Planning & Building (Jersey) Law 2002 - Appeal under Article 110(1)(a)

REPORT TO MINISTER FOR PLANNING AND ENVIRONMENT

By Graham Self MA MSc FRTPI

Appeal by Mr David Manning against a condition attached to a planning permission

Reference Number: P/2016/0221

Site at: Land east of Mandorey Villa, La Grande Route de St Jean, St John JE3 4FN

Introduction and Procedural Matters

1. This appeal is being decided on the basis of written representations. The appeal is against Condition 2 of a planning permission dated 25 August 2016, which was granted following an application dated 16 February 2016. The development was described in the relevant application as: "Change of use of land to domestic curtilage". The development was described in the planning authority's decision notice as: "Change of use of land from agriculture to domestic curtilage".

2. I carried out a site inspection on 4 October 2016. The exchange of statements and rejoining comments had not been completed by then, so the submission of this report has taken a little longer after the site inspection than normal. I also decided it was necessary to arrange for emails to be sent to both parties to invite written comments and put questions on certain matters. One of the reasons for this was because it seemed to me that the appeal raised legal issues which neither side had realised or considered, so it was in the interests of fairness to draw attention to these issues and offer the opportunity to comment.

3. My report has been delayed so that I could consider the responses, as well as the final comments by both sides made on 25 October 2016. Copies of the relevant emails and responding submissions will be available in the case file for you to see if required.

Site and Surroundings

4. The appeal site is the area edged red on the site plan labelled "Extend Domestic Curtilage" dated July 2016.[1] It is a rectangular-shaped parcel of land located about 60 metres to the east of La Grande Route de St Jean.

5. The site is reached from the nearby road along a private access way. The appellant's house, Mandorey Villa, stands south of this access. To the north is a large warehouse-type building which is evidently also owned by Mr Manning. The western part of this building (roughly two-thirds of it) is apparently let to a tenant and at the time of my inspection was in use for commercial warehousing purposes. The eastern part, which has two storeys internally, was occupied by Mr Manning and appeared to be used for miscellaneous storage and as a workshop.

[1]At the site inspection I checked with the appellant and Department's representative that this was the application plan (as amended). Although it is not labelled "Amended Site Plan", it is evidently the plan referred to as the "Amended Site Plan" in Condition 3 of the permission.

6. Immediately east of the building just mentioned is a concrete-surfaced area. Part of this area appeared to be used as an operating base for a mobile crane or plant hire business, or for storing items in connection with such a business. An Iveco vehicle labelled "KM Lifting" was parked there. An open-fronted building constructed of timber with a corrugated sheet roof stood in the northern part of the concrete-surfaced area. This building appeared to be of recent construction. The easternmost part of it appeared to be within the appeal site.[2] The items inside this building included a Kubota garden tractor or ride-on mower. Nearby on the concreted area was a small timber shed. I also saw an older timber shed and an old lorry body in the area north of the warehouse-type building. Another shed stood in the area east of the house (labelled "garden" on the site plan).

7. Most of the northern part of the appeal site is surfaced with chippings to form a hardstanding. Towards the south, part of the site is an L-shaped area of mown grass.

8. Various items were standing on the northern part of the site (within the red-edged area on the site plan) at the time of my inspection. These included a Land Rover vehicle which appeared to be disused, a steel excavator bucket resting on timber chocks, a four-wheeled vehicle trailer, a boat on a trailer, some bricks on pallets, a wheeled industrial-sized waste container, and a movable cabin. Inside the cabin were various miscellaneous items and a few garden tools such as rakes. Other items I saw within the site included some old, rusty, unserviceable wheelbarrows, timber pallets, a small heap of logs and a small metal skip.

Case for Appellant

9. The basis of Mr Manning's case is that the condition goes against the provisions of the Planning and Building (General Development) (Jersey) Order 2011, as it prevents a garden shed being erected without a planning application being submitted. The planning officer knew that a shed would be required to store garden equipment. A shed was approved by the planning application panel in 2015 but was rejected following a third party appeal. Without a shed some garden equipment would remain outside.

10. In his appeal statement Mr Manning refers to the past history of planning disputes relating to his land from 1973 onwards (as summarised in his seven-page list of dated events, called by Mr Manning "The continuing saga of Field 1007"). Copies of Royal Court judgments and findings of the Jersey Complaints Board are submitted in support of his statement. He contends that he was not informed that the condition was to be added to the 2016 permission - he was told (in August 2016) of the Department's intention to impose conditions but was not made aware that this would prevent a shed being erected. The condition was not a constructive way forward because the planning officer already knew the type of shed which had been previously approved by the planning committee, and without a shed more items would be stored in the open, which could make the area look more untidy; also there was a maximum size permitted for a shed and the permit had a maximum height.

