

Department of the Environment
Green Paper

Originally published 15 March 2013
Amended 21 March 2013

Planning appeals – can we improve the process?

PLEASE NOTE THE REVISED CLOSING DATE FOR COMMENTS

Purpose and type of consultation

This Green Paper outlines Jersey's current planning appeals process and asks for views on how the system might be changed.

In considering comments received in response to this consultation due regard will be made to the proposition adopted by the States on 20 March to establish an independent planning appeals tribunal (P.26/2013)

Closing date 26 April 2013

Summary

Currently, if you want to appeal against a planning decision in Jersey, you have to apply to the Royal Court. The court does not rule on whether the planning decision was right or wrong, only whether the Minister for Planning and Environment has acted unreasonably in reaching that decision.

The system was simplified some years ago, but the planning appeals process is still considered by many to be expensive, complicated and too formal. It is argued that this stops people from appealing against planning decisions. Three reports have also criticised aspects of the planning appeals process and proposed changes to the system to make it more accessible.

Your submission Please note that consultation responses may be made public (sent to other interested parties on request, sent to the Scrutiny Office, quoted in a published report, reported in the media, published on www.gov.je, listed on a consultation summary etc.).

Please delete the following as appropriate:

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I agree that my comments may be made public but not attributed (i.e. anonymous)

I don't want my comments made public

Planning decisions can have a lasting impact on Jersey's landscape. They must be carefully considered, and take account of current policies, and of responsibilities to the community and to the Island's character. The planning system should work in the interests of the community as a whole.

Consequently, it is important to have an effective planning appeals system; it should test decisions made in sometimes complex situations and may offer a fresh perspective on a case. Appeals also provide accountability by our decision-makers and should clearly demonstrate why decisions are taken.

This Green Paper outlines the current appeals process and looks at how the system might be changed. It explores some of the issues that would be raised by altering the appeals process and the implications of setting up a new separate appeals body.

The Minister for Planning and Environment invites comments from Islanders with a view on the appeals process and relevant related issues.

Making your comments:

Online

The Green Paper is available online (www.gov.je/consultations), where you can submit your suggestions to the questions raised.

By email

Email the department with your suggestions and comments to appealsconsultation@gov.je

In writing

Write to us at: Department of the Environment, South Hill, St Helier, JE2 4US

This consultation paper has been sent to the following:
The Public Consultation Register

Supporting documents attached

Green Paper Report and Appendices: Planning appeals – can we improve the process?

Your submission Please note that consultation responses may be made public (sent to other interested parties on request, sent to the Scrutiny Office, quoted in a published report, reported in the media, published on www.gov.je, listed on a consultation summary etc.).

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Department of the Environment

Planning Appeals – can we improve the process?

A Green Paper

March 2013

(Addendum added 21 March 2013)

Addendum

21 March 2013.

In considering comments received in response to this consultation due regard will be made to the proposition adopted by the States on 20 March to establish an independent planning appeals tribunal (P.26/2013). That proposition which was adopted by the Assembly called for;

(a) to agree that an Independent Planning Appeals Tribunal should be established with full jurisdiction to determine appeals against decisions of the Minister for Planning and Environment made under the Planning and Building (Jersey) Law 2002 entirely on their planning merits, with the exception of deciding points of law arising from such appeals, with the new Tribunal to replace the present provisions in the Planning and Building (Jersey) Law 2002 which require all appeals to be decided by the Royal Court;

(b) to request the Minister for Planning and Environment to bring forward for approval by the States detailed proposals for the establishment of the new Tribunal by the end of June 2013 and to further request the Minister, if the proposals are adopted, to bring forward for approval the necessary amendments to legislation to give effect to the proposals by the end of 2013 with a view to enabling the Tribunal to be operational by June 2014 at the latest;

(c) to request the Minister for Treasury and Resources to assess the relevant budgets of the Planning and Environment and Law Officers Departments, and those of the Bailiff's Chambers and the Judicial Greffe, in relation to the existing resources allocated to these departments to deal with planning appeals with a view to reallocating these existing resources to the operation of the Independent Planning Appeals Tribunal in 2014, with the Tribunal then being accountable to the Chief Minister for public finance and manpower purposes.

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Foreword

There are concerns over whether the current appeals process is the right one for Jersey. The aim of this Green Paper is to have a public debate about the issues surrounding planning appeals and to ensure they are considered in a balanced manner. There are constitutional issues to consider as well as Planning and administrative contexts and all of these factors must be brought together to fully appreciate what the implications for changing the system might be.

Subject to the results of this consultation I anticipate providing a White Paper that will reflect the issues raised and if necessary make suggestions as to what may need to change to provide an appeals system that is right for Jersey.



Deputy Rob Duhamel
Minister for Planning and Environment
March 2013

1. Executive Summary

- 1.1. If someone wants to appeal against a planning decision in Jersey, they have to apply to the Royal Court. The Court does not rule on whether the planning decision was right or wrong on the merits of the issue, rather it will make a judgment on whether the Minister for Planning and Environment has acted unreasonably in reaching that decision.
- 1.2. Changes were made to the planning appeals process in 2002 in an attempt to simplify it. However there are still concerns that the process is too complex, expensive and formal and this deters people from appealing even though they are allowed to put their case in person. There may be a case to be made that the right of appeal is not being exercised to the extent it might be if the arrangements were different.
- 1.3. Planning appeals should test decisions and actions that are made in sometimes complex situations and they should offer the prospect of a different perspective on a case.
- 1.4. Appeals make decision-makers justify their actions and explain why decisions are taken. They also establish a precedent against which future actions and decisions can be considered or from which new planning policies can be developed.
- 1.5. There have been 3 formal reports published since March 2007 which have looked at all or parts of the planning process.
 - The Report of the Committee of Inquiry - Third Party Planning Appeals to the Royal Court up to 31 March 2008
 - The Committee of Inquiry – Reg’s Skips Planning Applications Second Report
 - The Development Control Process Improvement Programme (PIP) (November 2010)

- 1.6. Each report raised concerns whether the test applied to planning appeals in Jersey is appropriate and questioned the accessibility of the planning appeals system.
- 1.7. The earliest formal draft of the present Law – the Planning and Building (Jersey) Law 2002 - contained proposals to set up an independent Planning Appeals Commission with full decision making powers. Due to concerns over the unknown costs associated with the introduction of third party appeals the system of appealing through the Royal Court was retained but the rules were changed to let people present their own cases.
- 1.8. However, there are still concerns that the prospect of appearing before the Royal Court can deter appellants, and once in court, they can be frustrated that the merits of their case are not necessarily addressed.
- 1.9. Planning decisions can have a lasting impact on the landscape and must be carefully considered, taking account of current policies and of responsibilities to the community and to the character of the Island. Who makes those decisions is an extremely important issue. Currently responsibility lies with the Minister who is democratically accountable for any actions, but changes to the appeal process may remove this direct accountability or alter the Minister's role in other parts of the planning process.
- 1.10. Giving the power to review a decision to an outside body may promote a sense of independent judgement, but would that body be sensitive to the particular character of the Island, and how would such a body be accountable?
- 1.11. This Green Paper outlines the current appeals process and looks at how the system might be changed. It explores the issues that would be raised by altering the appeals process and the implications of setting up a separate appeals body.
- 1.12. The Minister for Planning and Environment invites comments from Islanders with a view on the appeals process and the issues highlighted in this Green Paper. Subject to those responses, a White Paper setting out further detailed options for consideration will be published.

2. Introduction

- 2.1. This Green Paper seeks to start a debate about the current planning appeals process and looks at some of the issues that might arise if the process was altered.
- 2.2. The Planning and Building (Jersey) Law 2002 allows for appeals against decisions by the Minister for Planning and Environment in a wide variety of circumstances. In the case of applications for planning permission, applicants and third parties can formally challenge a decision through the Royal Court. Other decisions taken by the Minister or on his/her behalf – for example the serving of an Enforcement Notice or listing a building – are also appealed through the Royal Court.
- 2.3. If planning officers have refused an application for planning permission under delegated powers, the decision can be reviewed by the Planning Applications Panel (PAP). There is also an option to ask a Complaints Board to examine the circumstances of any decision although the Board's findings are not binding on the Minister.
- 2.4. The basis for the current appeals process is that because issues surrounding Planning can be complex with a multitude of factors needing to be balanced, there can legitimately be wholly different but equally plausible conclusions on the same situation. In light of this, an appeal to the Royal Court can only be made on the grounds that the action taken by the Minister was unreasonable having regard to all the circumstances of the case. The merits of the case itself are not the directly determining factor in the appeal.
- 2.5. In 1996, when discussion began over what was to become the current law, the idea of an appeals test, based on the merits of the case, was suggested as was the idea of appointing an independent mechanism to consider those appeals. These ideas were not carried through into the current law but there have been calls to re-examine this situation and encourage a discussion as to what the most appropriate arrangements might be for appeals against planning decisions.
- 2.6. This Green Paper will start that debate in its widest context, seeking views as to whether the appeal arrangements should change, how they might be improved,

and if so what might any changes look like. Included in the paper is an outline of the arrangements in other jurisdictions to help the debate and assist in considering the specific context of the situation in Jersey.

2.7. Once this consultation has finished and all the comments and suggestions reviewed a White Paper containing firmer proposals may be published.

How to make your comments

Online

The Green Paper is available online (www.gov.je/consultations), where you can submit your suggestions to the questions raised,

By email

You can email the department with your suggestions and comments at:

In writing

You can write to us at: Planning and Environment Department, South Hill, St. Helier, JE2 4US

Public submissions

Please note that responses submitted to all States public consultations may be made public (sent to other interested parties on request, sent to the Scrutiny Office, quoted in a final published report, reported in the media, published on a States of Jersey website, listed on a consultation summary etc). If a respondent has a particular wish for confidentiality, such as where the response may concern an individual's private life, or matters of commercial confidentiality, please indicate this clearly when submitting a response.

Consultation on this Green Paper ends on 26 April 2013.

3. Does the appeal process need to change?

3.1. In recent years 3 significant reports have addressed the planning applications process. All 3 reports expressed concerns about aspects of the planning appeals process, and in particular its accessibility, or about the fact that the Royal Court can only test the reasonableness of the Minister's decision, not the planning merits of the case.

3.2. The Committee of Inquiry - Third Party Planning Appeals to the Royal Court Up to 31 March 2008 (February 2009) stated:

“5.7.10 The Committee considered, during its deliberations, the position that would have obtained under a Planning Appeals Commission as compared with the current Royal Court system. Although outside its remit, on the evidence it received the Committee feels that a Commission would have been a more equitable and less daunting approach to planning appeals. Cases could be considered on their full merits and not restricted to a judgement on the reasonableness of the original decision.”

3.3. The Committee of Inquiry – Reg's Skips Planning Applications Second Report (April 2011) stated:

“3.30 The conclusion we have reached from reviewing the position (on the appeals process) on this in line with our own terms of reference is really that 'something must be done'. The present situation is manifestly unsatisfactory. People should be able to challenge, without significant ado, regulatory decisions that affect or curtail their rights to enjoy their property as they would, and possibly too their business interests and even their rights to family life. The Court should, as ever, be a place of last resort in probably only a handful of special or unusual cases where points of law arose.”

3.4. The Development Control Process Improvement Programme (PIP) – (November 2010) report was commissioned by the Minister for Planning and Environment partly in response to Committee of Inquiry – Reg’s Skips Planning Applications First Report (September 2010). It referred to concerns about the operation of the development control service within the Planning Department. The report found that:

“There is wide support for introducing an Independent appeal mechanism examining planning merits as exists in all other British Isles jurisdictions, alongside the right of appeal on matters of law to the Royal Court. The support appears to extend to a willingness by applicants to pay for the process. Initial concerns about jurisdiction passing off Jersey and cost can be addressed. Either an independent commission staffed by appropriately qualified professionals and Jurats or an environmental court under the aegis of the Royal Court could be introduced.”

3.5. Relevant extracts of the respective reports can be found at Appendices I to III.

3.6. The concerns expressed in these reports, along with anecdotal evidence of a reluctance of first and third parties to appeal due to the costs and complexity prompted the Minister for Planning and Environment to commit to examining again the appeals process in Jersey. Since the end of 2011 information has been gathered over how the system is operating at present, what alternatives might be available – with information gathering trips to the Isle of Man, Guernsey and the UK – and discussions with other bodies involved in processing appeals.

3.7. As a result of these investigations, a single overarching issue has emerged; should the test applied to appeals to planning decisions be changed? Should an appeal look at whether the Minister has acted unreasonably or whether the planning decision itself has any merit?

3.8. All the other issues that have been raised – such as who makes decisions, can appeals be easier and cheaper to pursue, why more appeals are not currently considered on the papers of the case – follow from the answer to that question, although these issues may themselves influence the answer itself.

3.9. If the test is changed to be based on the merits of the case then there are a number of issues to consider, including:

- Who should consider the appeal?
- How will any such body be accountable?
- How will appeals be made and considered?
- How will existing structures and processes be affected by the change?
- Who will administer the changed processes?

3.10. If the route of appeal remains through the Royal Court and the test applied remains whether the decision was unreasonable, the process can still be examined and if appropriate altered to address some of the concerns that are apparent.

