants", I find this very bizarre! The suggestion seems to be that employees of Bay Leaf Restaurant Limited are under suspicion by the Police. The fact of the matter is that my client company has no idea why the Police were called. Clearly, they wouldn't have been called by my client Company itself! One can only assume, therefore, that they were called by one of the persons on whose behalf you write – perhaps to complain of noise or perhaps even to intentionally cause inconvenience in the hope that the Police will "put the frighteners on them"?
- 31.24 Obviously, my client company doesn't have any idea of what questions were asked of the residents – whether those questions were about their housing status or otherwise. I can assure you, however, that there is no occasion at all for you to be concerned.

Turning, now, to your letter of 6th June to Mr. Khan, I refer to the bullet points and comment on them in order:-

31.25 *Fan*

- **The screening was attended to shortly after your letter arrived.**
- With respect, it is not for you, or the other residents, to dictate at what speed the fan should be run: as Mr. Khan agreed, he would instruct his staff to try to keep the fan running at a low speed in order to reduce (not eliminate) the noise. However, as already highlighted above, if the fan isn't running fast enough, then the smells would be sucked through hard enough in order to be efficiently filtered – and no doubt you and the other residents would then be complaining about cooking odours! It must therefore be left to my client company's staff to decide what is the best setting: you may rest assured they will do their absolute best to find the right combination between effectively extracting odours and keeping the noise to a minimum.
- The correlation between noise and smell to which you refer here has already been highlighted in the previous bullet point. That said, you are complaining, here, about burning metal. This has been looked into and its thought probably to do with new working parts being added in order to minimise the noise level.
- In your letter, you ask for a notice to be erected. In my client company's view, setting aside, for now, the cost, such notices could look unsightly and may give customers the impression that their host is dictating to them. As with most of these bullet points, my client company must be left to deal with whatever problems there may be in the way that it considers appropriate. My client company would rather instruct its staff to ask customers to leave quietly (if they are being too noisy) and not to wait outside (if they are congregating outside) rather than putting up notices here, there and everywhere.
- It is regretted if, from time to time, it has been found that the noise has been excessive. As already pointed out above, you can imagine that, when with five or six staff, who have been on duty all evening and haven't, therefore, had much opportunity to talk, finally do come off duty, they want to relax and socialise.
- As all the garage doors are the same all the garage owners will be aware that it is virtually impossible to close the door without it making a noise/banging. Obviously, since my client company keeps supplies in the garage, the garage needs to be closed and locked. Whilst staff will continue to do their best to minimise noise, it is difficult – indeed, almost bordering on the impossible to eliminate it.
- My client company is vigilant about reminding its delivery drivers to try and keep the noise level down late at night.

31.26 *Parking*

- As Mr. Khan understood, the purpose of putting a notice up on the emergency exit prohibiting parking in Paris Lane was so that, if the emergency exit had to be used, it wasn't obstructed (e.g. by a car). If that is the case, it is an issue to do rather with safety than with ensuring that cars don't obstruct Paris Lane. If otherwise, issue of parking in Paris Lane has been gone over time and time again.

**As the Parish Assemblies and the Licensing Assemblies were assured, my client company's staff are being vigilant to ensure that nobody parks in Paris Lane for any length of time.**

However, as Mrs. Fiander-Hill pointed out to the Licensing Assembly on 1st June, in her experience, as a former tenant of Magnolia Cottage, the main problem with the obstruction of Paris Lane lies not with customers of the restaurant but with the customers from Checkers and other local residents.

I am not sure that I can accept that the garages are "in constant use" although I concede that they are liable to be used at any time.

- I believe that the requirement is to ensure that there is no obstruction in the cul-de-sac at the back of the restaurant and my client company's delivery drivers have instructions not to park on the right of way (but only in the designated spaces).
- I don't know who "we" is but, if the deeds entitle you to do so, you (whoever "you" is) are obviously entitled to chain off that part of the cul-de-sac over which there is no right of way. However, you are not entitled to put a chain across the entrance to the cul-de-sac if it prevents access by my client company to its parking spaces and garage. If you erect such a chain, you are warned that an application may be made for an injunction for it to be removed. A chain is just as much (indeed, more of) an obstruction as would be a car, or anything else, left on the right of way. The fact that it can be removed is neither here nor there: a car can equally well be removed.

31.27 *Misc*

- There are already two boxes for cigarette ends and the fact that you and the other residents are seeking to dictate how many boxes should be put up, demonstrates how trivial and unreasonable your demands are becoming! My client company must be left to put up however many boxes it feels appropriate: and these are not matters in which you or the residents should properly be interfering.

31.28 You close your letter by asking Mr. Khan to "address these points immediately as [you] feel strongly that [your] quality of life is being eroded by the presence of the restaurant and its associated problems".

31.29 With respect, I think you will find that, as a matter of fact, the problems, such as they have been, are, in fact, a lot less than you had anticipated and the comparatively trivial nature of the few points which you have raised speaks for itself.

31.30 As I have said above, whilst always receptive to comments and willing to accommodate residents' concerns and wishes as far as possible, my client does not expect to receive "wish lists" nor incessant complaints about comparatively trivial matters.

### **27th September 2010**

32. A meeting was held with at the Planning Department on South Hill on 27th September 2010. In attendance were Planning Officers (the Assistant Director of Development Control and the Acting Principal Planner), residents, Deputies Green, Hilton and Higgins. The purpose of the meeting was to review the situation at the Bay Leaf Restaurant and examine more CCTV film footage. The main details of which are contained in a letter received from Planning on 8th October 2010.

### **8th October 2010**

33. On 8th October 2010 Deputies Higgins and Green received by e-mail a letter from the Acting Principal Planning Officer from the Planning Department regarding the conditions on the Bay Leaf Restaurant by various Authorities and evidence that needs to be gathered to take action to deal with the problems that had been reported to the Department.

The letter which is recorded below in full but with text broken down into numbered paragraphs and some statements highlighted in red ink stated:

33.1 I write further to our meeting on Monday 27th September to provide you with an update on the discussions that have occurred since the meeting, then to review the present position and responsibilities, and then to consider the 'next steps'.

33.2 Given the nature of the issues we have spoken to the agencies that have been involved to date, to ascertain their regulatory scope and understand their ability to actively enforce the various issues which have arisen at the property. For simplicity this has been arranged under Department headings, I can also confirm that the position has also been verified by each Department prior to sending this letter.

### **Planning**

#### **A) Background**

33.4 Back in May 2000, the Planning and Environment Committee approved application reference 10065/1 which granted planning permission for the change of use of ground floor from retail to restaurant. This permission was subject to only one relevant condition, being:

“that the opening hours of the restaurant hereby approved shall be 12 midday to 12 midnight on any day and no customers shall be present on the premises outside of these hours”.

- 33.5 The restaurant then operated for a period of some 9/10 years, until the lease changed hands (probably in late 2009) and new operators took the property over.
- 33.6 In early 2010 we were made aware of alterations to the extractor fan system, and in February 2010 the operator submitted a retrospective planning application seeking to regularise this work. As the use as a restaurant has been established by the 2000 permission, the 2010 application related solely to the revised extraction arrangements.
- 33.7 Planning permission was granted in May 2010 subject to the following conditions:
1. Unless otherwise agreed in writing by the Minister for Planning and Environment, all cooking odours shall be vented through the extraction system hereby approved, which shall consist of one canopy filter, three pre-filters and three active carbon block filters, as specified in the letter from the agent of 22 March 2010.
  2. Prior to first use of the extraction system hereby approved, a Schedule of Maintenance and Servicing shall be submitted to and approved in writing by the Minister for Planning and Environment, with the scope of work to be first agreed by the Health and Social Services (Environmental Health), to ensure the efficient operation of the extraction system, with the agreed Schedule of Maintenance and Servicing to be thereafter fully implemented in perpetuity.
  3. Prior to the first use of the extraction system, details shall be submitted to and approved in writing by the Minister for Planning and Environment to show a vertical screen to the top of the flat roof, to reduce views of the structure from Paris Lane, to be thereafter implemented within 30 days, and maintained in perpetuity.
- 33.8 The conditions quoted above therefore represent the operational matters which the Planning Department are able to control, and **as far as we are aware, they are being complied with.**
- 33.9 It is acknowledged that at the time of the May 2000 permission, the residents did make representations expressing their concerns, and a similar letter was received from the Parish. However, the May 2000 permission was subject to due process and proper consideration by the Committee of that time. **The Minister for Planning and Environment has no powers to revoke permission once it has been implemented.**



neither can conditions be retrospectively added to an established permit. Observation: But what about screening conditions on the new revised extractor system?

**B) Current Investigation**

- 33.10 The additional planning matter for consideration is whether the operations at the premises have gone beyond what can legitimately be considered as a “restaurant” (as per the May 2000 permission) and whether it now represents a “mass take-away food outlet” (as strongly presented by the residents at our meeting).
- 33.11 This situation raises the issue of what in planning terms is known as an ‘ancillary’ operation. Without relating to the circumstances at the subject site (as we explained at our meeting) it is quite legitimate that a restaurant includes an element of takeaway service, as long as it is ancillary to the primary use. However, at some point, the takeaway use may go beyond what is ancillary, and become a new use in its own right, or a composite restaurant/take-away use.
- 33.12 If it can be demonstrated that the take-away element of trade is no longer ancillary, then a “material change of use” may have occurred. It is important to emphasise this terminology, because for the purposes of being defined as “development” by the Planning Law (and so require an application) the new use must not only be different to the original, but the change must be “material”, in other words, significant.
- 33.13 As this background shows, the necessary assessment is not black-and-white. There is no defined cut-off point which, if a given percentage of trade is shown to be takeaway, would lead to a firm conclusion that a change of use is material. Every case will be different, depending on the specific operation and the context in which it sits. From our initial discussions with the Law Officers, we are advised that it is notoriously difficult to demonstrate that a material change of use has occurred in cases such as this.
- 33.14 Our approach is therefore to deal with this in a phased manner, with an evidence based approach. We have already commenced gathering information as to the nature of the take-away operation, and of course we have the CCTV information provided by the neighbours. The research will need to include detailed information as to the number of traffic movements, and the financial turnover, which can be put down to the take-away business. No single element of evidence will be conclusive to the assessment and a multi-layered approach will have to build a rounded picture.
- 33.15 On completion of the information gathering phase, we will be referring the matter to the Law Officers for a legal opinion on the “ancillary” issue. If we end up pursuing this route, and requiring an application, it is absolutely essential that the legal implications are

understood, both in relation to this site, and other comparable establishments.

- 33.16 So, to conclude from a Planning perspective, we will enforce the conditions as set out in section A above, and will continue to progress the first phase of the “ancillary” assessment of the take-away issue, as described in Section B.

### **Economic Development**

- 33.17 At the time of the change in the lease (late 2009/early 2010) the new operator approached the Economic Development Minister to secure a “Places of Refreshment” licence.