11. The planning authority and advocates in the Royal Court had referred to the bottom of Mr Manning's garden as an unauthorised extension to his garden. This description could have misled the court into thinking that he had committed a breach of planning conditions.

[2] I write "appeared to be" here because I did not make precise measurements since both parties agreed that the site boundary was marked by the line of a drain along approximately the eastern edge of the concreted area. The building extended eastwards across this line by about 0.3-0.4 metre.

12. Mr Manning had sent an email to States Members stating the illegalities made by States committees and the replies he received suggested that the majority of members had no interest in how other departments operated. He had suffered constantly for over forty years from the actions of the planning department, legal or not.

13. In response to my written questions, Mr Manning has stated that some of the items on the site are owned by his son, who does not live at Mandorey Villa, but has been allowed to store items here since 1997 when the store[3] was built for Mr Manning's business.

Case for Planning Authority

14. The planning authority state that the site lies within the Green Zone where policy NE7 of the 2011 Island Plan sets a presumption against development including the extension of domestic curtilages. However, planning permission was granted for the development because of the unique history and circumstances. In particular, the Royal Court had considered in 2011 that the removal of the hardstanding could not reasonably be required and that an application for a change of use might be reasonable, allowing suitable conditions to be imposed.

15. The Complaints Board also considered that non-agricultural use of the hardstanding area was immune from enforcement and that an application should be submitted allowing suitable conditions to be attached to any permission, although the then Minister had not fully accepted the Board's views. The area south of the hardstanding had also been used as an unauthorised extension of domestic curtilage for more than eight years and was therefore immune from enforcement action.

16. In granting permission subject to conditions, the committee took a pragmatic view having regard to the comments by both the Royal Court and the Complaints Board. A previous similar, but not identical, application had been approved but quashed by the Royal Court following a third party appeal, and to take account of the court's most recent observations it was considered necessary for tighter conditions to be imposed if a departure from policy was to be accepted. These conditions included the disputed Condition 2. The conditions were mentioned in the Department's report and discussed at the committee meeting where Mr Manning spoke. Mr Manning was also told of the proposal to add conditions by email on 16 August 2016.

17. The disputed condition is considered to be relevant, reasonable and necessary to retain control over any further development on this land. The condition has been focussed so that it applies just to structures rather than removing all permitted development rights.

My Assessment

18. Before assessing matters directly concerning the disputed condition, I think it is necessary for me to explain three points of planning law. To avoid this part of my report becoming unduly complicated, I explain the main points below briefly and have provided a more detailed analysis of the legal issues, and of the planning status of the current use of the site, in an appendix.

19. First, for legal reasons the term "domestic curtilage" is an unsatisfactory description of a use of land. The word "domestic" refers to the running of a home or to family relations. For the purposes of planning law, "curtilage" refers to a

[3] Mr Manning's reference to "the store" here appears to be a reference to the building north of the site access.

physical concept (rather like "field" or "plot") rather than a use of land. However, by a stretch, as explained more fully in the appendix, I consider that in the context of the present appeal, it is possible to interpret "change of use to domestic curtilage" as referring to the use of land for purposes ancillary to the residential occupation of the house at Mandorey Villa.

20. Second, when a planning permission is granted subject to conditions, the conditions do not have any effect unless and until the permission is implemented. With very limited exceptions, an applicant cannot be forced to implement a planning permission. Putting this another way: where a piece of land is used for use A, and conditional planning permission is granted for development consisting of a change of use to use B, but the land continues to be used for use A, none of the conditions attached to the permission would come into effect.

21. Third (and related to the second point above), almost everyone involved in this case appears to have assumed that the 2016 planning permission was retrospective and that the disputed Condition 2 is in effect. For example, the planning authority's statement says that the applicant is seeking to "regularise the use" of the site. But it is apparent to me, from my inspection and from the information supplied in answer to my written questions, that such assumptions are wrong. The appeal site is not, and was not at the time of the application in February 2016, in use for "domestic curtilage" or use for purposes defined by any reasonable stretch or interpretation of that expression, such as "residential" or "ancillary residential". The site is evidently in mixed use which includes a significant non-residential component, and this appears to have been so for some time. In these circumstances, for the reasons explained in my preceding paragraph, the disputed condition is not currently in force.

22. I now consider the condition itself, on the basis that it could come into effect if the 2016 permission were to be implemented. Under Article 110 of the 2002 Law the ground on which a person aggrieved by a planning condition may appeal is that "the condition does not fairly and reasonably relate to the proposed development". There can be no doubt that Condition 2 of the 2016 planning permission relates to the permission; so the key issue is whether the condition would be fair and reasonable if the permission were to be implemented.