4. Background

- 4.1. The current appeals process has its roots in the Island Planning (Jersey) Law 1964. This allowed an appeal to the Royal Court against action taken by the (relevant) States committee on the grounds of such action being unreasonable with regard to all the circumstances.
- 4.2. In 2001, in the report accompanying the first version of what was to become the Planning and Building (Jersey) Law 2002 (P50/2001) the then Planning and Environment Committee stated:

“Articles 106 to 117: Appeals

The provisions in the proposed Law for appeals are a significant departure from those contained in the existing Laws. The Committee has found that the system of appeal against a planning decision to the Royal Court is invariably a slow and expensive process which effectively denies a right of appeal to those of limited means, or makes an appeal unworthwhile where the cost of the works to be undertaken are significantly less than the exposure to costs in an appeal to the Royal Court.

Accordingly, the Committee proposes the setting up of a Planning Appeals Commission. This will be a panel of expert Commissioners, one of whom will be appointed by a Chief Commissioner, to conduct an appeal into a Planning and Environment Committee decision, either through the method of written representations or by public hearing. It is felt that this system will allow swift access to an independent tribunal, which will be able to assess the merits of a case, taking such expert advice as is necessary, and adjudicate. Appellants would not necessarily be required to appoint professional representatives and could expect a final and binding decision within three or four months depending on the way in which the appeal is heard. The Commission will be able to determine appeals on the merits of the case.

An appeal to the Commission would be available against refusals of permission, against conditions subject to which planning permission has

been granted, against the revocation or modification of permission, against the service or terms of certain notices and against certain listings. The Commission would be required to take into account the purposes of the Law and the policies contained in the Island Plan but it would have the power to find differently to the Committee on the planning merits of the case. It will have full jurisdiction under the Law and its decisions would be binding on the Committee.

The provisions do not alter the right to appeal under the Administrative Decisions (Review) (Jersey) Law 1982, or to seek judicial review by the Royal Court. “

- 4.3. At the stage of P50/2001, the Planning and Environment Committee decided not to recommend to the States the introduction of appeals by third parties, that is not the applicant but others interested in the proposal. The Committee was concerned that allowing third parties to appeal against decisions could prejudice legitimate development proposals. They were also concerned that the cost of allowing third party appeals estimating that the workload of the suggested independent Planning Appeals Commission could nearly double.
- 4.4. Notwithstanding the concerns of the Committee, States Members accepted an amendment to the law to introduce third party rights of appeal. (P.50/2001 third amendment)
- 4.5. Discussions continued as to how to service the appeals process to include third party rights and a compromise was suggested. The proposal for a Planning Appeals Commission was dropped, and appeal to the Royal Court for both first and third parties was introduced (P210/2004). At the same time, the rules governing Royal Court appeals were simplified and the process made more accessible. To keep costs down, appellants would be allowed to represent themselves in the Royal Court. (a copy of the rules is attached at Appendix IV).

4.6. The route of following the new process – which became known as the modified procedure – and the ordinary process was elegantly captured by the Committee of Inquiry - Third Party Planning Appeals to the Royal Court Up to 31 March 2008 (February 2009):

Modified Procedure	This permits appeals to be dealt with in a more efficient and less costly manner than the ordinary procedure. The modified procedure can be used for most Third Party Appeals since these do not generally raise points of law and are not overly complex. Although the hearing takes place in the Royal Court, the Court sitting is informal and the Court does not robe. Costs can be kept to a minimum as parties can chose to represent themselves or be represented by a non-legally qualified professional approved by the Court. In the modified procedure the normal expectation is that there will be no award of costs.
Ordinary Procedure	This is a formal hearing before the Royal Court and is used when an appeal by an applicant or third party involves complex factual matters, important issues of law or matters of general public importance. There is a much greater likelihood that parties to the appeal will be represented by an advocate and therefore the costs will be higher than in the modified procedure.

4.7. Soon afterwards, further changes to the proposed law were introduced (P47/2005) that changed the test of an appeal from merits based to that of unreasonableness of the decision. The same amendment introduced restrictions on who could pursue a third party appeal. The law was then brought into force.

4.8. Appendix V are two useful appendices from the Committee of Inquiry - Third Party Planning Appeals report, which provides a summary of the events leading to the law being brought into force.

5. The current appeal process

5.1. The Planning and Building (Jersey) Law 2002 Part 7 sets out how to appeal, and who can appeal against decisions of the Minister for Planning and Environment.

An appeal can relate to:

- The refusal to grant planning permission
- The refusal to approve or amend an application for planning permission for development which has already taken place
- The refusal to vary a previously approved application for planning permission
- The refusal to grant a certificate of completion (confirming a development has taken place in accordance with a previously approved planning permission)
- The refusal to grant building bye-laws approval
- The refusal to grant permission to undertake particular activities on/in/under a site of special interest.
- The refusal to grant permission for the importation or use of a caravan in Jersey
- The imposition of a condition on any permission previously granted by the Minister
- The revocation or modification of a planning permission
- The service of notices requiring actions
- The inclusion of buildings / places / trees on relevant lists for their protection
- The granting of planning permission – appeal by a third party

5.2. Anyone against whom a decision is made – and in the case of applications for planning permission this includes neighbours who have made representations on an application - may appeal through the Royal Court under Article 109 of the Law. In the Royal Court the test against which a decision is considered is that of unreasonableness of the decision. In practice this has meant that the Court may form an opinion on the merits of a scheme in order to rule as to whether the Minister was unreasonable in reaching any decision¹.

¹ (see Token –v- Planning and Environment Committee [2001] JLR 698)

- 5.3. If an application is refused under delegated powers by officers of the department an applicant may submit a Request for Reconsideration (RfR) of the application. The decision is then reviewed on the basis of the planning merits of the case by the Planning Applications Panel (PAP). The process for a Request for Reconsideration is long established although there is no formal basis for the process.
- 5.4. Applicants can also ask for any action by the Minister, including decisions over planning applications and other statutory powers, to be reviewed by the States of Jersey Complaints Board. This procedure, which applies to decisions made by any minister or department of the States, is provided for under the Administrative Decisions (Review) (Jersey) Law 1982. These hearings are normally held in the local parish hall and evidence is heard from both the complainant and the Minister, or his representative.
- 5.5. These proceedings are usually relatively informal and although a complainant may wish to be present at his or her case with the help of an agent or adviser, this is not necessary. After the hearing, the Board reports its findings. If it considers the Minister's decision to be unreasonable, the Board can request the Minister to reconsider his decision. However, it is important to recognise that the Minister is not bound by the conclusion of the Board and the usage of this route has fallen away in recent times.

6. Numbers of appeals submitted

- 6.1. For January 2006 to December 2012, there have been 98 appeals to the Royal Court. Of these 41 have proceeded to a Royal Court hearing or consideration on papers. The rest were either withdrawn by the appellant, resolved by negotiations, or reconsidered by the Minister.
- 6.2. Of these 87 related to the grant of planning permission, 9 related to the serving of an enforcement notice and 2 related to modification notices.
- 6.3. The statistics suggest that in connection with minor controls of the law either few people are aggrieved with any actions taken by the Minister – which is highly unlikely - or that the process is so daunting as to not be practical. This effectively excludes many more minor functions of the Planning and Building (Jersey) Law from any appeal process. In the same period (since January 2006) there have been a total of 564 RfRs. Of these 123 resulted in a decision being changed.

Appeal type	Number submitted	Withdrawn	Considered by the Royal Court	Upheld	Dismissed	Awaiting info
1 st Party appeal against the refusal of planning permission	44 (+2 not properly made)	23	20	3	16	1
3 rd Party appeal against the granting of planning permission	43 (+3 not properly made)	24	19 (including one appeal ordered to be withdrawn by the Court)	9	10	
Appeal against a Revocation / Modification Order	2	1	2		1	
Appeal against an Enforcement Notice	9	5	4		3	1
Request for Reconsideration of the refusal of planning permission under delegated powers	564			123 (22%)	441 (78%)	
Totals	659	53 (8%)		135 (20%)	471 (72%)	

7. Should a merit based appeal system be introduced?

7.1. How planning decisions are made – the context

- 7.1.1. The Island Plan is in place to secure issues of importance and give certainty as to where development should be targeted and how it should be delivered. The plan sets a framework of policies and guidance against which to assess the merits of an application for planning permission. The plan-making process is extensive and seeks to be inclusive so that adequate opportunity is given for views to be aired in finalising the plan. Decisions over development proposals should achieve development that is either in accordance with the Island Plan, or, where a proposal is not in accordance with the plan, that there are justifiable reasons to depart from it. The Island Plan will not please everyone or meet everyone's expectations but it will provide a transparent and balanced opportunity for the community as a whole to contribute.
- 7.1.2. Following the plan, come the individual applications for planning permission. These applications are usually a reflection of the plan and decisions are either directly informed by the plan's policies or can involve other issues that are raised during the application process. Decisions made in connection with applications for planning permission should relate directly to the merits of the proposal.
- 7.1.3. Given this process, should an appeal against a decision be required to reach a decision in the context of the same issues?
- 7.1.4. As has been observed, there is support for the introduction of a merits-based appeals process. One of the significant drawbacks to the current appeals process, is that the Royal Court does not solely rely on whether an application has merit, but only if the Minister acted unreasonably in reaching a decision.

7.1.5. The Development Control Process Improvement Programme (PIP) – (November 2010) concluded that despite the introduction of a modified procedure for the Royal Court there was a reluctance to appeal. This, the report contended, was borne out by the statistics for appeals and led the report to state:

“(to November 2010) Jersey is now unique in the British Isles in not having an independent planning merits based appeal process. Appeal rates in other jurisdictions would lead to an expectation that between 90 and 100 appeals would be made in Jersey each year. However the number dealt with by the Royal Court is about one tenth of this level. This suggests that a combination of the fear of cost of court action combined with the lack of an independent planning merits examination is suppressing up to 90% of potential appeals.”

A larger extract of the report can be found attached at Appendix III.

7.1.6. In 2005, Chris Shepley – a highly regarded UK planning practitioner examined the planning development control process and stated:

“The existence of an open, fair, impartial and accessible appeal system is in my view essential to the operation of the planning system. Its value is not just in resolving disputes objectively and efficiently, though of course this is crucial. But its existence also pervades the whole of the system – even when it is not used, the knowledge that it may be used is taken into account by the decision maker. Conversely, the applicants will not appeal frivolously to a properly independent body, but will do so only if they believe they have a good case. They will know that the body is not subject to influence, and that all parties with an interest will have equal access to it.”

A larger extract of Mr Shepley’s report is attached at Appendix VI

7.1.7. Considering proposals for development is judgemental and qualitative. It requires the consideration of policies, of practical issues of development, the constraints of a number of other professional practices – engineers, environmental health, landscape, heritage, architectural and legal – along with the views of individuals who may be experiencing the planning system for the only time in their life. Added to this is the fact that each proposal is unique as the spatial nature of development means that any situation cannot be replicated elsewhere as no two sites are exactly the same. It is the complexity of these issues and the weight that should be attached in each individual and unique case that might suggest that any decision over a development whether in the first instance or at appeal should be made on the merits of the case.

7.2. Third Parties

7.2.1. Jersey allows appeals against the granting of planning permission by a person who has an interest in land or lives within 50 metres of the application site, provided that person made a representation on the original application. As indicated in para 3.4 there were some concerns over the principle of allowing third party appeals. Part of the concern of allowing such appeals was the potential effect it would have on the recipient of a planning permission, both in terms of the delay in the development process, but more fundamentally on the rights of a landowner to realise the potential of their land. The ownership of property gives no immediate rights to neighbours over another's property except through legal covenants. The law, indeed the whole planning system, is geared to work in the interests of the community as a whole and not intended to confer rights on an individual property in lieu of legal rights.

7.2.2. The process for considering planning applications allows for representations from interested parties to be garnered and taken into consideration in reaching a decision. Currently third parties can appeal on the test of whether a decision is unreasonable but how would a change to

the appeal test, from reasonableness of the decision to the merits of the case operate?

- 7.2.3. Would it be appropriate for third parties to appeal on the merits of a case as well as the applicant? Is it reasonable to change the test for appeals by an applicant and not to apply it equitably to all those who are currently able to appeal? Or might the inclusion of a merits based test at third party appeals introduce an unreasonable restriction on a property owner for their reasonable enjoyment of their property?

7.3. Who decides?

- 7.3.1. Applications for planning permission involve engaging with the public or statutory bodies to seek their views on a proposal. When the information has been gathered it is brought together and a decision is made as to whether or not the proposal is acceptable. During consideration of all the issues surrounding an application a proposal may be considered inappropriate by someone. That someone might be officers of the Department of the Environment, statutory bodies who have concerns over the impact of development on their responsibilities, pressure groups, local politicians acting on behalf of their constituents or individuals with concerns.
- 7.3.2. The question of who then makes the decision on an individual proposal is a fundamental tenant of the planning system. The decision maker's role is to balance all the issues and reach a conclusion and that is why whoever makes the decision will carry responsibilities to everyone involved. The Planning and Building (Jersey) Law lays responsibility for those decisions with the Minister for Planning and Environment who is ultimately accountable to constituents as a States Member and to fellow States Members who chose the Minister.
- 7.3.3. The introduction of a Planning Appeals Commission as originally envisaged in the first versions of the current Law (see para 3.2) would have taken the responsibility for those decisions away from the Minister. Indeed many of the more recent discussions around this issue have included the idea of an independent and binding external decision making body or person. What appears not to have been part of any conversation is how an

external body or person might be accountable for their decision other than on a point of law where the Courts would become involved? Indeed is it desirable in principle to remove from a democratically elected individual the ultimate responsibility for a decision? This issue is not just one that involves the administration of planning appeals but crosses into constitutional territory and must be fully and deliberately addressed.