- 33.18 The licence was drafted, and specified conditions which included:

- (a) The permitted times of opening shall be between 9am & 11 pm. With no cooking beyond this time.
- (b) The doors to the rear of the premises to remain closed whilst cooking is in progress.
- (c) No home delivery vehicles to be parked at the rear of the premises or on Paris Lane.

- 33.19 However, the Places of Refreshment Licence was never issued, as the operator had also applied to the Bailiff for a “3rd Category Licence” (a Liquor Licence) as administered by the Licensing Assembly. Thus the conditions described above were not finalised and are not in force.

### **Licensing Assembly**

- 33.20 The 3rd Category Licence is (effectively) a higher-level licence than the Places of Refreshment Licence, and although the draft Places of Refreshment Licence from the Economic Development Minister was made available to the Licensing Assembly, they issued the 3rd Category Licence with the following conditions:

- (i) The doors to the rear of the premises must remain closed while cooking is in progress.
- (ii) The licence holder is required to keep a record of the regular maintenance of the extractor filters and provide such record for inspection by the Health Protection Department on request.
- (iii) The permitted opening times shall be between 9 a.m. and 11 p.m., such that all customers must be off the premises by 11 p.m.
- (iv) Background music only can be played.

- (v) If any door staff are employed, they be members of the Jersey Door Registration Scheme.
- (vi) That the number of persons permitted to be on the premises shall at no time exceed 55, excluding members of staff.
- (vii) The permitted opening times shall be between 9 a.m. and 11 p.m., such that all customers must be off the premises by 11 p.m.

The enforcement of these conditions is a matter for the Licensing Unit at the States of Jersey Police.

### **Health Protection**

33.21 Outside the Planning or Licensing process, Health Protection is responsible for implementing the Statutory Nuisance Law. The enforcement of a “Nuisance” is a different matter in Law, to considering whether the noise, or smells, are inconvenient or unwelcome, and a higher level of resulting impact would have to be demonstrated.

33.22 From our meeting with the residents, I understood that they had been in contact with the Health Protection team, who had visited the premises and offered to install automated noise monitoring equipment. Having discussed this with the Health Protection team, it is my understanding that their offer was not accepted. As such, Health Protection cannot progress their investigation.

### **Other Parties**

33.23 One of the key issues raised by the residents is the use of Paris Lane and the rear garage area for car parking by the customers of the restaurant (particularly takeaway customers) and by staff, including delivery drivers. Neither the Planning Permit, nor the 3rd Category Licence which is effective at the property include any requirement not to park in these areas, as such, neither the Planning Department, nor the Licensing Unit of the States of Jersey Police can enforce who can/cannot park in these areas. The agency with responsibility for parking enforcement in relation to Paris Lane is the Parish of St. Helier.

33.24 It is understood that the rear garage area is private land, and as such its use is a matter for resolution between the private parties involved. From the information provided by the residents, the ultimate owner/landlord is understood to be the Anderson family. If the contractually agreed private rights of the other users of the garage parking area are being damaged by the restaurant operations, then this should be taken up with the Anderson family directly.

## **In Conclusion**

33.25 The Planning Department is able to enforce the condition in relation to hours of opening on the original permit, and the conditions on the May 2010 permit for the extraction system. The enforcement of conditions on the 3rd Category Licence are the responsibility of the States of Jersey Police Licensing Unit.

33.26 Outside the process of the enforcement of the current conditions, the Planning Department will continue to progress the assessment of whether a material change of use has occurred, by virtue of the nature of the take-away business, and will provide a further up-date when the necessary legal opinion has been obtained.

33.27 I hope this letter is suitably comprehensive however, if anything further is required please do not hesitate to contact me directly.

### **21st October – 24th October 2010**

34. Between 21st and 24th October 2010, Mr. & Mrs. David Turner Snr., found the situation around the restaurant to be intolerable and were forced to move out of home and stay at a location in St. Peter.

### **27th October 2010**

35. On 27th October 2010 a meeting was held at St. Helier Town Hall which involved the Connétable of St. Helier, Simon Crowcroft, Planning Officers (the Assistant Director Development Control and the Acting Principal Planner), residents, Advocate Dorey and the 4 District Deputies. At this meeting, more CCTV evidence of what was going on around the restaurant was shown. It was agreed that all parties would meet 3 weeks later to discuss their findings.

### **12th November 2010**

36. The situation with cars, noise, etc from delivery drivers was very bad and police were contacted. The residents were given an I.log No. 4/949.

### **16th November 2010**

37. A further meeting at St. Helier Town Hall which involved the Connétable, Simon Crowcroft, Planning Officers (the Assistant Director of Development Control and the Acting Principal Planning Officer), residents, Advocate Dorey and the 4 District Deputies took place. The Planning Officers had done absolutely nothing, they had no information or findings to discuss whatsoever, and the meeting was given more information by residents and Deputies.

At this meeting the Assistant Director Development Control did not even acknowledge Mr. Turner Snr., and when Mr. Turner Snr. said “I want my home back” he merely shrugged his shoulders and opened his hands. When Mr. Turner Snr said “If you come down on Friday night you would see a fast-

food restaurant, a takeaway business”, he received no reply. In fact, no Planning Officers ever took up this invitation to come and see for themselves.

It was obvious to everyone present except the Planning Officers that Planning were dragging their feet and not interested in the plight of the residents or trying to resolve the situation.

### **17th November 2010**

38. On 17th November 2010 Advocate Caroline Dorey, acting for Mr. and Mrs. Turner, wrote to Advocate Andrew Begg who represented Mr. Kahn, the owner of the Bay Leaf Restaurant. She wrote:

38.1 I write on behalf of certain of the residents in the area of Bayleaves Restaurant with regard to various ongoing problems which are causing their lives to be prejudiced. You were aware of the potential concerns of the residents from what was said by them at Parish meetings and Licensing Assemblies. Unfortunately, their concerns have been more than realised.

38.2 The residents do not object to the presence of a restaurant. What is, however, causing considerable difficulty is the takeaway. The manner in which this appears to be run is that delivery drivers drive into Paris Lane and then into the cul-de-sac which runs off Paris Lane, and either leave their cars in the cul-de-sac or park in one of the car parking spaces immediately adjacent to the restaurant. There are considerable car movements every evening. The vehicles are frequently driven at an inappropriate speed and certain of the vehicles are exceedingly noisy. At night headlights blaze out. One has a residential area with cars entering and leaving and revving engines. If the vehicles are left in the cul-de-sac and the drivers are asked to move the residents are often met with abuse. In addition, certain of the residents find the attitude of the delivery drivers threatening.

38.3 Mr. and Mrs. Turner, who live at [address given] are elderly. Mrs. Turner has a heart condition and Mr. Turner is frail. They, in particular, have found the excessive noise and the attitude of the delivery drivers exceedingly distressful and, indeed, had to vacate their property for five days because of their concerns.

38.4 I note from the judgement given by the Royal Court on 15 February 2010 that various matters were raised, one of which was car parking. Your response on behalf of Mr. Kahn was that customers would be told not to park in Paris Lane and that the removal of the possibility of customers picking up takeaways would drastically reduce the parking problem, which had largely been caused by customers wishing to park simply for a few minutes whilst they took delivery of their food. However, this problem has not been removed; the actions of the delivery drivers causes at least as bad a problem if not worse.

- 38.5 The residents would be entitled to take proceedings to seek an injunction and damages by virtue of the private nuisance that has been caused. In addition, those who have a right of way over the cul-de-sac could take proceedings since the deed provides that they have a right of way at all times and for all purposes over the cul-de-sac.
- 38.6 However, from paragraph 10 of the Judgement of the Royal Court on 15 February 2010 it appears that Mr. Kahn is keen to meet the concerns of the neighbours. One possible way of so doing would be to arrange for the delivery drivers for the takeaways to park their cars either on Victoria Avenue or in the multi-storey car parks in Bellozanne Road, and to collect all deliveries from the front of the premises. There would then be no need for them to use the cul-de-sac at the rear at all.
- 38.7 Please confirm that such is agreed and Mr. Kahn will so instruct his staff and delivery drivers.

#### **18th November 2010**

39. On 18th November 2010 Advocate Andrew Begg sent an e-mail to Advocate Dorey. It read:
- 39.1 I acknowledge receipt of your fax dated 18th November, on which I will take instructions and revert to you.
- 39.2 In the interim I will confine myself to ask for which “certain residents” you purport to act if any besides Mr. and Mrs. Turner, to whom you refer to in the fourth paragraph of your fax; and to saying that it would be using a sledgehammer to crack a nut were your clients to apply for injunctions on the grounds of noise caused by revving engines and/or dazzling caused by headlights or rudeness of drivers of those vehicles when confronted!
- 39.3 You may rest assured that I would have a great deal else to say were an application to be made for injunctions. So if these are your instructions I should be obliged of you would kindly ensure that the application is on notice and not ex parte.

#### **23rd November 2010**

40. On 23rd November Advocate Dorey wrote to Howard Sharpe, the Solicitor General. She Wrote:
- 40.1 I act for Mr. and Mrs. Turner of [address given]. Their property is adjacent to Bayleaves Restaurant. I understand that the Planning department have sent papers to you concerning whether or not there has been a material change of use of the restaurant to include a takeaway without consent.

- 40.2 There has been ongoing problems with the manner in which the takeaway section of the business of Bayleaves Restaurant has been operated. My Clients, along with other residents in the area, have met with Planning on more than one occasion and also with the Parish Deputies. The fact is that the takeaway (as against the restaurant) has had a serious and detrimental impact upon the locality and the environment.
- 40.3 In order give you a flavour of matters I attach a copy of a letter written Advocate Begg (who acts for the owner of the restaurant) dated 17 November 2010.
- 40.4 If there is any further information that you require concerning the impact upon the locality my clients would be more than happy for me to provide that information to you.

41. Advocate Dorey did not receive a response to her letter to the Solicitor General. Not surprising in fact, as at the time he had no idea of what she was writing about. Planning only referred the papers to him on 29th November 2010, almost 2 weeks after the meeting on 16th November 2010. The Solicitor General responded to planning on 15th March 2011. [More on this later.]

#### **24th November 2010**

42. On 24th November 2010 the Connétable of St. Helier, Simon Crowcroft, wrote to Advocate Andrew Begg regarding the Bay Leaf Restaurant. The letter was copied to Dr. P. Anderson. He wrote:
- 42.1 Thank you for copying me in on correspondence with the residents of Paris Lane in relation to the above.
- 42.2 While I can understand your frustration with the length of time taken by this particular licensing application and accept your client has the necessary permissions to carry out his business, I am also mindful of the impact the take-away and home-delivery aspects of this restaurant is having on the surrounding community. In this respect I do not think it is correct to describe the neighbours' complaints as being "about comparatively trivial matters", nor are they seeing any evidence of the proprietor being 'vigilant about reminding its drivers to try and keep the noise level down late at night.' (Letter of 20 August 2010.)
- 42.3 In my experience of nearly 9 years as Constable I would say that there has been unprecedented level of political involvement in this particular matter, reflecting the concern which all of the elected representatives have about the effect on the residents' quality of life of the increased vehicular traffic generated by the restaurant. I have seen film showing how the private lane accessed off Paris Lane is being used by delivery vehicles, and given the proximity of the lane to residents' homes this new activity cannot be described as 'trivial' I would urge you to try persuade your client to minimise traffic movements in both Paris Lane and the private lane by ensuring that take-away meals are only provided from the front of the premises,

with the business drivers parking their vehicles in the free public car park in Route es Nouveaux.