23. All planning applications should be decided having regard to policies set out in the Island Plan (in this instance, the 2011 plan as revised in 2014). The appeal site is within the Green Zone designated in the Island Plan, and a key part of the plan is policy NE7. This provides that the Green Zone "will be given a high level of protection from development and there will be a general presumption against all forms of development". The change of use of land to extend a domestic curtilage is specifically mentioned as one of the forms of development covered by this general presumption.

24. The underlying aim of policy NE7 is to protect the countryside from development. A "general presumption" against is not a complete ban; nevertheless it implies that only in exceptional circumstances would it be appropriate to allow most forms of development. The policy mentions types of development which may be permitted as exceptions. One of these, under the heading "Residential", is the development of an ancillary building and/or structure where it would meet specified criteria. In order to meet the criteria, such a building would have to: (a) be modest and proportionate to other buildings on the site; (b) be well sited and designed relative to other buildings, context, size, material, colour and form; and (c) not seriously harm landscape character.

25. Mr Manning evidently wants to build a shed, using permitted development rights, and his primary objection to the disputed condition is that it would take away such rights. This is a weak argument, because if permitted development rights were to exist,[4] the design of the building, including aspects such as its size, shape, colour and finishing materials would not be within the control of the planning authority (other than the limits applicable under the Planning and Building [General Development] [Jersey] Order). Nor would the authority have any control over the more basic question of whether a shed should be erected at all, which may be a relevant consideration where there is a general presumption against development.

26. In his comments responding to my email Mr Manning has asserted that: "With the permitted development rights withdrawn, I am being forbidden to do the development needed for the storage that is required". This assertion misses the point that the removal of permitted development rights does not prevent the appellant or any future owner applying for planning permission. Mr Manning would only be, as he puts it, "forbidden to do the development" if an application for planning permission were refused. That in turn would depend on the case put forward for permission. From what I saw, Mr Manning appears to have ample provision for storage in a number of buildings, but if he considers that he needs more storage space it would be for him to make out a case as part of a planning application.

27. One of Mr Manning's contentions is that if he cannot build a shed, open storage would take place, which would be visually more intrusive than a building. This may or may not be a potential argument in support of an application for planning permission for a building, depending on factors such as the size and design of any building; but it is an unconvincing argument in favour of discharging Condition 2, since the restrictions which would apply under permitted development rights would not provide the same degree of control as would exist in response to a normal planning application.

28. The fact that the appeal site is not readily visible from public viewpoints has little weight, since if screening from public view were regarded as justifying built development in the Green Zone, such development could soon be scattered across the parts of the zone away from public view, irrespective of whether the tests set out in policy NE7 are met. There also appears to be a potential public right of way (which was pointed out to me during my inspection) along the north boundary of the site, although this appears to be unused at present and not accessible from the road.

29. The appeal site and adjacent land owned by the appellant has clearly been the subject of extensive dispute for many years. Mr Manning has made various accusations of unfair treatment and malfeasance, in effect alleging corruption because a neighbouring landowner has been treated favourably. I have noted these aspects of his case, but they do not outweigh the basic planning issues on which my assessment is based. The Department of Environment has evidently made mistakes in past dealings with Mr Manning and has been criticised by the Royal Court. That is not a planning reason for allowing the present appeal.

30. I am aware that urban development has taken place in the past on land neighbouring the appeal site. Most or all of this appears to have happened under old planning policies but whether the development should have been allowed is not for me to say, especially as I do not have powers equivalent to an

[4] Here I set aside the issue that such rights would only exist if the provisions of Class A of Part 1 of Schedule 1 of the Planning and Building (General Development) (Jersey) Order 2011 were to apply.

ombudsman to investigate past administrative processes. The existence of built development near the appeal site does not remove the requirement to protect what remains of the area's rural character - indeed if anything it increases the importance of this requirement.

31. I do not propose to comment in any detail on Mr Manning's complaint about the Department's description of the use of the southern garden area as "unauthorised". Mr Manning may not have understood that a development might be properly described as unauthorised even if has become immune from enforcement action because of the passage of time. Be that as it may, this is a side issue which does not affect the assessment of the present appeal.

32. In summary, bearing in mind the policy background I judge that the disputed condition was imposed for sound reasons, and that it fairly and reasonably relates to the permission. I do not see any justification for discharging it. I therefore conclude that the appeal should be dismissed.