- 7.3.4. If a merits-based approach were introduced, the Minister could remain as the ultimate decision maker but would have to demonstrate independence from the process prior to being asked to consider an appeal. The Ministerial Code of Conduct (December 2011) (Appendix VII) established a framework for the Minister to operate in, and which ensures he/she only become involved in individual applications in particular circumstances. This arrangement could be amended so that the Minister did not become involved in applications for planning permission or indeed any of the other processes that can be subject to appeal until the point of for appeal itself. However this might be extremely difficult to achieve practically as there is expectation of Ministerial involvement at many stages of the planning process.
- 7.3.5. As Planning Department staff would have already been involved in a case, if the Minister were to make a judgment on the merits of a case he/she would have to take independent advice to scrutinise officer advice. In the Isle of Man (see Section 10) appeals are heard by an independent inspector who then reports directly to the Minister. On the basis of the inspector's report the Minister makes a decision. If the decision is at odds with the inspector's report the Minister explains why this is the case.
- 7.3.6. If the responsibility for appeals on a merits basis is to fall away from the Minister the responsibility for appointing and regulating any alternative decision maker needs to be considered so that the independence and governance of that body can be assured. There would need to be a clear and cogent support framework that would support and administer the structure including having the ability to defend decisions in the Royal Court when an inevitable challenge arises.

7.3.7. If responsibility for appeal decisions is transferred from the Minister, then consideration must be given to who is best placed to take on that responsibility. As has been previously identified weighing up the issues surrounding planning proposals can be a complex matter. For this reason perhaps it should be independent, experienced and professionally qualified planners who take on this task. If this were to be the case would there be sufficient, suitably independent individuals – whether acting alone or as part of a panel – available in Jersey? Alternatively would it be acceptable to appoint people who do not have direct knowledge or experience of planning issues in Jersey and the particular sensitivities that can exist with some proposals? Or does the appointment of individuals who have no links to the planning system in Jersey actually add credibility to the process by demonstrating a truly independent view?

7.4. Involving lay people

7.4.1. Jersey has a long tradition of involving laypeople in the machinery of government. They bring an independent vigour and perspective to situations and are normally viewed as separate from any political influence. They understand the context of Jersey and the priorities and concerns of the population. Support is often provided to them either with their actual considerations or with the administration of their function. In the case of planning appeals would either first or third parties feel satisfied that such people possess the appropriate skills and experience to provide appropriate consideration to the issues involved? Or are there enough lay people available with some experience of the development process, and an understanding of balancing policy considerations with both physical impacts and the concerns of other professions and individuals, which could maintain the credibility of an appeal function? Alternatively could lay people fulfil this role credibly if they were advised or supported by independent planning professionals?

7.4.2. The Complaints Board process has its roots in Law (the Administrative Decisions (Review) (Jersey) Law 1982) and draws on lay people to consider cases. Decisions of the Complaints Boards are not binding on the Minister,

however if their considerations were seen to be by individuals with appropriate skills and experience the Minister, whilst retaining the power to make a decision, would have to be clear why their findings should not be followed.

7.5. Resources

7.5.1. Any potentially new structure raises resource issues. Without knowing what any final structure may look like there is no way of estimating the costs involved. However there is a principle to be considered as to whether the submission of an appeal should attract a fee. Processing the appeal will inevitably incur costs but is it right that these costs are borne by the public purse, or, in the case of applications for planning permission should the payment of a fee for the original application for be taken to cover the cost of the whole process including any appeal? Certainly the current process already has funded resources attached to it and it maybe that these can be reallocated to any changed process but would these be sufficient? Additionally whilst not wishing to unduly restrict the opportunity to appeal would the payment of a fee discourage frivolous appeals by any party?

7.6. Costs

7.6.1. While many comments about the operation of the appeal's process relate to the cost of bringing a case as being a barrier to appealing – including the possibility of costs being awarded against a party by the Court – there remain some circumstances where the issue of costs is relevant. Appeals may be made for insufficiently good reason or parties may behave in ways that cause delay or frustrate the efficient resolution of outstanding matters. For example, repeated appeals on the same proposal by an applicant or a poor decision should not put the other parties to unreasonable or unnecessary costs. The arrangements of other jurisdictions include the ability to award costs against a party if they have acted unreasonably. The award of costs would be an exception and should be framed so as not to prejudice the reasonable right for a case to be heard.

7.7. Requests for Reconsideration

7.7.1. Requests for Reconsideration (RfR) of applications that have been determined by officers under delegated powers is a relatively simple, quick and cheap way to challenge a decision. Usually the proposals that are the subject of RfRs are small in scale. The application is considered in the form it was determined – as no additional information or amendments can be submitted – so the plans and supporting information already exist. The process involves the application being placed on an agenda for the Planning Applications Panel (PAP) where it is considered on its merits by Members of the Panel. Changing the test applied to any appeal for applications that can take advantage of the RfR process would make no difference. However the retention of RfRs as well as the introduction of another process may result in an RfR followed by another appeal through any new process. Might this not just create further bureaucracy or could an appellant opt for a particular method of a merits based appeal? Or would offering various methods of appeal in itself complicate the situation?

7.7.2. Decisions are regularly overturned with PAP reaching a different conclusion to the original decision in around 20% of cases. In Planning terms this represents a healthy figure, not so great as to raise concerns over the quality of original decisions overall but large enough to indicate that sometimes the original decision should have gone the other way on the merits of the case. This process has no clear status in the law and may be vulnerable to challenge but its relative simplicity is attractive. It could be controlled through an Order rather than in the law itself although the law would need to be amended to allow the Order. Any such formalisation could be used to retain a third party right of appeal by clarifying the date from which the period to appeal relates.

7.8. QUESTIONS

Q1. Should Jersey introduce an appeals process based on the merits of each case in relation to decisions taken by or on behalf of the Minister of

Planning and Environment under the Planning and Building (Jersey) Law 2002?

Q2.If the appeal test changes to be based on the consideration of the merits of a case, should third party appeals be included in that change or is the test of unreasonableness more appropriate in light of the issues identified above?

Q3.Should the responsibility and accountability for the determination of planning appeals lie with someone/body other than the Minister for Planning and Environment?

Q4.If the responsibility for deciding merits based appeals were given to an independent body, who would appoint that body and what mechanisms would be put in place to support it in a transparent and independent manner?

Q5.If the responsibility for appeals was transferred to an independent person or body, should it be professionally qualified planners (or equivalent) with demonstrable experience of considering planning issues?

Q6.Should any new appeals process be subject to the payment of a fee to contribute to or cover the costs of the process?

Q7.Would it be appropriate to involve lay people in the appeal process either under suitable guidance from appropriately qualified individual/s or acting on their own?

Q8.Could the Complaints Board process be adapted to specifically address merits based planning issues?

Q9.Should the ability for an appeals body to award costs against a party be included in any process to discourage frivolous appeals or unreasonable behaviour?

Q10.Should the Request for Reconsideration (RfR) process be kept and formalised or should it be replaced by a single system that covers all appeals?

8. Retaining the test of unreasonableness for planning appeals

- 8.1. The Minister carries democratic responsibility for planning decisions. The Minister has been elected to the post and is expected to carry out duties responsibly and reasonably. Failure to do so results in accountability to the electorate and fellow States Members and corrective action by the Royal Court. If anyone other than the Minister exercises relevant powers then there is the danger of democratic deficit within the process
- 8.2. The current test for appeals to the Royal Court was not introduced without forethought. The test of whether the Minister has acted unreasonably puts considerable responsibility on the Minister to justify his/her actions. The Minister is directly accountable to the electorate and to fellow States Members. This has resulted in a large proportion of appeals lodged being resolved before going to court: 53 out of 98 since 2006. The absence of a Commission has not only avoided a further tier of administration outside an existing well functioning judicial system but has also ensured that the responsibility for decisions rests with a democratically accountable Minister.
- 8.3. While it is correct in the context of this Green Paper to raise the question of changing the test applied to appeals, it is just as relevant to ask whether, given the acknowledged constraints of Jersey as a self-contained governing entity, the current process is the most appropriate.
- 8.4. If the current test for appeals is retained is there is a case that improvements could be made to other aspects of the system, such as making the process less formal and intimidating, and reducing the costs of appealing?
- 8.5. There have been admirable efforts by the Royal Court and Judicial Greffier to make the process of appealing as simple as possible by the publication of guides to the process. No cases have ever emerged of anything but full and helpful co-operation of both the Planning Department and the Court in assisting would-be appellants. However for an individual with no experience of the Court setting the process remains daunting, as highlighted by all the reports into the planning process

- 8.6. Appearing in person in the Royal Court can cost more than £500 in Court and associated fees if the Hearing lasts up to half a day. Any extra half day will increase the cost by £300 per half day. If an appeal is considered solely on the evidence in affidavits the cost is £425. These costs do not include the cost of any professional advice that an appellant might take whether legal advice or from another appropriately qualified professional. Anecdotal evidence and conversations with actual and potential appellants indicate that the costs of engaging any professional assistance in preparing a case are significant, and without such help, appellants do not feel able to pursue their appeal. If this is the case, capturing real life examples of these situations would assist in understanding if appellants are being stopped from exercising their right of appeal.
- 8.7. In the previous investigations the reports have all indicated that officers of the Planning Department and the Court are helpful in advising any potential appellants. However the Royal Court Rules, even as modified, dictate the procedures for an appeal. Could these Rules be further modified or simplified for example to provide a more simple procedure for registering an appeal?
- 8.8. Appellants also say that even with the simplified system, the prospect of having to attend the Royal Court is in itself a deterrent. Whilst everyone who is familiar with the surroundings could amend their behaviour to reflect the less formal nature of the proceedings, those who are only experiencing both the Planning system and the Court for the first time may be understandably concerned.

8.9. Appeal on the papers

- 8.9.1. When the law was introduced it was anticipated that an 'appeal on the papers' would be the most common way of a case being determined. This is where a decision is reached without a hearing in the Royal Court but is considered by the Master of the Court. This has not occurred to the expected level and it would be useful to identify why this is the case, so that attempts could be made to encourage more appeals in this way. Is it because there is no opportunity to react to points made by the other side, or perhaps requesting a hearing is a way for appellants to demonstrate how strongly they feel about the matters?

8.10. Formalising Requests for Reconsideration (RfRs)

8.10.1. As discussed in section 7.7 there is an existing process of RfRs.

However this process has no clear status in the law and may be vulnerable to challenge but its popularity and relative simplicity is attractive. It could be controlled through new subsidiary legislation. Any such formalisation could be used to retain a third party right of appeal by clarifying the date from which the period to appeal relates.

8.11. QUESTIONS

Q11. Does the current test of unreasonableness, considered by the Royal Court, represent the most appropriate method of appeal against planning decisions in the context of providing an accountable, efficient and Jersey focussed process?

Q12. Are there features of the existing appeals process that seriously prejudice the pursuit of an appeal? Are there any identifiable barriers to potential appellants in exercising their right to an appeal?

Q13. Could the Royal Court Rules be amended to allow an easier way of registering and progressing an appeal?

Q14. Could more be done to assure potential appellants that any hearing in the Royal Court is unlikely to be as daunting as they might expect?

Q15. Why are more appeals not requested to be considered 'on the papers'?

Q16. Could the Request for Reconsideration (RfR) process be retained and formalised?

9. Other Controls

9.1. Much of the focus of the discussion on appeals has fallen on those relating to the granting or refusal of planning permission. However the route of appeal to the Royal court also applies to a number of other powers which the Minister may exercise. These are:

- The refusal to approve or amend an application for planning permission for development which has already taken place
- The refusal to vary a previously approved application for planning permission
- The refusal to grant a certificate of completion (confirming a development has taken place in accordance with a previously approved planning permission)
- The refusal to grant Building Bye-Laws approval
- The refusal to grant permission to undertake particular activities on/in/under a site of special interest.
- The refusal to grant permission for the importation or use of a caravan in Jersey
- The imposition of a condition on any permission previously granted by the Minister
- The revocation or modification of a planning permission
- The service of Notices requiring actions
- The inclusion of buildings / places / trees on relevant Lists for their protection

9.2. Notwithstanding the number of appeals to the Royal Court in connection with applications for planning permission only 9 have related to the service of an Enforcement Notice (with a total of 105 being issued) and 2 have been received in connection with the Modification or Revocation Notice (with a total of 10 being issued)

9.3. . Many of the above controls are wholly based on merits and do not include the sometimes competing policy and practical issue that inform a decision relating to determination of an application for planning permission.

9.4. For example a tree that has been included on the List of Protected Trees has been done so solely on the basis of the amenity value the tree provides. Such a subjective issue would be very difficult to challenge on the basis of the Minister coming to an unreasonable decision to include the tree on the List. It might be

far more appropriate to include these single issue actions – other than Enforcement Notices – within a merits based appeals process whether the appeals against decisions relating to applications for planning permission remain as they are or whether the test changes to a merits based approach.