- 42.4 I hope that you are able to assist me in, and the Parish .Deputies who are, trying to give back to the residents of Paris Lane their right to the peaceful enjoyment of their properties.

#### **24th December 2010**

43. The situation around the restaurant was so bad that Mr. & Mrs. Turner felt compelled to move out of their home again and stay in St. Peter. When Mr. Turner telephoned the Assistant Director Development Control at the Planning Department to advise him of this fact he received the distinct impression that he was not really concerned.

#### **10th January 2011**

44. On 10th January 2011 Advocate Dorey wrote a letter directly to the Anderson Family about the Bay Leaf Restaurant. She wrote:

44.1 As you are aware, I act for various residents in the area of Bayleaves Restaurant. You will have seen a copy of my letter to Advocate Begg of 17 November 2010. I attach a further copy for ease of reference.

44.2 As referred to in the fax to Advocate Begg there are considerable car movements. Since the opening of the new business in June 2010 there are approximately 30-40 vehicle movements per night at weekends in the cul-de-sac. What makes matters even worse is that certain of the vehicles have big bore exhausts (like rally cars) and thus the noise and roar penetrates through the homes even more than the noise from a normal car. The regular headlights have the effect of turning night into day.

44.3 I regret to say that matters have not improved at all. The lives of Mr. and Mrs. Turner, Snr. and Mr. Turner, Jnr, have been seriously compromised by the manner in which the take-away is being run.

44.4 Mr. Turner, Jnr, is on medication . . . and his condition has deteriorated as a result of what has been happening. He now finds it impossible to sleep in his bedroom by reason of the noise and has to resort to sleeping in an armchair in the sitting room.

44.5 Mr. and Mrs. Turner, Snr, are elderly and on at least two occasions have had to move out of the premises for a few days in order to have some peace and quiet; the last occasion was on Christmas Eve. In addition, during the warmer months, Mr. and Mrs. Turner have found it impossible to be able to make use of or enjoy their balcony.

44.6 In addition to the noise there is concern about fire hazard. The delivery drivers frequently throw away lit cigarettes whilst in the cul-de-sac. In a dry period there could be a conflagration.



- 44.7 There is concern that the manner in which the take-away is being operated has devalued the surrounding properties.
- 44.8 I am not aware of the terms of the lease you have with Bayleaves Restaurant. Indeed I do not know whether or not under the terms of the lease they are entitled to operate a take-away. Perhaps you could confirm the position.
- 44.9 In any event, however, they will have to comply with the terms of your Deeds, which give Mr. and Mrs. Turner a right of way and passage at all times and for all purposes across and along the private road in order to come and go to Paris Lane. It is specifically provided that no vehicles (other than those making deliveries to the property – and please note that deliveries do not extend to collections) shall be parked or placed on the private road which may impede or make it more difficult for Mr. and Mrs. Turner to exercise their right of way. Cars driven by the take-away drivers and customers are frequently left on the private roadway in breach of the afore-mentioned Clause; indeed, the last occurrence was on Saturday 8th January 2011.
- 44.10 Mr. Turner, Jnr. has not used his rear garage during the evenings since August 15, 2010 by reason of the cul-de-sac being frequently blocked and/or abuse from the delivery drivers. As the owner of the property, Bayleaves Restaurant, you have certain responsibilities notwithstanding the fact that you have let out the property. I would be grateful if you could take steps to remedy the difficulties being encountered by the residents, along the lines set out at the end of my fax of 17 November 2010 addressed to Advocate Begg.
- 44.11 One of the other residents of the area has commented that the actions of these delivery drivers, to his view, amounts to mental torture. When considering the residents one has to take into account that not only are there elderly residents but also young children.
- 44.12 The residents would welcome a meeting with you to discuss potential steps that could be taken to alleviate the problems that they are encountering.
- 44.13 For your information, and as you may be aware, many of the actions of the delivery drivers have been captured on CCTV.

#### **11th January 2011**

45. On 11th January 2011 Advocate Begg responded by e-mail to Advocate Dorey's faxes of 17th and 25th November 2010 and of 15th January 2011 regarding the Bay Leaf Restaurant. [The e-mail says it was dictated on 08.12.10.]
- 45.1 I acknowledge receipt of your fax of today's date and apologise for the delay in replying to your faxes of 17th and 25th November (and reverting to you following our telephone conversation on 26th November) I now have instructions.

- 45.2 I note that whilst, in your initial fax of 17th November, you said that you were writing “on behalf of certain residents in the area of Bay Leaf Restaurant. . . “in your fax of 25th November, you said that you were acting (only) for Mr. David Turner – whose property . . . is of course, immediately adjacent to (and to the east of) Bay Leaf Restaurant – although I note that you are/were also speaking for Mr. Turner’s elderly parents, who live with him (or vice versa). Could you kindly confirm whether it be the case that you act only for Mr. David Turner?
- 45.3 My client company is very well aware of both Mr. (David) Turner’s and his parents’ respective health problems – concerning which Mr. Turner addressed two Parish Assemblies, two Licensing Assemblies and a Planning hearing, at some considerable length – as will appear from the (interim) judgement of the Licensing Assembly (not the Royal Court, as you say) of 15th February 2010 and indeed, the final judgement of the Licensing Assembly of 1 June 2010.
- 45.4 I am pleased to note, from your fax of 17th November, that there is no objection to the restaurant per se and that, in particular, the problems which your clients and his parents (and, indeed, a number of other local residents and the Deputies representing them) had anticipated would be caused by the smell of cooking and the noise of fans (the purpose of the fans being installed to help minimise the smells) – and on the basis of which they vehemently objected to my client company being granted a liquor licence – have not, in fact, manifested themselves, as my client company maintained would prove to be the case.
- 45.5 On the contrary, I note that your client’s problem relates solely to the takeaway element of my client company’s business.
- 45.6 I further note that Mr. Turner does not appear to be complaining about cars obstructing Paris Lane (which was another matter about which your client complained to the Parish Assemblies and Licensing Assemblies), but about the noise and bright headlights of the takeaway drivers’ cars, and (ironically) that they are pulling into the “cul-de-sac which runs off Paris Lane” – i.e. I take it the short driveway which leads to the garages at the rear of the restaurant. I say “ironically” because one of the several proposals made to the Licensing Assembly on behalf of my client company (in order to overcome your client’s and other residents’ concerns about Paris Lane being blocked was that they (delivery vehicles) should drive into that driveway/cul-de-sac and make use of the two parking spaces at the rear of the restaurant. As I understand it, that is precisely what the delivery vehicles are doing but, as already noted, the problem now appears to be caused by the noise from revving engines; “blazing headlights” (which presumably have only been a problem in the last six to eight weeks, as the evenings have drawn in – although doesn’t your client or his parents, have curtains?); the attitude of the delivery drivers (in terms of being rude to your client when he has protested);

and a suggestion that, when the parking spaces at the rear of the restaurant aren't used, your clients right of way over the cul-de-sac is being obstructed.

- 45.7 I am bound to say that it seems rather excessive for Mr. and Mrs. Turner (Senior) to have moved out of their property for five days "because of their [above] concerns; at the Parish Assemblies and Licensing Assemblies, your client claimed that it would be impossible for him or his parents to ever leave the property (e.g. on holiday), were a liquor licence granted because they were so concerned about the activity of the restaurant and needed to be there to monitor the situation. One wonders, therefore, what has changed?
- 45.8 I note that your suggested solution to the (new) problem highlighted above is for "... delivery drivers to park their cars either on Victoria Avenue or in the multi-storey car park in Belozanne Road, and to collect all deliveries from the front of the premises". I presume that, by "the front of the premises", you mean the main road? If so, my answer to that suggestion is that it is a non-starter – because, as you must surely be aware, there is a T junction with traffic lights immediately outside the restaurant, as well as a yellow line – so delivery vehicles wouldn't be able to park in front of the restaurant – because it would be illegal as well as unsafe!
- 45.9 I might add that, at the time the restaurant was being renovated, in February this year, Mr. Turner protested vehemently about decorators' cars being parked on the pavement in front of the restaurant – so if per chance, that is what you are suggesting, parking there wouldn't be a solution either; the only viable solution was, and is, for the delivery vehicles to pull into the cul-de-sac and use the parking spaces at the rear of the restaurant which, as I have said above, was precisely the arrangement which was proposed at the Licensing Assembly – and of which one infers the Licensing Assembly approved in granting the Licence.
- 45.10 I assume that the revving of engines is being caused by the delivery vehicles going backwards and forwards as they manoeuvre into the two parking spaces at the rear of the restaurant (in order to avoid blocking up Paris Lane or the cul-de-sac).
- 45.11 Frankly, I am not quite sure how to solve one problem without reintroducing the other! Obviously, a certain amount of manoeuvring is required to reverse a delivery vehicle into a fairly narrow parking space in a fairly narrow cul-de-sac.
- 45.12 I can't imagine that the time of the noise and lights complained can really be posing a problem. As per the condition imposed by the Licensing Assembly, the premises are closed by 11:00 pm so deliveries usually stop at about 9:00 pm. It's obviously necessary for headlights to be used at night although I have suggested to my client company that drivers should be asked to use sidelights only after turning into the cul-de-sac so that if (as must be the case) Mr. Turner

and his parents don't have/aren't using curtains, those headlights won't beam into (what I presume must be) their bedrooms (if they are being disturbed so badly).

- 45.13 As far as concerns delivery drivers being rude to "the residents (presumably Mr. David Turner only – since I gather that his parents are housebound – although I should be glad to hear which other residents you are representing). I am bound to say that, although he had been tolerable polite to me personally, Mr. Turner has a reputation for patrolling the area like a archetypal traffic warden, looking for problems and confrontation. Indeed, when I sought instructions on your fax of 25th November, after taking the matter up with the delivery drivers, my client company informed me that it was Mr. Turner who was rude to them – thus, perhaps not surprisingly, prompting a rude response. I suggest that, if your client were a little more pleasant, diplomatic and relaxed, he would receive a much better response – and then you and I wouldn't need to get involved.
- 45.14 P.S. I apologise for the extended delay between dictation and despatch of the above. However, we have, of course, spoken on the telephone (on 17th December) in the meantime and discussed your client's concerns. As I explained, my client company changed its delivery drivers on or about 29th November so it was hoped that your client will have seen an improvement since then. I assumed that the conversation had negated the need for me to send the above email but I gather not from your telephone conversation this (Monday) morning with my Secretary.