9.5. Appeals against Notices – such as an Enforcement Notice – are slightly different within the existing Law as there is an opportunity to appeal on some of the merits of the Notice. Appeals against Enforcement Notices are not an application for planning permission for the breach of control in the Notice but perhaps such appeals could offer an opportunity to consider whether planning permission should be granted?

9.6. There is no opportunity in the current process to bring an appeal by an applicant for planning permission when the application has not been decided. In the other jurisdictions of the British Isles there is the opportunity to appeal against non-determination. There have been examples in the past where this has appeared to frustrate applicants. Would the ability to move to appeal when a decision is not forthcoming be something that would reasonably hold the Minister to account?

9.7. QUESTIONS:

Q17. Should appeals against decisions (other than those relating to applications for planning permission) be considered on a merits basis regardless of whether the test changes to a merits basis for applications for planning permission?

Q18 Should appeals against Enforcement Notices include the ability to have a deemed application considered for unauthorised development?

Q19 Should the ability to appeal against the non-determination of an application be introduced into the appeals process?

10. Other jurisdictions

- 10.1. England and Wales, Scotland, Northern Ireland, Ireland, the Isle of Man and Guernsey all have a merits based appeals process in place regarding all of the powers set out in the respective planning legislation. This includes refusals of planning permission, the non-determination of an application for planning permission, variation of conditions and permissions, enforcement notices, the protection of trees, the listing of buildings (identifying them for special protection due to historical or architectural interest) and all other powers afforded by the legislation governing the land use planning process.
- 10.2. For **England and Wales**, appeals are made to the Secretary of State for the Environment Food and Rural Affairs. The appeals process operates through the Planning Inspectorate. The Inspectorate is an executive agency of the UK government – with budgetary and managerial independence from central government – supported by legislation which allows the agency to determine appeals. There are some circumstances where the Secretary of State becomes directly involved. For instance the Secretary of State may indicate that he/she wishes to determine an application or an appeal (known as a call-in) and explain why they wish to become involved.
- 10.3. A similar structure operates for **Scotland** where appeals are made to Scottish Ministers and administered and considered through the Scottish Executive Inquiry Reporters Unit the equivalent of the Planning Inspectorate in England and Wales. In **Northern Ireland** appeals are made to the Planning Appeals Commission with the ultimate responsibility lying with the First Minister and Assistant First Minister.
- 10.4. In all these jurisdictions appeals are made to the relevant organisation which then administers the process, appoints relevant individuals to consider the appeal in a variety of manners and then issues a binding decision on the matter. A single inspector is appointed to each appeal case. Inspectors have slightly wider powers than planning authorities in that they can issue split decisions where part of a proposal can be allowed and part dismissed. Written decisions are issued that seek to address all the relevant issues so as to thoroughly demonstrate the reasoning behind any decision. The laying out of the issues

builds up a valuable resource of cases that can be referred to in future decisions or indeed development plan revisions.

- 10.5. Consideration of an appeal can be on the basis of written representations, which normally accounts for around 90% of appeals, an informal hearing or a public inquiry which has a quasi judicial procedure.
- 10.6. In the circumstance where the Secretary of State - or Ministers in Scotland or Northern Ireland – becomes directly involved they will receive an inspector's report and act on its findings. In these cases, the respective Minister is not bound by the inspector's findings but must justify any decision in any case and publish the inspectors report alongside any decision.
- 10.7. Decisions made at appeal can be challenged in the courts on a point of law which in some cases include a test of reasonableness.
- 10.8. In England and Wales, Scotland and Northern Ireland, the inspectors appointed to any case will work with some form of mentor. This is someone who will not directly influence the inspector's decision but will check for consistency and thoroughness in applying the material considerations and provide a valuable second look to avoid potentially catastrophic errors.
- 10.9. In **Guernsey** appeals can be made against most planning decision to a Planning Tribunal. The right of appeal against a planning decision or the failure to take such decisions is limited to the applicant. Appeals against the refusal of planning permission or against a condition attached to permission can be made on the merits of the decision. Appeals against other decisions – such as the listing of buildings, Compliance (Enforcement) Notices – can only be considered on the basis of specific grounds set out in legislation. For example an appeal against a Compliance (Enforcement) Notice can be appealed on the basis that a breach of control has not taken place, the Notice was issued too late to have effect, measures required by the Notice are excessive or that the period for compliance was too short. The appeal process consists of a Planning Panel which is independent of any States' Department or body and is supported by its own Secretariat. The Panel is made up of 8 members 3 of whom are described as professional – Chartered Town Planners - with the other half members of the public who have some experience of the planning system. All members are recruited on a fixed term basis. Appeals are either considered by a tribunal of

three Panel members or an individual professional panel member and can be by written representations or at a public hearing. The appellant can choose which format they prefer although all parties should agree to the format. Additional specialist advice can be provided to the tribunal or lone member by an appointed expert. The tribunal's decision will be based on the two ordinary members' decision with the professional member advising them. If there is a split decision the professional Panel member will provide a casting vote.

10.10. The Guernsey planning legislation allows an appeal against the decision of the tribunal on a point of law to the Royal Court. Such an appeal can be by an applicant or the Environment Department. However the law is clear that the appeal can not be on the basis of a procedural matter unless it relates to the inability of an individual to make a case to the tribunal.

10.11. In all of the above processes there is only a right of appeal against a decision by those directly involved with the site. Jersey's planning system allows appeals by third parties against the approval of an application if they live within 50m of an application site and made representations on the application.

10.12. First and third party appeals are allowed in the **Isle of Man** where the Governor in Council has appointed a panel of Planning Inspectors to consider planning appeals on a non-permanent basis and inspectors are invited to consider appeals when they arise. This has resulted in grouping appeals into batches. The inspectors are independent, professionally qualified people, from outside the Isle of Man, who have considerable expertise and experience in planning matters who are recruited to a panel on a fixed term basis. The inspectors are supported by the Planning Appeals Secretariat based outside the department that deals with planning matters. Appeals can be considered by written representation where everyone with an interest in the appeal agrees, or at an informal hearing. Decisions in the first instance are made either by officers under delegated powers or by a panel of laypeople who apply to be part of the planning applications panel. The panel is not made up of elected Members.

10.13. A single inspector is appointed to each appeal. The Inspector then produces a report on the case and presents it to the Minister for Local Government and Environment – who is not involved in the planning process in any other substantive way – and the Minister then makes a decision in light of

the inspector's report. If the Minister's decision varies from the inspector's findings, he/she will explain why this is the case.

- 10.14. In the Isle of Man, third parties who can make an appeal against the granting of a permission are known as Interested Parties and are defined by statute. An Interested Party is generally limited to individuals who are directly affected by a decision but can include the local authority (parish equivalent). There is no test as to the reasonableness of a third party's case prior to the start of an appeal.
- 10.15. The use of inspectors is limited to the consideration of appeals against the refusal / granting of planning permission or conditions attached to a permission. Appeals against enforcement action must be made to the High Bailiff.
- 10.16. In the **Republic of Ireland** appeals in connection with the planning system are administered by an independent body called An Bord Plaenala (the board). The board will consider first and third party appeals where a third party has made a representation in connection with the original application or are a direct neighbour. It is interesting to note that representations on a planning application must be accompanied by a fee of €20. There is no test as to the merits of the third party's case prior to an appeal commencing. An inspector is appointed to consider the appeal either by written representations or by oral hearing in complex cases. The inspector then submits a written report to the board which then convenes with all of the material information along with the report and then makes a decision on the merits of the case. The board's decisions are subject to judicial review but only on a point of law and not on the planning merits of the case. An appeal in Ireland has to be accompanied by a fee. This can vary between €175 up to €3,500.
- 10.17. In terms of resources it is perhaps only useful to look at the processes in Guernsey and the Isle of Man to draw comparisons.
- 10.18. Guernsey has recently published a timely report on their appeals process for 2011. In terms of the costs of the system in 2011, the Panel sat on 55 occasions to consider 53 appeals. This was against the background of the submission of 2079 applications in the same period with 161 being refused and the serving of 172 Compliance (Enforcement) Notices. The total cost of administering the process was £97,610. Appeals are increasing year on year

and in September 2011 a fee equivalent to the original planning fee was introduced to make an appeal.

10.19. As a snapshot in the Isle of Man a total of 191 appeals (first and third party) were considered from April 2011 to March 2012 against a total of 1921 submitted applications for the same period. The total costs for Inspector's was £165,302. There is an additional unquantifiable cost of an executive officer and administrative support which is provided by existing staff in the Chief Secretary's Office. The Isle of Man is currently considering the introduction of a flat rate (£150) fee for appeals

11. APPENDIX I: Committee of inquiry to examine the operation of third party planning appeals in the Royal Court (up to 31st March 2008): Final Report (Extract)

5.4 Full Merits Appeal versus Reasonableness test

5.4.1 The Law currently states that under Article 109 an appeal may only be made to the Royal Court on the grounds that the action taken by or on behalf of the Minister was unreasonable having regard to all the circumstances of the case. The Bailiff confirmed that the Court cannot substitute its own decision –

“The Court must form its own view of the merits but it must reach the conclusion that the Committee’s decision is not only mistaken but also unreasonable before it can intervene.”

(See Token Limited -v- Planning and Environment Committee [2001] JLR 698)

5.4.2 In the judgement Kerley -v- the Minister and Riggall (Appendix 3), the Court stated that –

“There is a margin of appreciation before a decision which the Court thinks to be mistaken becomes so wrong that it is, in the view of the Court, unreasonable (Sunier -v- Planning and Environment Committee [2003] JLR Note 49.”

5.4.3 The Committee questioned witnesses on whether they felt the legal test for an appeal was too narrowly drawn. The Director of Planning said that the fact that the appeal system was not a full merits appeal was a shortcoming of the process and that it “raise[d] the bar” in terms of appeals being successful. The Principal Planner – Appeals pointed out the difficulties of making planning decisions –

“because planning decisions involve the exercise of a discretion and a judgment, it is quite common for 2 entirely different conclusions which can be reached, neither of which might be unreasonable.”

5.4.4 However the Bailiff did not agree that the likelihood of a Third Party Appellant being successful was slim. He felt that when an appeal was brought it required all those involved in the process to reconsider their position and that this could sometimes result in a change of decision even before the case came to Court.

5.5 Protection Against Award of Costs

5.5.1 During the hearings, the Committee considered whether it would be desirable to introduce a system whereby an appellant is partially protected from the full weight of a cost order against them (particularly where cases are heard under the ordinary procedures). The Bailiff was opposed to fettering the Court’s discretion as this “tied the Court’s hands” and prevented it from being able to deal with the case on its merits.

5.6 Legal Representation in Court

5.6.1 The Committee is pleased to note that the Guide to Third Party Planning Appeals produced by the Judicial Greffe now makes it very explicit that all parties to an appeal can appear in person.

5.7 Conclusions

5.7.1 The Royal Court, as the appellate body for Third Party Planning Appeals, can be a daunting prospect for a Third Party Appellant in terms of –

- • fear of costs
- • fear of the court process.

5.7.2 The speech of the Attorney General in 2004, quoted in paragraph 5.3.7, does appear, in hindsight, to be prescient in summing up the current situation in relation to costs.

5.7.3 Although, at first reading, the modified procedure appears to provide protection from costs, this is far from certain. It becomes clear that, if the applicant decides to be represented by a lawyer, the appellant will feel obliged to do likewise and so incur costs. If the case is lost, the applicant could apply for costs and, despite the expressed intention that the process should be as inexpensive as possible, the Court could nevertheless still decide that such costs should be paid. Even if the award of costs is “extremely remote” as testified by the Bailiff, it is still a fear in the mind of the ordinary appellant and is likely to frighten many third party appellants from taking a case.

5.7.4 Whether an appeal is heard under the modified or ordinary procedures has great significance for any appellant in terms of potential costs. The Committee would encourage the Master of the Court and the officers of the Judicial Greffe to always strongly consider the merits of deciding a case under the modified procedure, wherever possible within legal constraints, so that appellants can be given the maximum protection from award of costs.

5.7.5 Planning applications often involve considerable costs to an applicant, particularly in the case of larger developments. Delayed developments also involve cost. There is therefore an incentive for a developer, if he loses an appeal, to take the matter to judicial review or Court of Appeal, where costs can be awarded. An individual is thus always going to be at a disadvantage in such cases. However, the Committee recognises that this can always be the case in any litigation and an appellant has to weigh up the merits of fighting on against the possible costs it might entail.

5.7.6 The third party appellants who gave their testimony found the process of taking their appeals to Court a daunting experience, particularly with regard to negotiating the complexities of the modified and ordinary procedure. The Committee hopes that, with the production of more information and other improvements in website support and coordination between the Planning and Environment Department and the Judicial Greffe, future appellants will be able to navigate the system more readily.

5.7.7 The Committee recognises the value of appeal cases being heard “on the papers” as this reduces the administrative burden on all parties, reduces the fear of going to Court, minimises the costs and assists with a speedy resolution of the appeal to the benefit of all parties.

5.7.8 The Committee concurs with the Bailiff in recognising that it is important not to fetter the discretion of the Court in the awarding of costs as it constrains the Court when considering a case.

5.7.9 It is recognised that, whilst the Royal Court remains the appellate body for Third Party Appeals, the test of reasonableness, as defined in the case law quoted above, is the appropriate basis upon which such administrative appeals should be heard.

5.7.10 The Committee considered, during its deliberations, the position that would have obtained under a Planning Appeals Commission as compared with the current Royal Court system. Although outside its remit, on the evidence it received the Committee feels that a Commission would have been a more equitable and less daunting approach to planning appeals. Cases could be considered on their full merits and not restricted to a judgement on the reasonableness of the original decision

12. APPENDIX II: Committee of Inquiry : Reg's Skips Ltd – Planning Applications – Second Report April 2011 (Extract)

2.5 The report also drew attention to what was stated to be a very unsatisfactory state of affairs in Jersey regarding planning appeals. The 2002 Planning Law had created a mechanism for third party appeals but its provisions creating new machinery for enabling first party appeals on the planning merits of a case had been shelved by Ministers because of their putative cost. To-ing and fro-ing on this in the States had significantly delayed the bringing into force of the whole new Law. The 2008 Committee of Inquiry report is eloquent on the serious weaknesses of both principle and practice that therefore continued to govern citizens' ability to appeal against development control decisions. Appropriate, better and more accessible arrangements for appealing against decisions on their planning merits (rather than its being possible only to challenge their reasonableness' in the Court) may well, we judge, have made a big difference to RSL, and perhaps saved everyone much time, effort and angst on that one difficult case alone. We return to this in the next section of this report, and make a recommendation accordingly.

(v) Appeals

3.20 This is a difficult subject, on which, as noted in the previous section, we are far from being the first to opine in recent years. Our starting point is that we believe that things in RSL's case could have turned out differently, and probably for the better in terms of the regulatory outcome secured by the company, had machinery been in place to allow 'planning merits' appeals against planning decisions to be made in a straightforward, low cost, manner. This led us to thinking that some reflection afresh on the current position might not be without value.

3.21 The current position is as follows. Planning applications rejected by officers of the Department under delegated authority can be heard again by the Planning Applications Panel if the applicant considers that the refusal was unreasonable. This is the 'Request for Reconsideration' procedure. In practice, anyone who seeks reconsideration by this means is given it. Those, however, whose applications are decided directly by either the Planning Applications Panel or the Minister (something, of course, over which applicants do not have control) do not benefit from a 'request for reconsideration' option. They have the option only to appeal to the Royal Court or to request that their 'case' is heard by a Complaints Board under the Administrative Decisions (Review) (Jersey) Law 1982.

3.22 Appeals to the Court on such matters are governed by the Royal Court's Practice Direction RC6/03. This put in place a 'modified' procedure for certain planning appeals and was introduced as a consequence of the decision, already noted, to drop the proposed appeals mechanism – an 'Appeals Commission' – that had originally been included in the new 2002 Planning Law. The Direction enables appeals to be heard primarily by affidavit evidence, enables applicants to be represented other than by an advocate (and indeed sets out the expectation that this should be the norm), and sets out that an award of costs would be made only in exceptional circumstances. These

are not insignificant modifications to the normal rules of the Court, but nonetheless the procedure involved remains a 'legal' one with all the dauntlessness for ordinary citizens implied by that.

3.23 And it is not, and cannot be, for the Court to substitute one 'planning merits' judgement for another; under the Planning and Building Law (Article 109) an appeal to the Royal Court can be made only on the grounds that the action taken by or on behalf of the Minister was unreasonable having regard to all the circumstances of the case. As established in case law, the Court cannot intervene if it believes a planning decision was merely mistaken; the decision has to be unreasonable. In the judgemental and qualitative area that is planning, and where the Law deliberately gives the Minister wide discretion in

his decision-making role that is an extremely high hurdle. We certainly incline to the view that it is probably therefore an unreasonable one from a public policy perspective, although in RSL's own case things went so wrong that, who knows, the Assistant Minister's eventual decision on the 'roofing over' application may well have been susceptible to intervention by the Court had the moment of relevance not in practice passed for other reasons.

3.24 The provisions of the Planning Law enabling 'third party' appeals against decisions by the Minister or Panel to approve planning applications submitted by others require similar tests of 'reasonableness'. It is not within our remit to consider the pros and cons of Jersey's having introduced arrangements for third party appeals, but it is hard not to remark that it is curious, to say the least, that such effort was put by the States into protecting the rights of third parties against decisions taken by the Department or Ministers aimed at others when attention to those of first parties, whose property rights are those in question in any decision-making, seems, relatively, to have been really quite wanting. (This is, moreover, the worse in our view given that since April 2009, applicants whose applications had been considered and turned down by the Panel have lost even the option of being able to request a 'voluntary' reconsideration by the Minister – a change that was reportedly motivated by an internal departmental review that advocated rationalising the process.⁶)

3.25 All the arguments on this are excellently set out in the 2008 Committee of Inquiry's report already referenced and those interested should go back to that. The evidence collected and analysed there is clearly the starting point for any reconsideration of the law or practice in this area anew.

3.26 The procedure regarding a Complaints Board is a little different. Such a Board is empowered to consider whether a planning decision –

- (a) was contrary to law;
- (b) was unjust, oppressive or improperly discriminatory, or was in accordance with a provision of any enactment or practice which is or might be unjust, oppressive or improperly discriminatory;
- (c) was based wholly or partly on a mistake of law or fact;
- (d) could not have been made by a reasonable body of persons after proper consideration of all the facts; or
- (e) was contrary to the generally accepted principles of natural justice.

⁶ See Ministerial Decision MD-PE-2009-0059

These are wide powers of investigation and inquiry. But although there is no reason to doubt that Complaints Board decisions are weighed carefully by Ministers, they are manifestly not bound by those decisions. This is not therefore a route by which the Minister's or the Panel's view on the planning merits of a case, as compared with the process surrounding it, could ordinarily be challenged, although (and it is perhaps quite an important saving) the very fact of an appellant's having invoked such a process could well have its own impact on the Minister's or the Department's practical thinking about the

merits of a case challenged through this particular means. There are examples of this effect from other areas such as the provision of information under the States Code of Practice on that subject, which wisely provides an appeal mechanism through the Complaints Board route.

3.27 The 2005 Shepley Report encouraged a revisiting of the arrangements for planning appeals. Ditto, with RSL's case in mind, it seems to us to be fairly indubitable that the existence of a viable and accessible 'first-party' appeals system with powers in place for the revisiting of the planning merits of a case and the overturning or amending of poorly rationalised planning decisions (including planning conditions affecting the terms of an approval) would act as a constant deterrent against sloppy standards and poor decisions. This is certainly a crucial factor in the UK system, testified by the 2 members of the Committee with experience of English local government; English local authorities have very great incentives, financial and political, to get decisions, and decision-making, 'right' first time.

3.28 POS observed in its more recent report that *'Jersey is now unique in the British Isles in not having an independent planning merits based appeal process.'* Its report discusses several options for change in respect of first party appeals. It recommends the establishment of an independent appeals commission (and the consequent is continuation of the 'request for reconsideration' process which, it rightly observes, though not being without merit falls short of being truly independent. If a 'commission' approach were to be deemed unworkable, POS suggests that it might be better to reinstate ministerial 'request for reconsideration' hearings at which decisions of the Panel could be reviewed from a purely planning perspective. That would still leave a potential problem with decisions decided in the first instance by the Minister herself or himself, but it would certainly narrow down the size of the problem, especially if it is envisioned that in coming years the Minister may (not least through a new code of practice on ministerial involvement in decision-making) be directly involved in fewer cases than in the recent past. We make this point not to detract from the fair point of principle that would or should be given effect by establishing a wholly 'independent' appeals body, but in recognition of the practical and financial constraints that would inevitably surround taking forward such a proposal in a reasonable timescale.

3.29 Whatever, if the idea of an independent appeals body were to be taken forward once more, it would be important in our view that it was given no role at all in determining third party appeals. Those are different beasts, and should continue to be governed by the rules of the Royal Court so that there is a fairly high bar to be crossed by anyone contemplating such action. The intrinsicity of this from our own perspective

apart, that would be in keeping with the significant weight of legal and professional evidence presented in the 2008 Committee of Inquiry's report which was critical in principle of the third-party arrangements that the States had chosen to put in place.

3.30 The conclusion we have reached from reviewing the position on this in line with our own terms of reference is really that 'something must be done'. The present situation is manifestly unsatisfactory. People should be able to challenge, without significant ado, regulatory decisions that affect or curtail their rights to enjoy their property as they would, and possibly too their business interests and even their rights to family life. The Court should, as ever, be a place of last resort in probably only a handful of special or unusual cases where points of law arose.

3.31 What might a realistic appeals system look like? One option might be the model lately introduced in Guernsey, tantamount to utilising a specialist Panel including at least one person not from there. Another is to keep it within the Department but with strong and deliberate steps taken to ensure, and to be seen to ensure, fairness and transparency, and of course accessibility. Crucially, on such a model, no appeal could be considered or decided by any officer, Minister or Assistant Minister who had been involved in the original decision. It needs also to be emphasized that that 'decision' may not only be a decision to have rejected an application. It could equally concern the inteneration of a condition on an approval or (as might have needed to occur in RSL's case) a seemingly improper enforcement notice.

3.32 The machinery for this does not need to be complex; it needs to be reasonable, having regard to the arguably slightly peculiar circumstances of a small place such as Jersey. We were very struck, for example, when investigating what went wrong on RSL's case, that there was one 'independent' area of the Department, the section dealing with cases where an appeal to the Court had been made or proposed, that was very well able to cut through previous poor thinking and practice and get a bad decision – in that instance, the unwarranted issuing of a enforcement notice – readily reversed by the Minister. We suspect there is something good to build on there, especially when account is taken of the not inconsiderable costs already perforce tied up within the Department in handling 'independently' appeals made to the Court. Equally, it is possible to contemplate some improvements to the 'Request for Reconsideration' procedure to make it more robust and credible. Coupled, moreover, with measures such as an effectual widening of permitted development and restraint on the number of cases decided at first instance by the Minister or the Panel, we cannot believe that it would not be possible to go a long way towards achieving sensible and acceptable arrangements for 'planning merits' appeals that would be neither onerous or costly. Citizens, one suspects, would mainly want assurance, as tangible as possible, that although their appeal was being handled administratively that was being done in good faith and according to basic rules of natural justice.

3.33 Our recommendation on this in the next section is not designed to provide a blueprint for what a 'planning merits' appeals system might look like but rather, having

regard to our thoughts above, to enjoin the States to accept that suitable change in this area is now needed and to get thinking going seriously on what exactly it should comprise.

4 RECOMMENDATIONS

4.1 We make the following recommendations to the States pursuant to our third term of reference

A 'Planning Merits' Appeals System

(vi) taking account of comments in this report and in the relevant parts of the other reports referred to in paragraph 2.2 above, and indeed the whole 'history' of the matter over the last number of years, the Minister should publish, within four months from the date of this

report, a public discussion document on introducing a 'first-party' planning appeals system (that is, concerning appeals against any decisions on or relating to planning applications taking account only of 'planning merits'). The discussion document should set out a clear

putative timetable for progress to be made to a satisfactory conclusion. Once public views have been gathered and assessed the States should have an orientation debate on the whole issue and remit the Minister to work with the Environment Scrutiny Panel and all interested parties to prepare specific proposals;

13. APPENDIX III: Planning Officers Society, States of Jersey Final Report. Development Control Process Improvement Programme 2010 (Extract)



States of Jersey

FINAL REPORT

Development Control Process Improvement Programme 2010

POS Enterprises Ltd is the operational arm of the Planning Officers Society.
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Executive summary of findings and recommendations

(Extract)

There is wide support for introducing an Independent appeal mechanism examining planning merits as exists in all other British Isles jurisdictions, alongside the right of appeal on matters of law to the Royal Court. The support appears to extend to a willingness by applicants to pay for the process. Initial concerns about jurisdiction passing off Jersey and cost can be addressed. Either an independent commission staffed by appropriately qualified professionals and Jurats or an environmental court under the aegis of the Royal Court could be introduced.

8. Protocols for advice to and involvement of Ministers and Panel Members in decisions and arrangements for appeals

(Extract)

RFRs process and appeals

8.45 At present there is no Request for Reconsideration referral mechanism against decisions of the PAP or Minister. This looks strange, as uncontroversial application decisions can be referred but not more major ones. With the Minister's recommended reserve decision-maker role would this not at least imply he might be expected to adjudicate on RFRs on PAP decisions? Human Rights property protocols and natural justice considerations suggest that an independent hearing of the planning merits, would add value. If RFR requests can be made about decisions on non controversial applications how could this not be a consideration on the more controversial decisions taken by the PAP? The emphasis on the Minister's high level adjudication role would create the potential to consider requests for his reconsideration of decisions if there remained no independent appeal system.

8.46 This analysis suggests that the Minister might hear referrals on PAP cases (with Ministerial decisions open to appeal in the Royal Court. Alternatively, an independent right of appeal on the planning merits of decisions needs to be introduced for applicants. This logic leads back to the preferable alternative of independent appeals which are able to review the planning merit arguments on any planning application decision.

Appeals

8.47 At present the Minister or Panel hear referrals of delegated decisions where no hearing has taken place. This adjudication role could be passed to the PAP as they have well developed review processes. However they do not comprise an independent review of the planning merits of a case.