### **17th January 2011**

46. On 17th January 2011 Advocate Dorey responded by e-mail to Advocate Begg's e-mail of 11th January 2011. She stated:
- 46.1 I acknowledge receipt of your email of 11th January 2011, dictated 8th December. It is a shame it took so long to be sent out.
- 46.2 My fax of 25th November did not state that I was acting (only) for Mr. David Turner. If you revisit that fax you will see that I said that "my one client David Turner . . . and not "my client David Turner". There are a group of residents who are extremely unhappy at the situation. These include Mr. and Mrs. Turner Senior, Mr. Friend, Mr. Williams, Mr. and Mrs. Mapplebeck and Mr. Noel. Mr. Turner is the informal representative who meets with them and relays the combined views to me.
- 46.3 Matters have not improved. There are still regular problems of the manner set out in my original letter to you. Certain of the vehicles seems to have big bore exhausts, like rally cars, which result in the noise and roar penetrating through the homes. Mr. and Mrs. Mappelbeck have two young children, who are often woken by the noise of the cars and the banging of the car doors.

- 46.4 The delivery cars regularly block not only the cul-de-sac but also Paris Lane. On occasions they block the way to the garages and, indeed, to the front door of Mr. Noel's house. This causes great inconvenience to the residents.
- 46.5 You have misunderstood my suggestion as to the way to remove the problem. It is for the delivery drivers to park at the lay bys on Victoria Avenue or in the nearby multi-storey car park and then to walk to the front entrance of the restaurant to collect the takeaways. This should solve all the problems. Indeed this was the car parking solution that you suggested at the hearing on 15th February 2010 when you were dealing with customers coming to pick up takeaways. If your client wishes to be neighbourly and has in mind the concerns of the residents then surely this is a potential solution?

### **17th January 2011**

47. Advocate Dorey received a letter from Mr. P G Anderson dated 17th January 2011 responding to her letter of 10th January 2011. It stated that the letter had been passed to him as the co-director of DWA Holdings Limited which owned the freehold to Bayleaves Restaurant, First Tower, and that he was asking Advocate Michael Clapham of Messrs. Ogier to reply to her letter. They also asked Advocate Dorey to pass all future correspondence on the matter directly to Advocate Clapham. **Other than a very brief e-mail from Advocate Clapham, Advocate Dorey received no further communications from the landlords or their legal representative.**

### **24th January 2011**

48. On 24th January 2011 Advocate Dorey wrote an e-mail to Advocate Begg In this e-mail she wrote:
- 48.1 I refer to my email of 17th January 2011 and note that I have not heard from you.
- 48.2 Matters are not improving. This last weekend the cul-de-sac was again blocked by takeaway delivery cars; again cars with big bore exhausts were being used. Deputy Higgins attended the area on Saturday night and witnessed the continuing problems.
- 48.3 I have seen a copy of your letter to Ms dF of 20th August 2010; the problems are not trivial. You say in that letter that Mr. Khan is always receptive to comments and willing to accommodate residents' concerns, but there appears to be no evidence of that.
- 48.4 There is one other matter. My understanding was that it was a condition of the liquor licence that the permitted opening hours were between 9 am and 11 pm. However, an advert in the JEP on 14th January 2011 refers to Friday and Saturday opening hours being (in the evening) from 6 pm to 11.30 pm. If the condition of the licence has not been changed this is a clear breach of the same.

- 48.5 It has to be in Mr. Khan's interests to accommodate the concerns of the neighbours; or is it the position that he has no concern for them?

### **15th February 2011**

49. Another meeting was held at the Town Hall on 15th February 2011. It was attended by the Assistant Minister with responsibility for Planning, Deputy Collin Egré of St. Peter, who had a private showing of the latest CCTV evidence before racing off for another meeting. The main meeting followed and had the following people present. The Chief Executive of Planning and Environment; Colin Russell and Ted Vibert, Chair and Vice-Chair of the First Tower Community Association; residents and District Deputies. Deputy Egré felt the situation was unacceptable and that the time had come for the Department to take action. The Solicitor General would be contacted.

### **February – March 2011**

50. At some point in February/March 2011 – the exact date is not known because the St. Helier Chef de Police is not willing to release the information – Mr. Miah, the Manager/Owner? of the Bay Leaf Restaurant appeared before a Centenier for breach of the Licensing Law. The Police Licensing Unit had raided the restaurant in response to a complaint in December 2010 and discovered customers on the premises and the serving of alcohol some 40 minutes after the closing time imposed by the Royal Court Licensing Bench. The restaurant had also failed to display the name of the licensee over the entrance to the premises. Mr. Miah was cautioned against further breaches of the Law. It seemed very strange that this case, unlike other similar cases at the time, was referred to and dealt with by the Town Hall rather than the Magistrate's Court or the Royal Court Licensing Bench.

### **15th March 2011**

51. The Solicitor General gave his legal advice on the Bay Leaf restaurant to the Planning Department.

Coincidentally, one anxious resident contacted the Law Officers' Department to try to discover whether or not any advice had been forwarded to the Planning Department and was told that they had advised Planning, but could not advise any member of the public of the nature of that advice.

52. During the interim between the legal advice being given to the Planning Department and the Enforcement Notice actually being drafted, the Solicitor General's advice was mislaid by the Planning Department. Deputy Egré had asked his officers to see it and it could not be found. After what seemed an inordinate delay, it was discovered and a decision was taken to serve the Enforcement Notice.

### **9th April 2011**

53. Former Senator Ted Vibert was knocked unconscious and hospitalised in an unprovoked and cowardly attack by Mr. Miah, the Manager of the Bay Leaf Restaurant. The attack occurred when Mr. Vibert, the Vice-Chairman of the

First Tower Community Association, was investigating cars parked in the rear cul-de-sac behind the restaurant and in Paris Lane following a telephone call from a resident. When he arrived at the site, there was a delivery car parked in Paris Lane, and 2 delivery cars using the cul-de-sac, with drivers standing around together. These drivers verbally abused him as he took photographs of the parked cars. He was then verbally abused by the Manager of the restaurant Mr. Miah, who then attacked him, physically striking him on the chin and knocking him against a garage door and to the ground. Mr. Vibert was taken by ambulance to hospital where he was detained. He spent a night in hospital for observation. Mr. Miah was subsequently arrested, charged and ultimately remanded to appear in the Magistrate's Court [see paragraph 57 below].

### **18th April 2011**

54. The Planning and Environment Department drafted and dated an Enforcement Notice on Mr. Eliah Miah, the proprietor of the Bay Leaf Restaurant. It stated the following:

54.1 **THIS IS A FORMAL ENFORCMENT NOTICE** issued by the Minister for Planning and Environment ("the Minister") pursuant to the powers conferred on him under Article 40 of the Planning and Building (Jersey) Law 2002. Because it appears to him that there had been a breach of development control at the Bay Leaf Restaurant on La Grande Route de St. Aubin, First Tower, St. Helier and it is expedient for him to issue this notice.

54.2 **THE MINISTER**, having received the facts of this case considers that a breach of planning controls by means of unauthorised change of use has occurred at the above premises. Bay Leaf Restaurant enjoys planning permission to operate as a restaurant, subject to various conditions. However, it has become apparent that the takeaway service being provided by the establishment has become more than ancillary to the operation of the restaurant resulting in a detrimental impact on the local amenities. This change of use has not been authorised by the Minister.

54.3 **REASONS FOR ISSUING THIS NOTICE**

It appears to the Minister that a breach of development control has occurred within the last eight years. Bay Leaf Restaurant enjoys planning permission to operate as a restaurant. However, it has become apparent that the take away service being provided at the Bay Leaf Restaurant has become more than ancillary to the operation of the restaurant. In a two week period in October 2010, the restaurant generated £7,542 in sales. £3,128 or 40% of the income was produced by the 136 customers who ate in the premises during the relevant period. 60% of income was generated by the take away orders; both 89 delivery orders (£2,278) and collection by 95 customers (£2,135).

54.4 The restaurant's take away delivery vehicles use the area surrounding the restaurant for the purposes of unloading or loading take away deliveries and conducting activities related to those functions such as

keeping the engines running. During the evenings, the take away vehicles generate a considerable volume of traffic. The result has been significant and detrimental impact on the local neighbourhood.

54.5 It appears to the Minister that there has been a material change of use for the purposes of the Planning and Building (Jersey) Law 2002, for which no permission exists.

54.6 **THE MINISTER HEREBY GIVES YOU NOTICE TO UNDERTAKE THE FOLLOWING WORKS AT THE LAND AFFECTED:** Permanently cease using the premises for the operation of a takeaway service which is more than ancillary to the use of the premises as a restaurant.

54.7 Stop the take away delivery vehicles using the area surrounding the Bay Leaf Restaurant for the purposes of unloading and loading take away deliveries and conducting any other related functions to the take away service which includes but is not limited to keeping engines of the vehicles running.

54.8 **THE AREA SURROUNDING THE RESTAURANT**

The area surrounding the restaurant is marked on the attached map. It includes but is not limited to the side road Paris Lane, the cul-de-sac and the restaurant's garage area, forecourt area at the back of the restaurant.

54.9 **THE LAND AFFECTED.** Bay Leaf Restaurant La Grande Route de St. Aubin, First Tower, St. Helier

54.10 **BY THE:** Within 7 days

54.11 **WHAT WILL HAPPEN IF THIS NOTICE IS NOT COMPLIED WITH:** Failure to comply with an enforcement notice which has taken effect can result in:

- (i) Prosecution by the Attorney General and/or
- (ii) Remedial action by the Minister who may claim from you as a debt any expenses reasonably incurred by him in doing so.

54.12 **WHAT YOUR RIGHTS ARE:** In accordance with Article 117 of the aforesaid Law, you may appeal to the Royal Court within 28 days of the serving of this Notice.

54.13 **SIGNED:** For and on behalf of the Minister for Planning and Environment.

An Attachment showing the area in question was included with the Notice [see Appendix 1].



55. **Both the District Deputies and the residents were surprised that it took the Planning Department so long to issue this Enforcement Notice. If they had the data regarding the amount of business being carried out in takeaways compared to the restaurant in October 2010 why then did they not take action immediately and issue of an Enforcement Notice then instead of waiting until 7th May 2011. It is clear from the evidence that the Department had gathered no further evidence other than that collected by Mr. Turner, Deputy Higgins, and members of the First Tower Community Association.**

**The Planning Department had to be pressed repeatedly to do something. They did not put the papers with the evidence into the Solicitor General's hands until 29th November 2010, and even after he responded on 15th March 2011, they still did not draft the Enforcement Notice until 18th April and finally serve it until 7th May 2011.** [See more on this in paragraphs 54 and 56 below.]