8.48 PAP provides a quasi hearing on delegated decisions by RFRs which appears to work well reviewing planning merits of a decision. They appear to be appreciated by first and third parties engaging in the RFR (and thus avoiding the alternative of a Royal Court appeal). The PAP hearing may not be full enough to meet the Human Rights (Jersey) Act and European Convention (HRA) requirement for a fair hearing in the way that an independent appeal process would, but it nevertheless provides a useful informal hearing process. The legal view is that the appeal to the Royal Court meets the HRA

requirement. An independent appeal process could better consider the planning merits of an appeal as the Court is not in a position to consider planning merits; only the reasonableness of the decision. Challenges to the Minister's, or the PAP's, decisions have to be heard by the Royal Court. There is also an opportunity to raise issues of administrative or procedural error with the Complaints Board. However this has no expertise to determine matters of planning merits nor was it set up for this purpose.

- 8.49 The 2005 Shepley report recommendation for an independent appeal commission was not accepted.
- 8.50 Representatives of the judiciary interviewed, felt the existing system was fit for purpose. They explained the reasons why the independent commission had not been introduced in 2006. They explained that the cheaper modified procedure was used in most cases to keep the risk of costs down. The reasons previously given for not introducing independent appeals were the cost, estimated possibly at £600,000, and the desire to retain decision-making in Jersey.
- 8.51 Applicants, agents, amenity groups, members and planning and environment officers interviewed, unanimously supported the introduction of an independent appeal system. Its value was felt to be not just in resolving disputes fairly and effectively related to all types of applications. Its existence would be likely to add to public confidence in the robustness and availability of the system to all. Its existence would pervade the whole system even when not being used. The knowledge that it may be used is taken into account by all parties.
- 8.52 They argued that such a system could provide a check or balance, without the level of costs which had previously been estimated, and which would allow the planning merits of the case to be independently reviewed. This was judged to be particularly important in an Island such as Jersey. Indeed, interviewees proffered the view that the value of an independent appeal process was such that agents and architects thought it might be feasible to charge a fee for the extra service. First and third party appeals to the Royal Court would be unaffected and remain, but would essentially deal with points of law.
- 8.53 The existence of an open, fair and impartial appeal system was judged by the 2005 Shepley report to be essential to the operation of the Jersey planning system. Since then third party appeals have been introduced, which stay permits granted until such appeals are resolved. However, there is no appeal available to applicants on the planning merits of refusals or conditions imposed by the States.
- 8.54 Jersey is now unique in the British Isles in not having an independent planning merits based appeal process. Appeal rates in other jurisdictions would lead to an expectation that between 90 and 100 appeals would be made in Jersey each year. However the number dealt with by the Royal Court is about one tenth of this level. This suggests that a combination of the fear of cost of court action combined with the lack of an independent planning merits examination is suppressing up to 90% of potential appeals.
- 8.55 Guernsey recently established an independent appeal body to hear appeals. They are heard by a panel of independent professionals and jurats to review the planning merits of decisions. This panel is drawn exclusively from within the Channel Islands, and has avoided the level of costs previously of concern.
- 8.56 There is a certain irony in having an advanced third party appeal system compared to the rest of the British Isles (which the Scots and English governments are proposing) without an applicants' appeal system. As outlined above in para 8.52 the opportunity for

minor application delegated refusals to be re-examined by the RFR system, but not the more controversial proposals, also seems strange.

- 8.57 Appeals to the Royal Courts can be made on the alleged unreasonableness of the decision to refuse an application or impose conditions. The Royal Court is not currently constituted as an environmental court, nor has it established such a court or panel. Its test is whether a decision was unreasonable having regard to all the circumstances of the case. This is a different test to the examination of the balance of planning merits involved in an independent appeal hearing.
- 8.58 The Royal Court appeal process is felt by many to be un-affordable, notwithstanding that most cases are heard by the modified procedure, in order to minimise costs. The level of appeals to the Royal Court is about one tenth of the rate of appeal in the UK jurisdictions. An average of 9 appeals per year has been made to the Royal Court each year. Appeal rates in the England and Wales would lead to an expectation of about 90 appeals per year for the level of applications received. Thus it appears that a majority of potential appellants are deterred from exercising their rights of appeal.
- 8.59 To assist confidence in the planning system and ensure normal rights are available to all, it is recommended that an independent appeal system is introduced. Development interests have argued strongly that having no right of appeal against a non determination even after the passage of years is not reasonable. This issue should also be reviewed if a planning merits appeals procedure, which appears to require legislation, was introduced. This procedure could either be established as an independent body as previously recommended or as a panel of the Royal Court utilising appropriate RICS, RTPI or RIBA adjudicators.
- 8.60 If an independent appeal commission is established the PAP RFR process for delegated refusals and certain conditions should be removed from the delegation scheme and other guidelines and advice to avoid duplication and over commitment of limited department resources.
- 8.61 If no independent appeal commission is introduced, then the PAP RFR process should continue for delegated items, and the existing inability to be able to challenge a PAP decision other than in the Royal Court will continue.

RECOMMENDATION

- 8.62 *Promote legislative amendments to introduce appeals into planning merits and failure to determine an application through an independent appeals commission or environmental branch/panel of the Royal Court, and consider appropriate fees to offset the costs.*

14. APPENDIX IV: Royal Court of Jersey RC 06/03 Planning Appeals

1. Rule 15/3A of the Royal Court Rules 2004, as amended, (“the Rules”) has introduced a modified procedure for certain planning appeals. This Practice Direction applies to such planning appeals.

2. Appeals under the modified procedure where there is an oral hearing will be dealt with primarily by means of affidavit evidence. If a party to an appeal wishes to cross-examine a deponent on the contents of his affidavit he must obtain the leave of the judge who is to preside at the appeal. Such an application must be made (with notice being given to the other parties) at a pre-trial directions hearing which must take place at least seven days before the time fixed for the hearing of the appeal. Such leave will only be granted in exceptional circumstances.

3. Where an appeal involving an oral hearing is considered to fall within the modified procedure the amount of time allowed for the hearing before the Royal Court (the date of which will have been fixed under Rule 15/2(3)(b) of the Rules) will normally be no more than one to one and half hours. In such appeals, although either party is entitled to be legally represented or otherwise represented as provided by Rule 15/3B(1) of the Rules, the Royal Court will only make an award of costs in such an appeal in exceptional circumstances (whether or not a party is legally or otherwise represented).

4. The expectation is that, in appeals under the modified procedure, parties will not ordinarily be legally represented. It is the Court’s intention that the proceedings should be conducted with as much informality as is consistent with the proper administration of justice. Members of the Court will not be robed and would not expect any advocate appearing before it to be robed.

5. Parties are reminded of the terms of Practice Direction RC 05/20. This provides that where an action is to last less than a full day parties must be ready to appear at an earlier date than that allocated on receiving seventy-two hours’ notice requiring them to do so.

6. The modified procedure under Rule 15/3C allows for appeals to be dealt with by the Judicial Greffier without the need for an oral hearing. In such cases the Court would not expect to make any award of costs.

7. The Bailiff has directed that the fee payable for which is to be dealt with by the Judicial Greffier (as described in paragraph 6 above) shall be £200 payable on the filing of the Notice of Appeal. The usual fees are payable in relation to appeals to be heard by the Royal Court.

J. G. P. Wheeler

Master of the Royal Court

15. APPENDIX V : Appendices 4 & 5 from the Committee of Inquiry – Third Party Appeals Report March 2008

APPENDIX 4

The Chronology of the Planning and Building (Jersey) Law 2002

December 1996	Draft Law Drafting Brief issued for consultation, detailing proposed changes to Island Planning (Jersey) Law 1964
August 1998	Post-consultation Drafting Brief
November 1998	The P&E Committee decided to broaden the scope of the Law Drafting Brief by combining the Public Health (Control of Buildings) Law 1956 and the Island Planning (Jersey) Law 1964 in a single piece of legislation
November 1999	Draft Law published for consultation
20th July 2000	Act of P&E agreeing to introduce a Planning Commission to consider planning appeals
18th January 2001	Act of P&E noting that appropriate resources and remuneration were of utmost importance prior to the introduction of the Law, including the formation of the Appeals Commission
27th March 2001	P.50/2001: Draft Planning and Building (Jersey) Law 200- lodged <i>au Greffe</i> . Comments: Finance and Economics (3rd April) Amendments: (1st) Deputy J.L. Dorey (10th April) (2nd) P&E (24th April) (3rd) Deputy C.J. Scott Warren (1st May) (to introduce Third Party Appeals) (4th) Deputy P.N. Troy (1st May)
6th June 2001	States debate on Draft Law Amendment 3 “Third Party Appeals” carried
17th April 2002	Third Reading of Law
November 2002	Registration of Law in the Royal Court
November 2002	P.206/2002 Repeal of Third Party Appeals (P&E) (withdrawn under the 12 month rule). Discussions subsequently held with Deputies Scott Warren and Dorey regarding limited Third Party Planning Appeals provision
Approved: 15th December 2004	<u>First Amendment</u> P.210/2004: “Reinstatement” of Royal Court as the appellate body instead of P&B Appeals Commission
Approved: 20th April 2005	<u>Second Amendment</u> P.47/2005: To amend Law from reviewing cases <i>de novo</i> under P&B Appeals Commission to use of ‘reasonableness’ test in Royal Court. Additional amendment to introduce 50m limit for third party qualification
Approved: 19th	<u>Third Amendment</u> P.128/2005: Establishing Planning

July 2005	Applications Panel (consequence of move to Ministerial government)
Approved: 23rd May 2006	Draft Planning and Building (Jersey) Law 2002 (Appointed Day) Act 200-
1st July 2006	1st Appointed Day Brought into force whole Law exception provisions for Third Party Appeals and dangerous structures. N.B. Relevant amendments to Royal Court Rules brought in at same time
Approved: 6th December 2006	Draft Planning and Building (Jersey) Law 2002 (Appointed Day) (No. 2) Act 200- (P.156/2006)
31st March 2007	2nd Appointed Day Brought into force provisions for Third Party Appeals and Dangerous Structures N.B. Relevant amendments to Royal Court Rules brought in at same time
8th May 2007	First Third Party Appeal filed

APPENDIX 5

Planning and Building (Jersey) Law 2002 Chronology – Discursive Account

Preparations for the replacement of the Island Planning (Jersey) Law 1964 began in earnest in 1996, when negotiations to secure law drafting time commenced and the first substantive law drafting brief was published by the Planning and Environment Committee for the purposes of public consultation.

In subsequent years the scope of the new draft Law was broadened to encompass the provisions of the Public Health (Control of Buildings) (Jersey) Law 1956 and draft legislation to control dangerous structures. Further consultation with States members and with the public was agreed in December 1999 and was progressed subsequently. Options for a new planning appeals process was one of the matters considered during this period and the Planning and Environment Committee, in its Draft Planning and Building (Jersey) Law 200-, proposed the setting up of a Planning Appeals Commission to consider such appeals (albeit noting that judicial review of the Commission's ruling would remain an option for any legitimate complainant). It was envisaged that the Commission would include a full time, salaried Commissioner and a panel of 5 Deputy Commissioners, all professionally qualified and conversant with the constraints under which the Committee operated.^{2[1]}

At that time the Committee declined to pursue the implementation of 3rd Party Appeals in view of problems reportedly experienced in other jurisdictions (i.e. delays, vexatious appeals, additional workload and costs). Instead the introduction of open application

^{2[1]} P&E Committee Act No. B7 of 20th July 2000.

meetings was proposed as a way of informing the public of the applications process and promoting openness and transparent decision-making.

Scope to deal with certain appeal cases via written submissions only and/or, in more straightforward cases, by way of hearings conducted by a single Commissioner was identified. The Committee had noted in 2000 that a majority of applications were determined under delegated powers and that such cases demanded a proportionate or 'fair and efficient' appeals system.^{3[2]}

Compliance costs arising from the new draft Law were assessed in the latter part of 2000. In December of that year the Committee was formally advised that 'an increase in funds would be required in order to implement many of the new functions contained in the revised appeal procedure'. There was nevertheless a corresponding expectation of financial savings for the Royal Court as fewer cases might need to be brought before it.^{4[3]} Further advice on the resource implications was sought by the Committee and one month later specific estimated resource implications were provided. This caused the Committee to conclude that 'appropriate resources and remuneration were of utmost importance prior to the introduction of that Law'.^{5[4]}

On 27th March 2001 the draft Law was lodged 'au Greffe' (P.50/2001 refers), with comments from the then Finance and Economics and Human Resources Committees. The former had noted that the annual ongoing cost of £632,000 was –

' a significant sum which ha[d] not been provided for in the 2002 Cash Limits which were agreed by the States in 2000.'

It declined to support the necessary increase in cash limits. Instead it suggested that the Committee should bid for the necessary funding in the context of the agreed cash limit for 2003 and, further, that the draft Law be referred to the then ongoing Committee of Inquiry into Building Costs with a view to identifying possible savings. The response of the latter Committee was also circumspect. It stated –

'If the States agree the proposals, any staffing requirements would only be considered in the light of the States policy on manpower and would not normally be approved unless compensatory savings are made elsewhere.'

Debate on P.50/2001 commenced on 15th May 2001. Several amendments to the draft Law had been lodged. None of these had a particular bearing on the proposed appeals process, with the notable exception of the 3rd Amendment, which had been lodged by Deputy C.J. Scott Warren of St. Saviour. This was subsequently adopted by the States on 6th June 2001.

On 17th April 2002 the States adopted the Planning and Building (Jersey) Law 200- in 3rd reading. It was subsequently registered in the Royal Court 7 months later.

^{3[2]} P&E Committee Act No. B18 of 31st August 2000

^{4[3]} P & E Committee Act No. B4 of 15th December 2000

^{5[4]} P&E Committee Act No. B4 of 18th January 2001

One week after the adoption in 3rd reading, the Committee lodged an amendment to the Law (P.56/2002 refers) to amend the way in which the Planning and Building Appeals Commission would be constituted. In the accompanying report the Committee referred to a need for a 'nucleus of full-time, salaried commissioners, but also the ability to appoint part-time commissioners to hear cases as the need arises'. It was envisaged that remuneration for Commissioners would be a matter for the States, so as to ensure an appropriate degree of independence. With this in mind, and having acknowledged the previous decision of the States to embrace the concept of 3rd party appeals, the Committee set out the financial and manpower implications of its proposals as follows –

*Financial implications for the States/Third Party Appeals
Estimated increased costs of Independent Appeals Commission*

	<i>First party appeals only</i>	<i>With third party appeals</i>
<i>Manpower</i>		
<i>Commissioners</i>	3	5
<i>Temporary Commissioners</i>	2.5	5
<i>Registrar/administration</i>	3	5
<i>Overall costs</i>	<i>£565,000(A)</i>	<i>£880,000(B)</i>

Estimated increased costs to Planning and Environment Committee

	<i>First party appeals only</i>	<i>With third party appeals</i>
<i>Manpower</i>		
<i>Planners(Appeals Section)</i>	2	5
<i>Clerks/secretaries</i>	1	3
<i>Overall costs</i>	<i>£140,000(A)</i>	<i>£364,000(B)</i>

Estimated additional cost of Third Party over First Party appeals = £539,000

In its comment to P.56/2002, the Finance and Economics Committee expressed grave concern that the proposition had been lodged at a time of budgetary deficits and without commensurate provision having been made for the Commission in the 2003 cash limits. It recommended that the States should not approve the amendment until such a time as the States had determined that the Commission represented a sufficient funding priority for funding as part of a future Resource Plan. The Human Resources department also commented, stating that any decision by the States to agree the proposals would be interpreted as support for the creation of 11 full-time equivalent posts.

Projet P.56/2002 was subsequently withdrawn by the Planning and Environment Committee in accordance with the then Standing Order 22(3) and on 5th November 2002, in a pronounced change of tack, the Committee lodged P.206/2002 entitled, 'Planning and Building (Jersey) Law 2002 – removal of 3rd party appeals'. The proposition was deemed withdrawn after 12 months, having never been debated.

On 17th February the Committee resigned in the face of a vote of no confidence concerning a matter not related to the introduction of the new Planning and Building Law. The Committee was reconstituted under the presidency of Senator P.F.C. Ozouf. One of its first acts was to consider the matter of 3rd party appeals. It formed the view that there were sound philosophical reasons for maintaining opposition to Third Party Appeals and noted that additional funding for the establishment and operation of such an appeals system had not been forthcoming through the Fundamental Spending Review process. Therefore, the Sub-Committee concluded that it should look beyond an 'in principle' decision and move to resolve the matter permanently in order that the Law could be brought into force on 1st January 2005. It instructed officers to pursue an amendment to the Law to deliver –

- (a) the formal removal of Third Party Appeals,
- (b) the introduction of a mediation procedure, and
- (c) the retention of the Royal Court as the appellate body.^{6[5]}

In the intervening period the Committee faced the controversy of a major infill application in the parish of Trinity. An independent report into the circumstances of that application made a number of recommendations, one of which was that the new Law should be brought into force as soon as possible. Later that year the Committee resigned and was again reconstituted under the presidency of Senator Ozouf, following which it pressed forward with its proposal to amend the appeals procedure.

On 23rd November 2004 the Committee lodged the Draft Planning and Building (Amendment) (Jersey) Law 200-, which would reinstate the Royal Court as the appellate body and thereby maintain the Royal Court appeals system. The proposition (P.210/2004) was debated on 15th December of that year and was adopted by 32 votes to 6, with no abstentions.

In January 2005, the Environment and Public Services Committee received a report from the Acting Corporate Resources Director regarding the resource allocation process for 2006 to 2008^{7[6]}. The Committee recognised that, because of the service reductions and efficiency savings they needed to make, there would not be the resources to implement all aspects of the proposed Planning and Building Law 2002.

The matter of Third Party Appeals and their likely cost implication became a subject for debate once again when the Committee lodged the Draft Planning and Building (Amendment No. 2) (Jersey) Law 200- 'au Greffe' on 15th March 2005 (P.47/2005 refers). The amendment replaced the Planning and Building Appeals Commission with the Royal Court as the appellate body under Article 114, and was lodged in accordance with a States decision on the matter in December of the previous year. Deputy C.J. Scott Warren lodged a further amendment to P.47/2005 on 5th April 2005. If approved,

^{6[5]} Minute No. B5 of the Environment and Public Services Policy Sub-Committee, dated 25th March 2004.

^{7[6]} E&PS Committee Act No. B4 of 20th January 2005

the Deputy's amendments would limit the right to appeal to those who lived, or had an interest in property that was, within 50 metres of the site where planning permission had been given. The intention was that this would reduce the number of appeals made against the grant of planning permission, and would therefore enable the third party provision to be enacted within the Planning and Building (Jersey) Law 2002.

But it was the cost of running any kind of Third Party Appeal system which remained a cause for concern, and the Finance and Economics Committee presented a comment to that effect on 19th April 2005. It stated –

'The amendment does not detail its financial and manpower consequences, whilst they may be less than the full original Third Party Appeals Process, the costs, whilst unknown at this stage, will still be significant. There is no allocation within cash limits to fund the Third Party Appeals Process, no matter what form it takes.'

The Environment and Public Services Committee did not feel able to support the Deputy's amendment either. Following its meeting on 18th April 2005 (Minute A2 refers), the Committee submitted a comment the following day, saying that, unlike its predecessors, its members supported the principle of Third Party Appeals in some form. However, since the States approval in December 2004 of the amendment to the Law replacing the Planning and Building Appeals Commission with the Royal Court as the appellate body, earlier assessments of financial and manpower implications were no longer relevant or appropriate. The Committee felt that the current implications were unclear, and at such short notice, it had not been possible to quantify what they might be. It recalled that the Committee President had given an undertaking to the States that the Committee would conduct consultation on the principle of a limited form of Third Party Appeal and further research on the costs and manpower implications, and considered that the amendment could not be supported in the absence of such research.

The matter was debated on 20th April 2005, when the Planning and Building (Amendment No. 2) (Jersey) Law 200- was adopted by 33 votes to one, and Deputy Scott Warren's amendment was also adopted by 19 votes to 18. The Planning and Building (Amendment No. 2) (Jersey) Law 2005 was registered in the Royal Court on 19th August 2005. The Third Party Appeals system was not included when the Law came into force the following year.

On 13th April 2006, the Minister for Planning and Environment, Senator F.E. Cohen, lodged 'au Greffe' the Draft Planning and Building (Jersey) Law 2002 (Appointed Day) Act 200-. This was adopted by the States by 37 votes to 13 on 23rd May 2006. The Act brought into force the whole Law, with the exception of Chapter 3 of Part 6, Article 114, and certain provisions of Articles 22, 109 and 117 on 1st July 2006. These provisions, which related to Third Party Appeals and the powers to remedy dangerous structures, were not introduced because the Minister stated that there were insufficient resources available to him and the Royal Court to support them, but that they would be introduced as resources permitted.

It was not until 31st March 2007 that the remainder of the Planning and Building (Jersey) Law 2002 was brought into force. The Draft Planning and Building (Jersey) Law 2002 (Appointed Day) (No. 2) Act 200- (P.156/2006 refers) was lodged au Greffe on 21st November 2006 by the Minister for Planning and Environment and approved by the States on 6th December 2006 by 45 votes to 2, bringing Third Party Appeals into operation on 31st March the following year.

**16. APPENDIX VI : Review Of Planning and Building Functions by
Chris Shepley (November 2005) (Extract)**

STATES OF JERSEY

**REVIEW OF PLANNING AND BUILDING
FUNCTIONS**

November 2005

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4.18 Appeals

This is an important part of my report; I believe that it is in this area that the greatest problems in the Jersey Planning system occur.

There are at present three ways in which a decision can be revisited. At present this normally applies only to first parties. There is a proposal to introduce third party appeals and I deal with this later (p 34).

The three routes are set out in Development Control Practice Note No 3. The first, and most frequently used, is the request for reconsideration (RFR). This is not technically an "appeal". Under the present system cases which have been determined by the Sub Committee may be reconsidered by the full Committee, on request of the applicant, generally because it is argued that there is new information available. This is commonly used – there were 96 cases in 2004 (55% of all the cases refused). Of these 20 were successful. It is understood that in most years the figures would be higher. Under the new system it is assumed that requests for reconsideration will be considered by the Minister sitting with the members of the Sub Committee.

It has been increasingly common for the applicant or his agent to be allowed to address the full Committee in RFR cases but this privilege has not always been available to all the other interested parties.

The second process is for the matter to be reviewed by a Board of Administrative Appeal. Though this is in some ways an attractive route, it is only used by four or five people per year on average. The decision is not binding on the Committee, which on reconsidering the decision can re-affirm its original view. Its value is obviously limited, therefore.

The third is an appeal to the Royal Court. This is a very effective route and will involve a thorough examination of the case. However it is seen as expensive and forbidding, and in practice unattractive to most potential appellants – so much so that only a handful of cases are considered by the Court (7 in 2002 and 2003, only 1 in 2004). Even though the steps set out in Rule 15 of the Royal Court Rules 2004 do not appear unduly onerous, and there have been instances where an individual has pursued a case through the Court without legal representation, the Report to the States (Draft Planning and Building (Amendment) (Jersey) Law P210/2004) lodged on 23rd November 2004 recognised the problems surrounding the Court.

I would add another very important point: that under the existing law the rules do not allow for the involvement of third parties in the way that they should. Under the new law this will change and I believe it is important that this provision is brought into force (I understand it may be delayed) in order to demonstrate the fairness of the process. Where a person has objected to (or commented on) an application, and that view has been supported by the Committee, then that person should have a continued right to express relevant views at the appeal stage. This does of course involve additional administrative work, though in most cases this should not be substantial.

The Planning and Building Law 2002 included provision for an administrative tribunal – a Planning and Building Appeals Commission. (Article 107). This was subsequently ruled out, in the same 2004 report, essentially on grounds of cost and the Royal Court was re-instated as the appellate body.

The existence of an open, fair, impartial and accessible appeal system is in my view essential to the operation of the planning system. Its value is not just in resolving disputes objectively and efficiently, though of course this is crucial. But its existence also pervades the whole of the system – even when it is not used, the knowledge that it may be used is taken into account by the decision maker. Conversely, applicants will not appeal frivolously to a properly independent body, but will do so only if they believe they have a good case. They will know that the body is not subject to influence, and that all parties with an interest will have equal access to it.

I do not regard the RFR process as being a satisfactory system for a variety of reasons. Firstly it is not independent; the same people who made the original decision (augmented in the Ministerial system by one additional person) will be reconsidering the case. Members might be (or at least might be thought by outsiders to be) vulnerable to lobbying and pressure at this point. Secondly it is not transparent. Though this might be expected to improve when Committees are opened up, at present it appears to be the case that applicants can present “new” information to Members, but that other parties may not have the same opportunity. Thirdly, it was suggested to me (from outside the Department) that applicants, knowing that they have this route available to them, will often submit a relatively “thin” application to the sub-Committee, with the intention of going on to the full Committee/Minister with more information if they are unsuccessful; this must certainly be a danger (and one causing much unnecessary work for the Department). Fourthly, in the new system, it will not be a good use of the Minister’s time for him or her to be involved in this quite large commitment to case work; the Minister should be concentrating on policy, and will have wider responsibilities as a Member of the Council of Ministers. Fifthly it appears not to bring a final resolution – in the sense that (as in the Route de Noirmont case) further requests for reconsideration can follow regarding essentially the same application. Sixth, the very high proportion of refusals which go to RFR, and the relatively low proportion of cases which are successful, suggest that the system might be too readily accessible to those whose cases are weak.

The Board of Administrative Appeal ought to be a useful body when it comes to suggestions of administrative or procedural error – rather like the Ombudsman in other jurisdictions. Article 9 of the 1982 Law sets out the limited grounds on which it can consider a case. It is clearly not a suitable body to examine the planning merits of a case, however, having neither the power nor the expertise to determine such matters, and its role in planning is likely to diminish if a more accessible appeal system is brought into operation. One person suggested to me that in purely procedural cases (not just in planning) it ought to be given greater influence – but I do not think that is a matter for this report.

The Royal Court is of course independent, it is transparent, and it is decisive. But it is not seen as being accessible by appellants and does not, in my view, adequately involve third parties.