#### **Late April 2011 – 4th May 2011**

56. In late April 2011 the residents were concerned at the build-up of black plastic rubbish bags containing food and other rubbish that was accumulating around the rear of the restaurant. [See the pictures contained in Appendix 3.] They were especially alarmed at the seagulls and vermin (rats) that were pecking at, or burrowing into, them. Complaints were made by both residents and Deputies Higgins and Green to the Environmental Health Department whose response was not only dilatory but also grossly inadequate. Officers firstly stated that the bags only contained bottles, etc. whereas the Deputies had seen for themselves foodstuffs before they registered their complaints. One officer also stated that they would not accept that there were rats active unless they actually saw one for themselves. The Deputies were also surprised that Val Cameron of the Environmental Health Department actively supported the restaurant in the Jersey Evening Post article of 4th May 2010. [See the Article in Appendix 3.] Since when has it been the policy of the department to make statements such as these to the media? Their action was wholly unprecedented and discourteous to the residents and Deputies who had identified and reported the public health infraction. It was also interesting to note the Jersey Evening Post's apology to the restaurant at the end of this article. Were they threatened with a lawsuit? If so, they should have stood firm, as their report was based on factual information, accurately reported and could have been substantiated. Why also did the JEP not print the residents' rebuttal of Mr. Miah's comments?

#### **6th May 2011**

57. On 6th May 2011 the Planning Department Enforcement Officer came to the home of Mrs. Turner and stated that he wanted to gather 3 more weeks' evidence before he would issue the Enforcement Notice. This was surprising, considering he had already been instructed to serve the Notice by the Assistant Minister with responsibility for Planning, Deputy Collin Egré, and the Solicitor/Attorney General had given his consent to the Department serving of the Notice after reviewing the available evidence. Not surprisingly, concerned residents contacted Deputy Egré to find out what was happening. He had to

instruct the Enforcement Officer once again to carry out his job and serve the Enforcement Notice.

#### **6th May 2011**

58. On Friday 6th May 2011 a couple visited the Bay Leaf Restaurant at First Tower at about 7.30 p.m. in the evening. They were asked by a waiter whether they wanted a meal in the restaurant or a takeaway. They then placed an order for a takeaway and consumed a pint of John Smiths beer and a cider whilst standing at the bar awaiting their takeaway. This was both in contravention of the 3rd Category liquor licence held by the restaurant and part of the judgment of the Licensing Assembly on 1st June 2010. The couple later made a statement to the States of Jersey Police, who took no action.

#### **7th May 2011**

59. The Enforcement Notice that was drafted and dated on 18th April 2011 was finally served on Mr. Eliah Miah, at the Bay Leaf Restaurant on Saturday 7th May 2011.

#### **18th May 2011**

60. On 18th May 2011, Mr. Miah was convicted of common assault in the Magistrate's Court for the unprovoked attack on former Senator Ted Vibert, the Chairman of the First Tower Community Association. He pleaded guilty to the offence and was bound over to keep the peace for 12 months and required to pay Mr. Vibert £150 in compensation for damage to his glasses and camera. However, because the Duty Centenier failed to present Mr. Vibert's victim statement for £430, Mr. Vibert then had to sue Mr. Miah for the balance of the damages in the Petty Debts Court and was successful. What was surprising about this incident was that Mr. Miah's case was initially to be heard by a Centenier in the same manner as his licensing infractions, rather than by the Magistrate's Court as are other offences of this nature. Other liquor licensing infractions have also received cautions from the States Police rather than being referred to the Magistrate's Court or Licensing Assembly.

#### **10th June 2011**

61. On Friday 10th June 2010 a couple entered the Bay Leaf restaurant to purchase a takeaway after deliberately parking their car in Paris Lane outside the restaurant in a way that completely blocked the lane to any traffic.
- 61.1 At the time of ordering, the driver of the vehicle said: "I've parked my car outside in Paris Lane. Is that OK?". "Yes, no problem", said the server. At no time did any member of staff look out of the windows to check whether his car was stopping other motorists using Paris Lane.
- 61.2 The couple were in the restaurant for about 15 minutes when they asked the server whether they could purchase a bottle of wine with their takeaway. "Of course", said the server, who gave them a wine

list. They left the Bay Leaf with their takeaway and a bottle of wine, again in contravention of the Licensing Law.

- 61.3 The staff's total disregard of parking in Paris Lane, as illustrated by this example, is in total contradiction of statements made by Advocate Begg and the owner at the various Parish and Licensing Assemblies that considered the 3rd Category Licence and in correspondence.
- 61.4 The couple made a statement to the States of Jersey Police, who again took no action.

### **21st June 2011**

- 62. On 21st June 2011, Mr. Ted Vibert, the Vice-Chairman of the First Tower Community Association, wrote to the States of Jersey Police's sole licensing officer regarding the Bay Leaf Restaurant at First Tower. In his letter Mr. Vibert informed the Officer that:
  - 62.1 the Association has been concerned for some months about the operations of the restaurant, especially over blocking Paris Lane with their takeaway delivery cars and noise late at night which has caused great inconvenience to the residents of Paris Lane and surrounds;
  - 62.2 the restaurant has breached the planning consent issued in 2000, which was for a sit-down restaurant, in that its takeaway business was now generating more business than the sit-down restaurant, and that this fact thus constituted a change of use for which the restaurant should have sought planning permission;
  - 62.3 the Enforcement Notice prohibits the use of Paris Lane to drivers and customers for the takeaway service and that takeaways must not exceed the business being carried out in the restaurant;
  - 62.4 there have been numerous breaches of these restrictions and evidence – including CCTV evidence – was being presented to Planning Officials on Friday with the aim of possible prosecutions for those breaches;
  - 62.5 the Association had also been made aware of breaches of the restaurant's Third Category Licence, which only allows them to serve alcohol to diners who are eating on the premises. In particular, the Association had evidence that people waiting for their takeaways have been served with drinks whilst they wait for their takeaways, which is in contravention not only of the 3rd Category Licence that it possesses, but also the terms of the Licensing Assembly's decision of 1st June 2010;
  - 62.6 the Association also had evidence that people picking up a takeaway were also sold wine to take away. Statements from a couple who did so in June were also attached to his letter;

- 62.7 he had recently been assaulted by an employee of this restaurant who was charged and sentenced to a Binding Over Order for 12 months and was ordered to pay him £150 compensation a month ago;
- 62.8 despite this assault, the employee was still employed by that company, and that he had never received an apology from the licensee, which indicated an inability to control his staff and put a question mark against his fitness to hold a liquor licence;
- 62.9 that the Manager was brought before a Centeniers' meeting for breaches of his liquor licence and was given a warning, and that it would appear that these warnings were having no effect.

63. The States of Jersey Police took no action.

### 19th September 2011

64. On 19th September 2011 the Planning and Environment Department Enforcement Officer wrote a letter to Mr. Turner in which he stated:
- 64.1 That the ongoing problems of parking and traffic in the area of the Bay Leaf Restaurant and the garages to the rear of the premises, caused primarily by staff in the employ of the restaurant whilst using the area to collect takeaway meals for home delivery was addressed by the serving of an Enforcement Notice on Mr. Miah to cease his practice.
- 64.2 That the problem was not resolved immediately. That Mr. Miah believed [that] he had 28 days to comply with the requirements of the Enforcement Notice when he in fact had only 7 days. Therefore, there was a breach of the Enforcement Notice for a period of 14 days.
- 64.3 That the Department's position is that the serving of an Enforcement Notice is a last resort and a serious escalation in the enforcement process undertaken when all attempts at mediation have failed.
- 64.4 Therefore that a breach of the Enforcement Notice is a serious breach of the Planning and Building Law and prosecution is usually inevitable.
- 64.5 In the case of the Bay Leaf Restaurant and Mr. Miah there was a clear breach of the Enforcement Notice. Mr. Miah was interviewed under caution at my office and invited to explain the situation and the reason for the breach.
- 64.6 That Mr. Miah appeared genuinely shocked when he learnt that he did not have 28 days to comply with the notice and that, that timeframe related to the period of time he had to submit an appeal to the Royal Court opposing the Enforcement Notice.

- 64.7 That Mr. Miah went on to explain that since the 28 days after the notice was served he and his staff have ceased the practice of using the area surrounding the restaurant for business purposes. They now use the public parking facilities in the area.
- 64.8 That he [The Enforcement Officer] had not received a single complaint from anyone since that 28 day period ended, except for a last telephone conversation he had had with Mr. Turner in which he states Mr. Turner gave him third-party information with vague details.
- 64.9 That during that period, thoughtful consideration had been given as to whether Mr. Miah, being the proprietor of the premises, should be prosecuted for breaching the Notice
- 64.10 That we must all keep in mind that the purpose for serving an Enforcement Notice is to resolve a Planning Breach. The particular breach in this case concerning the movement of traffic in the area of the restaurant.
- 64.11 That it appears that the problem had already been resolved by the serving of the Enforcement Notice, albeit with a delay of 28 days, and that the objective had been achieved.
- 64.12 **That the initial breach of the notice had been explained and it was accepted [The Enforcement Officer] as a genuine misunderstanding and that it had been decided that Mr. Miah was not to be prosecuted for a breach of the Enforcement Order on this occasion.**
- 64.13 That the Enforcement Notice remains “Live” and as such can be used again if the same breach were to recur and that if there was a next time the matter would be reconsidered.
- 64.14 That he had written to Mr. Miah today [19th September 2010] to advise him of the decision and to emphasize the fact that this did not mean that he could return to the “old ways” and that if he or his staff were to do so then the matter would be reconsidered with a view to putting it straight to court.
- 64.15 That there might be the occasional isolated incident and each incident will if reported be dealt with appropriately.
- 64.16 That he [The Enforcement Officer] was sure that [Mr. Turner] would agree with him that the important thing in this case is that the problem that the vehicular movement from the Bay Leaf Restaurant was causing him [Mr. Turner] and other residents had been resolved and [that] there is little point in chasing the matter to court on this occasion.
- 64.17 That there will probably be occasions when unsolicited members of the public, wishing for convenience sake to park in the lane whilst purchasing takeaway foods from Bay Leaf will cause a problem, and

that Mr. Miah cannot be held responsible for such incidents if he is not aware of them or soliciting or encouraging them, and that proving the contrary would always pose considerable problems. He further stated that on occasions such as these, the offender(s) will be the driver of the vehicle, who is not subject to the Planning and Building Law, but the Road Traffic Law overseen by the police and that Mr. Miah cannot be expected to be aware of all occasions when a member of the public acts in this way.

- 64.18 That he [The Enforcement Officer] is confident that Mr. Miah is fully aware of the implications of further breaches of the Law and that he was sure that Mr. Turner and the other residents would continue to monitor the situation and that if Mr. Miah or his staff transgress and would invite them to inform the department which would attempt to prevent an isolated situation becoming a habit.
- 64.19 That he was confident that Mr. Miah was fully aware of the implications of further breaches of the law.
- 64.20 That as Mr. Turner was aware that he [The Enforcement Officer] has continued to monitor the situation and has been heartened by the improvement in the area.
- 64.21 That although he was formally closing the investigation he was always available to receive fresh concerns and would always act in the best interests of the Planning and Building (Jersey) Law 2002.
- 64.22 That he thanked Mr. Turner for his assistance in this matter and that he would retain the CCTV footage supplied by Mr. Turner just in case this matter becomes a matter of concern in the future and he needed to recall previous incidents.

### **23rd September 2011**

65. Everyone who had been involved in providing evidence to the Planning Department about persistent and consistent breaches of all the conditions laid down by the various Authorities regarded this letter as a total and utter failure by the Enforcement Division of the Planning Department to do its job. Deputy Higgins immediately contacted the Department to organise a meeting with all concerned, including the new Minister, and a meeting took place on 23rd September 2011.

Present were the Minister for Planning and Environment, Deputy Robert Duhamel of St. Saviour, the former Assistant Minister for Planning and Environment, Deputy Collin Egré, the Acting Principal Planner, the Enforcement Officer, Mr. Ted Vibert, Chairman of the First Tower Community Association; and Deputy Mike Higgins of St. Helier.

At this meeting:

- 65.1 Mr. Vibert stated that the residents had been initially delighted when the Enforcement Notice was served as they saw it as an end to their nightmare and went on to say that at the end of 7 days nothing changed in the way the Bay Leaf was operating and that the restaurant continued to use the cul-de-sac and Paris Lane and cause the same problems as before for 53 days. He also said that “it was quite clear that the proprietors of the Bay Leaf were prepared to stick two fingers up to the Authorities and keep operating regardless of the restrictions imposed on them, showing total contempt to the Planning Minister, the Court and the Law”.
- 65.2 It was pointed out that contrary to what was stated in the Enforcement Officer’s letter to Mr. Turner the breach of the Enforcement Notice was not for a period of 14 days (paragraph 64.2) or 28 days (paragraph 64.11) the breach went on for 53 days and that this information was not only known to the Enforcement Officer who also had a copy of the CCTV footage in his evidence which proved this fact.
- 65.3 It was also pointed out that during this 53 day period:
- 65.3.1 constant complaints were made to the Enforcement Officer that the Enforcement Notice was being breached;
  - 65.3.2 that at no time did the Enforcement Officer, or any other Planning Officer, come down to monitor compliance with the Enforcement Notice;
  - 65.3.3 that on a number of occasions that Mr. Turner had offered the Enforcement Officer the opportunity to monitor the events from Mr. Turner’s balcony which overlooked the back of the restaurant and the cul-de-sac;
  - 65.3.3 Mr. Turner Snr. and Jnr., other residents, Deputy Higgins and Mr. Vibert had witnessed the use of Paris Lane and the cul-de-sac by takeaway drivers on many nights in breach of the Enforcement Notice and had been prepared to give statements as to what they saw and when;
  - 65.3.4 the Enforcement Officer himself only inquired twice what the situation was when he telephoned Mr. Vibert and Mr. Turner;
  - 65.3.5 that what was the point of serving an Enforcement Notice if no one bothered to check if it was being observed?
- 65.4 When Deputy Higgins asked the Enforcement Officer if it was true that when he finally acted and called Mr. Miah into the department for a formal interview Mr. Miah initially denied that he had breached the Enforcement Notice and continued to do so until he [the Enforcement Officer] showed Mr. Miah the CCTV evidence, at which point Mr. Miah then said words to the effect that, “I am obviously guilty”, the Enforcement Officer confirmed that this was true.

- 65.5 When Mr. Vibert asked the Enforcement Officer why he accepted Mr. Miah's story that he had misunderstood the Enforcement Notice and thought he had 28 days to comply when it clearly stated that he had 7 days. Mr. Vibert asked why he [the Enforcement Officer] did not ask Mr. Miah which part of "within 7 days" he did not understand. The Enforcement Officer replied that he thought Mr. Miah's explanation was "reasonable".
- 65.6 When Deputy Higgins then asked the Enforcement Officer whether he believed Mr. Miah's statement as to why he had not complied with the Enforcement Notice the Enforcement Officer replied, "No I didn't!"
- 65.7 When Mr. Vibert said to the Enforcement Officer "but you said in your letter to Mr. Turner that the initial breach of the Notice has been explained and is accepted as a general misunderstanding. Yet you now say that you knew he was telling you lies and yet you were prepared to accept that lie. Can you explain that to us? The Enforcement Officer did not answer.
- 65.7 When Deputy Higgins asked why, if he didn't believe his answer, the Department decided not to prosecute him for the breach the Enforcement Notice, the Enforcement Officer stated that he had originally intended referring the papers to the Attorney General but that he had a discussion with his superior, the Assistant Director of Development Control and that they decided not to prosecute and he did what his boss told him.
- 65.8 When asked by Mr. Vibert "why did you tell us that the papers regarding the matter had gone to the Attorney General when it was obvious that the AG's office had not been involved?" the Enforcement Officer replied that at Planning they operated under a notice from the AG not to forward to him matters that could be dealt with by the Planning Department. He did not answer the core question of why he had told Mr. Vibert and others that the matter had been referred to the Attorney General and was awaiting their advice of how to proceed, which was a total lie.
- 65.9 When it was pointed out that it was the previous Attorney General (the current Deputy Bailiff) who used to say this to departments, and that the current Attorney General would want the papers referred to him, the Enforcement Officer didn't answer.
- 65.10 When asked by Deputy Higgins how he would explain to the court their letter to Mr. Miah saying that the Department was not going to prosecute if the Attorney General decided to prosecute him based on the evidence (whenever it was presented to him) the Enforcement Officer did not answer.



- 65.11 When Deputy Higgins questioned the Enforcement Officer about the statement in his letter to Mr. Turner, [paragraph 64.8] that he “had not received a single complaint from anyone since that 28 day period ended except for a last telephone conversation he had had with Mr. Turner in which he states Mr. Turner gave him third-party information with vague details” he agreed with Deputy Higgins that the reason he had not received any was because he had requested that he be provided with any further complaints as he had sufficient information to justify a prosecution.
- 65.12 When Deputy Higgins stated that the Enforcement Officer’s statement in his letter (paragraph 64.17) “That there will probably be occasions when unsolicited members of the public, wishing for convenience sake to park in the lane whilst purchasing takeaway foods from the Bay Leaf will cause a problem, and that Mr. Miah cannot be held responsible for such incidents if he is not aware of them or soliciting or encouraging them, and that proving the contrary would always pose considerable problems” could give Mr. Miah an opportunity to encourage people to park knowing that it would be difficult to argue in the absence of evidence to the contrary that he was responsible, the Enforcement Officer didn’t answer. This is illustrated by paragraph 58.1.
- 65.13 Although it was not stated at the meeting, the Enforcement Officer’s statement (paragraph 64.17) that “on occasions such as these, the offender(s) will be the driver of the vehicle, who is not subject to the Planning and Building Law, but the Road Traffic Law overseen by the Police and that Mr. Miah cannot be expected to be aware of all occasions when a member of the public acts in this way” could be construed as the Planning Department washing its hands and saying that it is not our problem in the future.

### **23rd September 2011**

66. Following the meeting, the Acting Principal Planner at the Planning Department sent an e-mail to all the parties who attended summarising the key outcomes of the meeting. He confirmed that the department would:
1. send the file to the Law Officers’ Department to obtain advice of the Attorney General on the breach of the current Enforcement Notice, specifically whether it is in the public interest to pursue a prosecution;
  2. obtain the further advice of the Attorney General on:
    - (a) whether the content of Planning and Environment’s letter to Mr. Miah on 19th September 2011 to Mr. Miah prejudices the ability of the Department to take further action in relation to the parking of vehicles by customers collecting takeaway orders, specifically in Paris Lane, and including other elements of the local highway network; then

- (b) whether this parking of vehicles by customers collecting orders means that the takeaway element is more than ancillary to the approved restaurant use; and then
  - (c) whether further Enforcement Action should be progressed.
3. Consider whether a payment of £7,700 should be made to Mr. Turner, in lieu of the time and expenses he has incurred in his gathering evidence.

#### **4th October 2011**

67. On 4th October 2011 Deputy Mike Higgins lodged au Greffe Proposition P.166/2011 seeking an *ex gratia* payment for Mr. D. Turner from the Planning and Environment Department. This was an insurance mechanism in case the Department decided not pay compensation.

#### **28th October 2011**

68. A meeting was held at the Planning Department at South Hill on 28th October to discuss my proposition and reimbursement of Mr. Turner's costs and expenses.
69. Present at the meeting were the Minister for Planning and Environment, Deputy Robert Duhamel of St. Saviour; the former Assistant Minister for Planning and Environment, Deputy Collin Egré of St. Peter; the Chief Executive, Planning and Environment Department; Mr. David Turner; Mr. Ted Vibert, Chairman of the First Tower Community Association; Advocate Caroline Dorey and Deputy Mike Higgins of St. Helier.
70. The costs incurred by Mr. Turner could be broken down into 2 separate sections, namely costs in obtaining evidence and secondly legal costs. Advocate Dorey explained that the legal costs were only incurred by reason of the failure of the Planning Department to deal with matters expeditiously.
- “To put it bluntly”, she said, “if the Planning Department had done their job, Mr. Turner would not have had to have turned to a lawyer for assistance”.
71. At the conclusion of the meeting it was confirmed that the Department would compensate Mr. Turner for both types of expenditure and that the Chief Executive of Planning and Environment would talk to the Minister and revert to Advocate Dorey later that day.
72. The Chief Executive, Planning and Environment, telephoned Advocate Dorey later in the afternoon to advise her that the Department would pay Mr. Turner the sum of £7,700 on a without prejudice basis. Advocate Dorey recorded what was said.

### **2nd December 2011**

73. On 2nd December 2011, Mr. Eliah Miah appeared in the Magistrates court to answer a summons for breaching the Enforcement Order issued by the Planning and Environment Department. He reserved his plea and was remanded on bail. He was advised to obtain legal advice.

### **23rd December 2011**

74. On 23rd December 2011, Mr. Miah again appeared in the Magistrate's Court. He again reserved his plea and was further remanded on bail and advised to obtain legal advice.

### **13th January 2012**

75. On 13th January 2012, Mr. Miah again appeared in the Magistrate's Court and pleaded not guilty. He was remanded for a further period and a date was set for a pre-trial review. Deputy Higgins, who witnessed the court proceedings, spoke with the Enforcement Officer afterwards and advised him to look very carefully at who was being charged with the offence as it appeared that there would be an individual/company argument used by the defendant to try to avoid liability. [It later appeared that he ignored the advice because these arguments came up later in court.] [See paragraph 78.2 below.]

### **3rd February 2012**

76. On 3rd February 2012, Mr. Miah changed his plea to guilty and was warned to appear for sentencing on 17th February 2012.