4.19 The tribunal

As mentioned earlier the proposal for a separate tribunal has been dropped. In my view this is a pity. It might be supposed that, because I ran the Planning Inspectorate in England and Wales, I would be bound to say that. But I note that outside the Channel Islands the whole of the British Isles has some form of tribunal. The Irish, Northern Irish, Scottish, and English/Welsh systems vary considerably in their form and structure but all carry out essentially the same procedures. All are independent, open and impartial. In the Isle of Man, Inspectors from outside the Island are used to determine cases in a similarly impartial way. All of these systems have a high degree of trust. They offer a variety of different ways of resolving disputes, using written or oral routes, and are open for all to use. They place a discipline on Authorities and applicants alike and bring a degree of thoroughness and professionalism to the whole of the process.

It is of course true that the cost of running such a system can be high, though the number of cases in the Jersey context is likely to be quite low; I would expect it to be significantly less than the 96+ which currently go via RFR because people would not use a Tribunal without considering the chances of success much more carefully. For the Solicitor General the cost should not be high because legal representation would not normally be needed.

The Isle of Man system may not be acceptable in Jersey but it is a very effective and inexpensive way of dealing with the problem.

I hope therefore that the notion of a separate tribunal of some kind will not be lost. Of course I respect the reasons why the decision has been made, and I think there are other measures which can be taken to improve the situation. However, I **recommend** that the proposal for a separate tribunal should be revisited in due course.

4.20 The Royal Court

I am aware that discussions have been taking place at a high level with the Royal Court to examine whether, the Tribunal having been dropped for the time being, a more accessible system can be devised within the Court. Reference was made to this in the November 2004 report mentioned earlier. The proposition, which I regard as extremely sensible, is that three routes should be available to an aggrieved party – the decision as to the correct route being taken by the Court Administration. The first, for the simplest cases, would be the use of mediation; the second would be a new route, for cases involving planning merits only, using simpler procedures (written representations and hearings), and the third – for the most complex and difficult cases or those raising points of law - would be the present procedure.

Opinions differ as to the likely effectiveness of mediation. Some fairly limited experiments have been carried out in the UK which suggest that for small householder cases and for issues which involve design or appearance but which do not go to the heart of policy, such a procedure can be very effective. Mediation can be very quick and inexpensive, and can produce an enduring solution – though there is no guarantee that (in its true form, where the mediator assists the parties to reach their own agreement rather than determining a solution for them) it will actually produce a conclusion. But I think it would be valuable to experiment with this method in Jersey, where many of the disputes do concern relatively minor matters.

It is the second route which is innovative and different and which I believe ought to be pursued. It is proposed that there should be a simple process. Many cases would be dealt with by written representations only, with, I would assume, a site visit by the decision maker(s). In England and Wales between 70% and 75% are dealt with in this way, in Ireland a much higher number. As an alternative there would be an informal hearing process. In England such cases are heard by a single Inspector, in a very informal round table session, with no legal representation; again there is always a site visit. Around 20% of cases are dealt with in this way, and it is a popular process which enables parties to meet with the decision maker but without any formality and without significant cost to them. In England, unlike Ireland, parties have a right to choose an oral hearing. The third method in the UK is the public inquiry, which again is normally heard by a single Inspector, but with greater formality and with legal representation, and a site visit.

In all of these cases third parties have a very clear right to involvement.

There is, of course, an opportunity for parties who are aggrieved with this process in England to go to the High Court and beyond to seek judicial review.

There are various questions to be resolved concerning the application of this system in Jersey, but none of them seems insurmountable. In principle, it is important that the process is freely available to all, with no deterrent to potential appellants – though there is a need to discourage frivolous cases. I understand there is likely to be a fee involved, and I would argue that the award of costs should be made possible – either against the States if its decision was found to be wholly unreasonable or against the appellant if the appeal was found to be wholly without foundation. There are questions as to who should hear appeals. Should they have planning expertise? And if so, where is the source of such expertise? How can the decision maker be seen to be demonstrably independent? From what I have learned of the system in Jersey it seems likely that these cases might be heard by a Jurat, assisted as necessary by a Commissioner who would be a person, probably from outside the Island, who has suitable expertise. The Bailiff has the power to appoint such people. It is my firm view, though I know it is disputed, that in these cases where it is the planning merits which are at issue, professional expertise on the part of the decision maker(s) is necessary.

I would anticipate that the third option – a full hearing by the Court with a Judge and two jurors (or expert Commissioners) – would rarely be used in planning cases in practice.

Where it is, I believe that third parties should be able to give evidence, and that a site visit should take place. I am aware that there has been some debate about this but my experience is that it is impossible to reach a sound conclusion on a planning case without familiarity with the site – though safeguards are needed as to the way in which the site visit is carried out.

Of course the existence of an opportunity for judicial review, or reference to the Court of Appeal, of decisions made by either of these routes is an important safeguard.

There is much more to be said on this issue, and I can assist further if necessary. I am sure that the Planning Inspectorate in England and Wales or their equivalents elsewhere would also be willing to help with the detail. At this point however I think that for the States of Jersey the way forward is clear. I recommend that the proposal for an alternative system within the Royal Court for dealing with planning cases should be pursued with urgency.

It would not surprise me at all if this were to evolve into a tribunal system, the (important) role of the Court itself being in judicial review.

I also recommend that the system of requests for reconsideration be terminated, and that this should be done at the same time as the introduction of a simplified system in the Royal Court. I have already indicated my concerns about this process. But in addition, I believe that if an alternative and more thorough system is being established in the Royal Court it is essential to make sure that people use this system – with all its advantages of demonstrable fairness and impartiality, and its deterrence to hopeless cases.

Because there are resource issues here, the phasing out of RFRs will ease pressure on the Department. Although provision will have to be made for the additional cost of running the appeal system, there will be savings which will offset some of those costs. However it would be very difficult for the Department to run both systems at the same time.

I believe the process will bring greater order and discipline to planning, and by giving an opportunity for interested persons to be heard before an independent arbitrator, it may remove some of the less structured interventions in the process and the extended debates which currently take place.

4.21 Third Party Appeals

The new Law contains at Article 114 a provision for third party appeals. To date the Committee has determined that this provision will not be activated, on grounds of cost, but it remains in the legislation.

Elsewhere in the British Isles third party appeals exist in the Republic of Ireland (and I understand that visits have been made to Dublin to examine the system there) and the Isle of Man. Serious consideration has been given recently to introducing them in Scotland and Northern Ireland but the decision has been made not to proceed for the time being. In

the Isle of Man I understand that in total there are around 250 appeals per year of which about a quarter are from third parties.

Third Party Appeals are superficially an attractive proposition. They provide members of the community who object to a proposal with an opportunity to be heard by an independent person. They are, of course, all the more attractive at present in Jersey because those people do not have an opportunity to address, or even attend, the Sub-Committee where the decision is made, but this is shortly to change.

It is sometimes argued that because first parties have a right of appeal against refusal, third parties should have an equal and equivalent right to appeal against an approval which they believe might affect them. In my view this is not so. The existence of planning laws removes, in the interests of the community, a right which had previously existed for property owners to develop their land with little constraint. It does not remove a right from the rest of the community – it confers one upon them. It is the job of the States to protect the reasonable interests of the community, taking fully into account any representations received, and to do this expeditiously. So long as this happens, there should be no need for further debate (unless the States have behaved improperly).

It is my view that by opening up the process in the ways which are intended and which have been discussed in this report, and by demonstrating the transparency and objectivity of the decision making process, the need for third party appeals will be reduced. To put it another way, it is only if the decision making process is, or is thought to be, unsatisfactory that there is a need for third party appeals.

It was clear from what was said to me that part of the impetus for this innovation comes from a distrust of the way in which the larger developers operate in Jersey. I do not say that this is justified. But it arises for example from the perceived practice of seeking outline planning permission for a relatively harmless development and then bringing forward a detailed application for a different and potentially more harmful scheme. I am not in a position to comment on the veracity of this – but I will observe that developers, if they do engage in such practices, do themselves no favours.

The disadvantages of third party appeals are obvious, of course, and will have been clear from the discussions with Dublin. The first is the question of resources and cost; these are likely to be very considerable, even with the limitations which are proposed in Jersey. At a time when the reduction of “red tape” is a priority it would seem inconsistent to introduce a new process of this kind unless there were an overwhelming case for it. The second is the delay which is caused to development whilst time is allowed for an appeal to be made – and then, if it is made, for it to be heard. The third is that it will tend to take virtually all contentious decisions away from States Members to another body.

In the Jersey context I would add that, in view of the discussion earlier, there is an urgent need to attend to the problems surrounding first party appeals before proceeding, if necessary, into a new area.

Should it be decided to introduce such a system there are various ways in which the number of appeals can be influenced. It is already proposed to limit the right of appeal to those who have made representations at the application stage; this limitation was recently introduced in Ireland and has at least put a restraint on the growth in numbers, though it carries the danger that additional representations will be made at the earlier stage in order to gain the right to appeal. It is also now proposed to restrict the right to those with an interest in property within fifty metres of the site boundary. This will clearly limit the numbers very effectively, though it is a somewhat crude criterion; it could cut out those beyond fifty metres who might genuinely be affected by a larger development. The Isle of Man has a rather more vague criterion – people who have a direct interest – which is open to debate and argument and is not recommended.

It is understood that there will be a fee (as in Ireland); Other possible measures are to limit such appeals to cases where the decision is significantly in conflict with the Island Plan (though this is not always easy to define); or to limit them to cases above a certain size.

In my view it is important for Jersey to introduce the other reforms which are either currently in the new Law or which I have recommended in this report. The introduction of these proposals will bring quite sufficient change for the time being! But more importantly they will bring an openness and transparency to the process which is presently lacking. It is important, as I have said, that efforts are made to explain this new set of processes and to enable States Members and the Public to take advantage of the opportunities which they offer for greater involvement and understanding. I **recommend** that third party appeals are not introduced for the time being, and that the position is reviewed when the currently proposed reforms have been in operation for (I would suggest) a period of five years.

THE PLANNING PROCESS (S.R.2/2007): RESPONSE OF THE MINISTER FOR PLANNING AND ENVIRONMENT

It was too early to determine whether the new planning appeals mechanism, coupled with the forthcoming limited third party appeals system, was delivering meaningful benefits.

I agree, and it will take some time yet for the new system to bed down. The introduction of third party appeals in March will have a further impact.

The Shepley report suggested that it could take 5 years for the system to develop to maturity.

17. APPENDIX VII Minister for Planning & Environment: Code of Conduct for the consideration and determination of planning applications and pre-application advice. December 2011

1. Application Determination

- 1.1. The Minister will only become involved in determining applications for planning permission or any other application that requires consent in exceptional circumstances. The exceptions are likely to include:
 - Proposals of Island wide significance
 - Proposals where there is published ministerial guidance or recorded pre application advice for major proposals
- 1.2. In all cases when the Minister does become involved in determining applications for planning permission or any other consent the reasons for the intervention will be publicly recorded, and any proposed call in will be discussed with the officers prior to the Minister using reserve call in powers.
- 1.3. All applications determined by the Minister will be determined by way of a Public Inquiry or Ministerial Hearing. The Minister at a Ministerial Hearing will allow a full explanation of all material considerations to be given by the presenting officer, followed by a full audible debate to assist all those present to see how material considerations are being balanced.
- 1.4. Full reasons for a decision which address all the material issues raised during consideration of the application should normally be given in writing, after the Hearing, as part of the public record of the decision.

2. Pre Application Role

- 2.1. The Minister will only become involved in pre – application discussions in exceptional cases. These will include proposals of Island wide significance and major proposals where there is published Ministerial Guidance unless requested to become involved by officers. All pre applications with Ministerial involvement should, in every case:
 - be with officers present
 - be by appointment to allow time for preparation
 - be with ministerial guidance, officer note of advice and/or conclusions sent to proposer and recorded on file
 - avoid lobbying and explain the Minister will not be able to determine an application on which lobbying has occurred
 - include a statement in the note of the pre application discussion that the Minister has not made or pre-empted any decision on the application
 - include a statement in the hearing report of the Minister's recorded pre-application advice or guidance and that the Minister has not pre-determined him or herself on the application

2.2. If either of the last two bullet points cannot be included then the Minister is conflicted and should not determine the application.

2.3. The Minister should pass requests for advice or representations on other proposals to the case officer without comment

2.4. If the Minister is involved in pre-application discussion and guidance for a proposal of island wide significance the Minister will publish guidance and make it publicly available as soon thereafter as possible, following planning forums or other inclusive public consultation

2.5. If pre application discussions or guidance are offered on lesser applications at the request of officers, the officers will record that advice and ensure it is publicly available when any ensuing application is submitted, and incorporated in the officer report to a Planning Applications Panel or Ministerial Hearing.

3. Potential Interests and Pre application and Application Stages

3.1. If there is a direct or indirect financial interest or a prejudicial interest, or where the Minister has been lobbied, or has been subject to personal approaches or personal interests he or she would not be comfortable disclosing, the Minister should regard him/herself as conflicted on receipt of the application and not determine the application, to ensure public misconceptions of undue influence do not arise.

3.2. If the Minister is conflicted the Planning Applications Panel (PAP) or Assistant Minister, subject to PAP Code of Conduct, will be responsible for determining the decision.