### **17th February 2012**

77. On 17th February 2012, Mr. Miah appeared in court for sentencing.
78. During the court proceedings:
- 78.1 the Magistrate asked the Enforcement Officer to set out the nature of the offence, which he did from a written statement;
  - 78.2 the defence advocate then argued a number of points:
    - 78.2.1 that it was wrong for the Planning Department to write a letter to Mr. Miah stating that it was not going to prosecute him for breaching the Enforcement Notice and then for the Attorney General to then prosecute him for the same breach;
    - 78.2.2 that the prosecution was brought in Mr. Miah's name and that Mr. Miah was a director of the company and that prosecution should have been brought in the company's name;
    - 78.2.3 that Mr. Miah was subject to a binding over order which could have a serious implications for him if he was convicted because the prosecution was being brought in his name rather

than the company's [there followed a discussion on legal points and about whether the binding over order was still within the 12 month period].

78.3 The Advocate representing the Crown gave no explanation to the Court as to why they had decided to prosecute Mr. Miah, despite the letter sent to him by the Enforcement Officer saying that he would not be prosecuted. In fact, throughout the proceedings the Crown Advocate said nothing.

79. The Magistrate said that the whole matter was totally unsatisfactory and it was unfair that a person should be told in writing that he would not be prosecuted and then the Crown months later decide to prosecute. Despite Mr. Miah's guilty plea he gave him an absolute discharge, and so all the work carried out by the local residents came to nought thanks to the actions of the Acting Director Planning Control and the Enforcement Officers acting beyond their authority.

#### **29th February 2012**

80. On 29th February 2012, Mr. Miah made an application to the St. Helier Parish Assembly to lift the 11 p.m. closing hour restriction imposed on the Bay Leaf Restaurant by the Royal Court Licensing Assembly on 1st June 2010. He wanted the restaurant to be able to stay open to 1 a.m. in the morning. The Assembly rejected his application by 23 votes to 8 against.

#### **2nd March 2012**

81. On 2nd March 2012, Deputy Mike Higgins e-mailed the Chief Executive of Planning and Environment. The e-mail stated:

“Further to my communications earlier this week would you please advise me what the situation is with the compensation for Mr. Turner. The court case against the Bay Leaf Restaurant has been concluded and it was agreed he would be compensated once it was over. Mr. Turner is in serious need of the funds to carry out the dental surgery that he requires and put on hold to fund the equipment purchase etc.”

#### **2nd March 2012**

82. On 2nd March 2012, the Chief Executive of Planning and Environment, e-mailed Deputy Higgins to say:

82.1 “Apologies for not replying sooner. As previously communicated the Minister is minded to accept this. He does however need the legal authority of the States Assembly to make an ex gratia payment, and I have been looking through legal advice on this matter. As accounting officer I can advise nothing apart from this.

- 82.2 **Therefore, the Minister proposes to lodge an amendment to your proposition to add this legal authority, in doing so the report will make it clear he is supportive of your proposition.**
- 82.3 **We will also make it clear that we are not legally bound to pay this, however the unique circumstances in this case would allow the Minister to support.**
- 82.4 I am currently assessing whether the receipt of “goods” from Mr. Turner warrants a part payment by another means, but the legal costs certainly will require an amended proposition.
- 82.5 **I hope to be in a position to do this paperwork early next week for the Minister to sign. I hope this would then lead to a straightforward debate in the Assembly”.**

### **16th March 2012**

83. On 16th March 2012, the Minister for Planning and Environment presented Comments on Proposition P.166/2011 rather than lodging an amendment as the Chief Executive for Planning and Environment had told Deputy Higgins he would do on 2nd March 2012.
84. The Comments, which were published within a week of the date scheduled to debate the Proposition, said that the Department would not pay the legal costs incurred by Mr. Turner. This was contrary to what the Minister had been telling Deputy Higgins, Advocate Dorey, Mr. Turner and many others since 28th October 2011, and was implicit in the e-mail of 2nd March 2011 which stated: “that the report will make it clear that he is supportive of your proposition”. All parties had been assured that once the trial was complete, Mr. Turner would be compensated in full. The Minister had effectively reneged on the agreement.
85. The Minister did so without contacting Deputy Higgins, who at the time was in the United Kingdom. By the time he heard of the Minister’s action it was too late for him to produce a report before this Proposition was to be debated (as previously there had been no need to produce this document because the agreement to pay the compensation meant that there would in fact be no need to debate the Proposition). As the Proposition had come to the end of its six months life it had to be re-submitted for debate at a later time.
86. The Comments Paper stated:
- 86.1 This case relates to the prosecution of a restaurant for failing to comply with the terms of an Enforcement Notice served by the Planning Department pursuant to Article 40 of the Planning and Building (Jersey) Law 2002 on 7th May 2011. The owner of the business was charged with the criminal offence of breaching the Notice during May and June 2011 on 2nd December 2011. Since 3rd July 2011, there have been no enforcement issues.

- 86.2 The Minister does not accept the Deputy's criticisms in respect of a case that was not straightforward. The Minister has confidence in the Department, which worked hard on a case which ultimately resulted in a prosecution and guilty plea, but at the same time acknowledges that one can always improve and the Department will be better for the experience. Of course, the Minister also acknowledges that residents suffered as a result of the conduct that resulted in the issuing of the Enforcement Notice and the prosecution.
- 86.3 Proposition 166/2011 invites the States Assembly to agree an ex gratia payment to a prosecution witness in the sum of £7,757, described as compensation for costs incurred by the witness in gathering evidence to deal with an alleged breach of the Planning and Building (Jersey) Law 2002.
- 86.4 It is understood that only £1,626 of this sum directly relates to the expense incurred in obtaining evidence. The remaining £6,131 relates to legal expenses incurred by the witness.
- 86.5 It seems that the Proposition's primary aim is to compensate the witness for legal expenses incurred in appointing a lawyer to assist him, inter alia, to present his concerns and complaints to the Planning Department from 12th January 2010 to 17th May 2011.
- 86.6 The Minister accepts that the Department encouraged the witness to gather evidence for the benefit of the Department and therefore has paid Mr. Turner the sum of £1,626 as a Departmental expense.
- 86.7 The claim for legal fees in the sum of £6,131 is a different matter. There is no obvious connection between the taking of legal advice and the gathering of evidence. As a matter of law, the Minister is not obliged to pay a member of the public their legal fees because he or she feels that the Department's decisions are not correct. Indeed, the 2002 Law precludes the Minister from making such payments. If this payment is allowed, then presumably the States of Jersey will, in order to be consistent, have to consider making ex gratia payments in respect of all individuals who instruct lawyers when they feel that the Planning Department has been slow to act or has taken a wrong decision. Whilst the Minister has every sympathy for Mr. Turner in terms of the difficulties caused by the breaches of the planning conditions in this case that has since been put right, it is not appropriate to pay the legal fees in this case. It is contrary to the Law.

*Financial and manpower implications*

- 86.8 Any payment will need to be met from the existing resources of the Department of the Environment.
87. The following points need to be made about what is stated the Department's Comments Paper:

- 87.1 In paragraph 86.2 above, the Minister states that he “does not accept the Deputy’s criticisms in respect of a case that was not straightforward. The Minister has confidence in the Department, which worked hard on a case which ultimately resulted in a prosecution and guilty plea”.

How the Minister can state this in light of the facts that have set out in this report baffles me. The Department has repeatedly failed the residents in the First Tower/Paris Lane area and the Turner family in particular. The case was straightforward in that the people running the restaurant repeatedly broke conditions that had been imposed on them by a number of Authorities, including the Enforcement Notice issued by the Department itself, and had repeatedly acted in a manner to the detriment of the residents of the area. Had the Planning Department done their job in an efficient, professional and unbiased manner in the first place, they would have nipped the problem in the bud from the very beginning. The Department has shown itself not only to be negligent, but also to be unfeeling of the residents’ needs and plight and has shown itself to be incompetent on more than one occasion. In my opinion, the failings of the Department need to be seriously addressed by the Minister and the States Employment Board, for their actions have not been worthy of public servants.

As for the Minister’s comments that “the Department worked hard on a case which ultimately resulted in a prosecution and guilty plea” it would be laughable if it was not so serious. He forgets that his Department did not follow the correct procedure and refer the case to the Attorney General in whose hands the decision on whether to prosecute or not lies. The Department’s officers decided on their own initiative not to prosecute and advised the defendant of that fact in a letter, despite clear evidence that he was a liar and blatantly and incontrovertibly guilty of breaching the Enforcement Notice. Nor does the Minister say that although the defendant pleaded guilty he was given an absolute discharge by the Magistrate because the Department’ actions had undermined the prosecution case.

- 87.2 In paragraph 86.4, the Minister states “It is understood that only £1,626 of this sum directly relates to the expense incurred in obtaining evidence. The remaining £6,131 relates to legal expenses incurred by the witness”. This point is accepted and this fact has been known and stated since the meeting of 28th October 2011. Invoices had also been provided to the Department setting out what the funds had been expended on. They never asked for an itemised invoice but they have since been provided with one.

- 87.3 In paragraph 86.5, the Minister states it seems that the Proposition’s primary aim is to compensate the witness for legal expenses incurred in appointing a lawyer to assist him, inter alia, to present his concerns and complaints to the Planning Department from 12th January 2010 to 17th May 2011. This is not true as the Department is fully aware. The real reason for engaging Advocate Dorey was to try to alleviate the problems his family and indirectly the other residents of the First

Tower area were experiencing through the operation of the restaurant/ takeaway business located at Brixton House in Paris Lane. She would not have had to be employed if the Planning Department had done its job and not failed residents on repeated occasions dating back to 2000, when they first granted the change of use of the premises to a restaurant.

87.4 In paragraph 86.6, the Minister accepts that the Department encouraged the witness to gather evidence for the benefit of the Department and therefore has paid Mr. Turner the sum of £1,626 as a Departmental expense. To date, Mr. Turner has not cashed the cheque and the Minister has confirmed that the prosecution could not have been taken place if it were not for the CCTV evidence gathered by Mr. Turner and other evidence gathered by other residents, the Deputies, and the First Tower Community Association. Certainly his Department did almost nothing and failed the residents of the Paris Lane/First Tower area.

87.5 In paragraphs 86.7 and 86.8, the Minister claims that the claim for legal fees in the sum of £6,131 is a different matter. There is no obvious connection between the taking of legal advice and the gathering of evidence. As a matter of law, the Minister is not obliged to pay a member of the public their legal fees because he or she feels that the Department's decisions are not correct. Indeed, the 2002 Law precludes the Minister from making such payments. If this payment is allowed, then presumably the States of Jersey will, in order to be consistent, have to consider making *ex gratia* payments in respect of all individuals who instruct lawyers when they feel that the Planning Department has been slow to act or has taken a wrong decision.

The Minister's comment that it would set a dangerous precedent is directly contradicted by his Chief Executive, who stated in the e-mail sent to Deputy Higgins on 2nd March 2012. The relevant part of the e-mail stated:

“We will also make it clear that we are not legally bound to pay this, however the unique circumstances in this case would allow the Minister to support.”

If the situation is so unique how can it set a precedent?

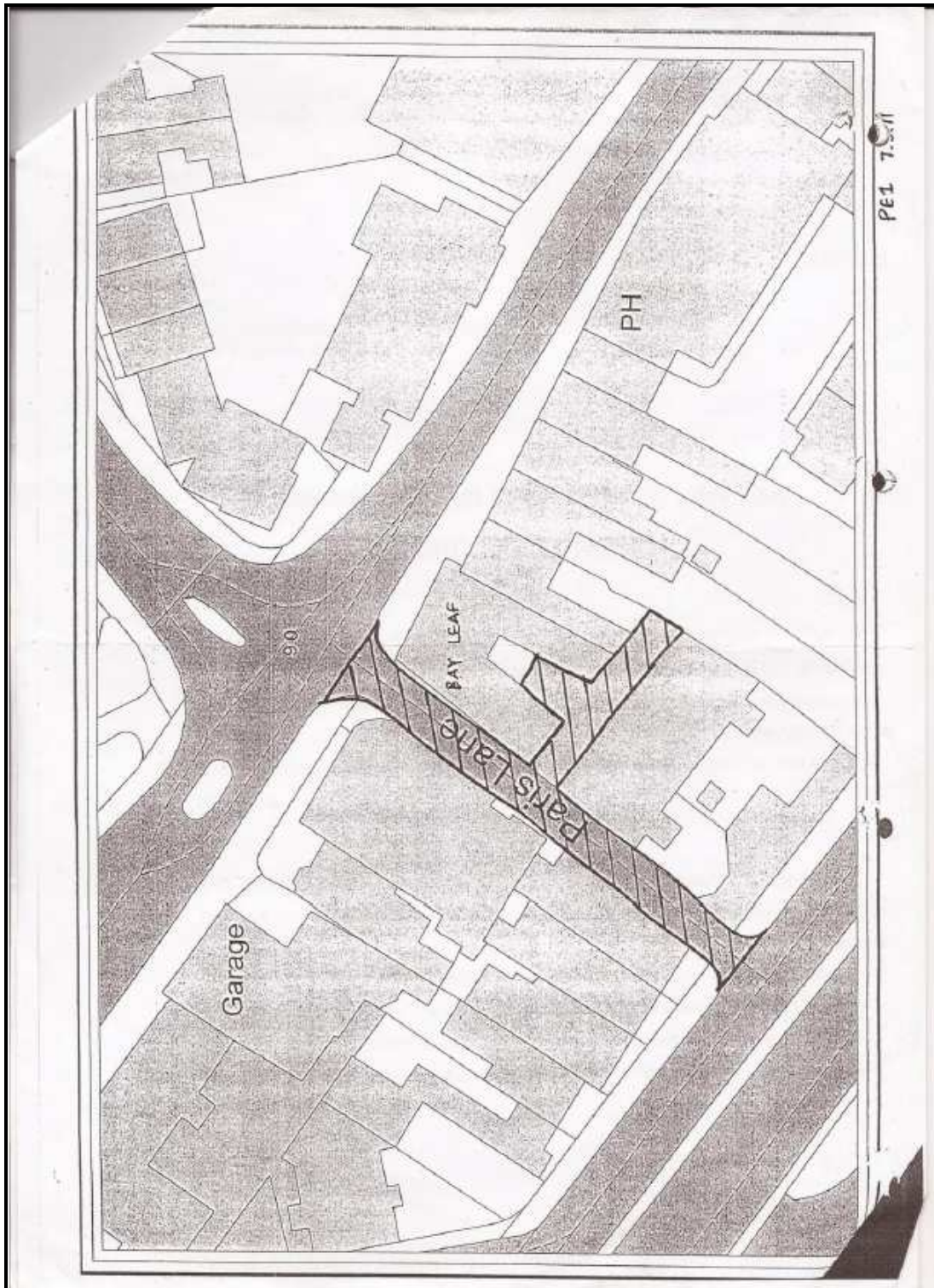
87.6 What the Minister also does not say is that the question of legal costs was covered in the meeting held on 28th October 2011, at which Mr. Turner's advocate, Advocate Dorey, was present. The covering of legal costs was discussed and agreed at the meeting at which the Minister was present and confirmed by the Chief Executive in his subsequent telephone call to Advocate Dorey later in that day. He also fails to mention that the Department could not find the invoices for legal costs that Mr. Turner had previously supplied to them and they asked for, and were given, further copies. Why has it taken them some 5 months to come up with this argument?



- 87.7 In paragraph 86.7, the final comment in the Comments Paper says that to pay the compensation would be contrary to law. I would remind the Minister that the States decided in the case of Reg's Skips, brought by former Senator Shenton, that it wanted an *ex gratia* payment to be paid to Mr. and Mrs. Pinel, including for legal costs, following the actions and failures of the Planning Department.
88. Deputy Higgins lodged this Proposition in order to make clear that the compensation sought is for the members of the Turner family [Mr. David Turner], who instructed Advocate Dorey and paid the bills, and that it covers both compensation for gathering evidence, cost of equipment and his legal costs incurred through the failure of the Planning Department to act, and act efficiently and expeditiously, etc.

APPENDIX 1

1. Location Map



St. Aubin's Inner Road to left, Victoria Avenue to right

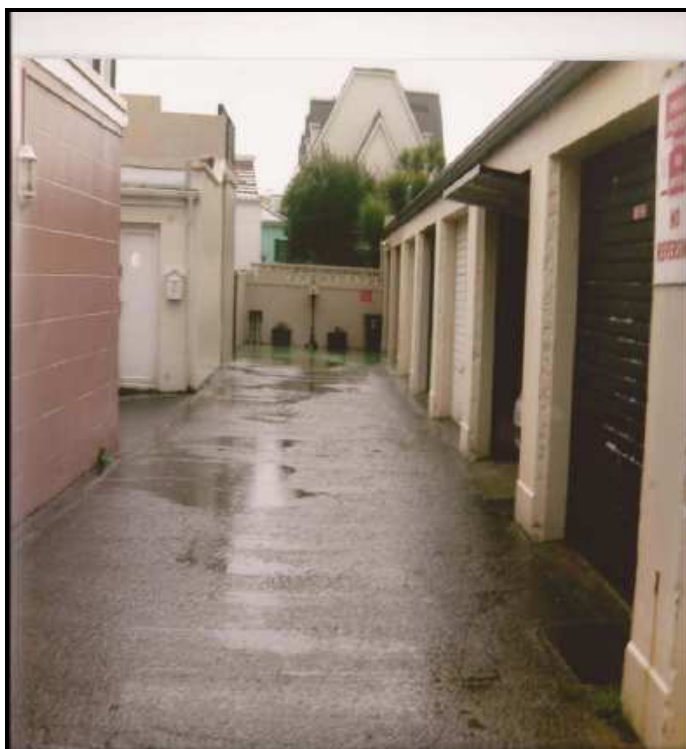
**2. Paris Lane facing St. Aubin's Inner Road – Traffic lights near First Tower**



**3. Paris Lane facing Victoria Avenue: car blocking exit**



**4. Cul-de-sac at rear of Bay Leaf Restaurant**



**5. Cul-de-sac facing Paris Lane – blocked by delivery cars**



**1 Extractor fan viewed from next-door neighbour to the west**



The flowers in the foreground are on the balcony of the Turner residence. Note the location of the vertical screening in pink on the opposite side of the extractor unit, which is located to the west and next to Paris Lane. Could the failure to screen the unit from the neighbours to the east be a deliberate act or a provocation?

**2. Extractor fan – facing Turner home and balcony**



**3. Extractor fan before screening – facing south**



**4. Extractor – facing east, flats above Checkers Xpress, First Tower**



**Note: incorrect dates on all photographs due to faulty camera**

1. Article in Jersey Evening Post of 4th May 2011 about rubbish at rear of Bay Leaf Restaurant

## Environmental health inspectors report no concerns after visit to Bayleaf restaurant

ENVIRONMENTAL health inspectors say that they have got no concerns about an Italian restaurant at First Tower.

Val Cameron, the head of the States Health Protection department, said that one of her team had visited the Bayleaf after an inquiry from a member of the public.

She issued a statement following allegations made by former Senator Ted Vibert, the vice-chairman of the First Tower Community Association, that the restaurant and take-away was leaving piles of rubbish at the back of the restaurant, which was attracting vermin.

Mrs Cameron said: 'We received an inquiry from a member of the public. This was investigated by an environmental health officer and nothing untoward was found at the time, although advice was given to the restaurant.

'We receive inquiries of this nature routinely from members of the public about restaurants and carry out these investigations and offer advice routinely.'

Elias Miah, the owner of the Bayleaf Restaurant, said that Mr Vibert and a handful of residents were behind unfounded allegations. He said that they were pursuing a vendetta against his restaurant.

'Mr Vibert has never come to talk to us to see if we can find a solution to the concerns of a small number of residents,' he said. 'They have all just made up their minds and want to close us down.

'We are just trying to abide by the law and regulations. Whenever we have been given advice, we have acted on it.'

He added that the restaurant only had a licence until 11 pm and so that if there was noise late at night in the area, it was not coming from his customers.

'Prior to opening, it came to light that a handful of our neighbours were dissatisfied with the reopening of the restaurant,' Mr Miah said. 'This became even more apparent during the Licensing Assemblies. With that in mind since opening, we have been trying our best to build bridges with these few disgruntled individuals.'

'I must also add that a vast majority of residents at First Tower have been extremely supportive and delighted that these licensed premises had been allowed to be reoccupied to serve the local community.'

He added that the restaurant had complied with all conditions and regulations required by the Health, Health and Safety, Planning and Fire departments and had even called in engineers to quieten the extractor fans in response to the concerns of some residents.

• The Jersey Evening Post would like to make clear that the reference to vermin in a news report about the Bayleaf Restaurant published on 12 April was reported as an allegation by Mr Vibert. The allegation has been strongly denied by the restaurant's management, to whom the JEP apologises for any distress or embarrassment caused.'

2. Rubbish sacks outside kitchen of restaurant – food on the ground



Assault on former Senator Ted Vibert

NEWS

# Former Senator 'assaulted' in restaurant nuisance row

By Debrae Cowburn

debrae@postmedia.com

FORMER Senator Ted Vibert was arrested Sunday night after a row over parking' problems in First Town, according to a police officer.

The 72-year-old politician was photographed a half-hour after the alleged assault on Sunday night in a row over parking' problems in First Town, according to a police officer.

A resident had asked him to go there on Friday night to witness the large number of deliveries' entering' to the restaurant' nearby' health' concerns.

### Photographs

It was then that I was arrested and knocked through the door of the restaurant' nearby' health' concerns.

It was then that I was arrested and knocked through the door of the restaurant' nearby' health' concerns.

Residents often find their cars blocked, or damage done to their cars, in the middle of the street. They have to move before they can get to their properties.

The restaurant' nearby' health' concerns.

The restaurant' nearby' health' concerns.

The restaurant' nearby' health' concerns.

The restaurant' nearby' health' concerns.



Former Senator Ted Vibert outside the Bayfield Indian restaurant at First Town, Koochichewong they local intimidated there.