Other Detailed Matters and Minor Amendments

33. On three matters of detail, if you decide to dismiss the appeal I am recommending that the Condition 2 be varied to rectify the ungrammatical use of a singular verb with a plural subject ("no works….is permitted"). I am also recommending that the opening words of Condition 1 be amended so that they refer to the use of the land, not an area, for the reasons explained in the last sentence of paragraph 3 of the appendix to this report, and that the words "from agriculture" are omitted from the description of the proposed development, for the reasons explained in paragraph 9 of the appendix. These are minor amendments which do not affect the sense of Conditions 1 and 2 or the permission, and can be made without any injustice to either side.

Additional Comments

34. I recognise that the term "domestic curtilage" has been commonly used by people dealing with planning matters in Jersey, and that it is found in Island Plan policy. However, as I have explained elsewhere, in my judgment it is a legally unsatisfactory way of specifying a *change of use of land* for the purposes of a planning application or permission. The same would apply to "office curtilage", "industrial curtilage" or "shop curtilage". (Similar considerations can arise with some other expressions such as "farm field", "house plot", "orchard" or "paddock" - these are descriptions of physical features or concepts, and are not proper descriptions of uses of land under planning law.[5])

35. I have considered recommending that you use your powers under Article 116 of the 2002 Law either to dismiss the appeal on the grounds that the original application (specifying "change of use of land to domestic curtilage") was not validly capable of being determined, or to alter the permission so as to describe the development being permitted as: "Change of use to use for residential purposes ancillary to the residential occupation of the dwelling at Mandorey Villa". One of the purposes of my email to the appeal parties was to make them aware of these possibilities and invite comments, so that no injustice or reason for complaint would arise if the appeal were to result in such an outcome.

[5] A "farm field" might under planning law be in use for various different uses such as agriculture, a caravan site or leisure camping, depending on the actual use of the land and the definition of the planning unit. An orchard, for example, might for planning purposes be in residential use, agricultural use, or possibly use as a leisure plot depending on various facts relating to location, layout or degree of separation from a dwelling, and the nature of the actual usage.

36. On balance, I have decided not to recommend the first of these steps; but this is an aspect which you may wish to consider, and I also mention it here, together with the appendix, for consideration by your department when dealing with future planning applications. I think the second step can be adequately achieved by amending the first sentence of Condition 1, leaving the wording of the permission the same as the application.

Recommendations

37. I recommend that the appeal be dismissed.

38. I also recommend that the following detailed amendments be made (under Article 116(2)(d) of the 2002 Law):

(i) the wording of planning permission reference P/2016/0221 be varied by omitting the words "from agriculture".

(ii) the first sentence in Condition 1 of the permission (starting with the words: "The area of domestic curtilage hereby approved…") be replaced by: "The permission for a change of use hereby granted shall only be interpreted as allowing use for purposes ancillary to the residential occupation of the dwelling at Mandorey Villa".

(iii) Condition 2 of the permission be varied by deleting the word "is" and substituting "are".

Alternative Actions

39. Having regard to my comments in paragraph 34-36 above and in the appendix, you may decide to dismiss the appeal on the ground that the original application was not validly capable of being determined. If you do so decide, the decision to grant planning permission should be reversed, the application should be refused, and there would be no need or reason to make any of the amendments just described as they would be superfluous.

40. As a further alternative, if you decide to vary the permission so as to grant permission for the development as described between quotation marks in paragraph 35, amendment (i) would be superfluous as it would be covered by the changed development description.

G F Self

Inspector

27 October 2016

Note: The appendix follows starting on the next page.

Appendix: Legal Issues Relating to Use of Appeal Site

1. This is not the place for a complete exposition of planning law having relevance to the present appeal, but I set out the following summary analysis.

2. Some words or expressions have specific meanings for the purposes of planning law, although they are not defined in primary legislation; instead their definitions are derived from court judgments ("case law"). Two such terms are "curtilage" and "planning unit" - which, in relation to any particular site, sometimes coincide but frequently do not. The definition of "curtilage" is derived from court judgments over many years, and in the absence of any relevant Jersey judgments[6], UK case law applies, going back to the standard leading judgment in *Sinclair-Lockhart's Trustees v Central Land Board [1950].* Later cases include *Dyer v Dorset CC* [1988] and *McAlpine v SSE* [1995]. An office building or factory or any other sort of building can have a curtilage, and in some situations a building may be within the curtilage of another building, even if the buildings are used for different purposes. Based on the judgments I have quoted, the curtilage of a building is defined as an area immediately around a building, normally enclosed together with the building, and serving the purpose of the building in some necessary or useful way.

3. The adjective "domestic" means "of the home or family".[7] A "family curtilage" has no useful meaning, but for planning purposes the description "domestic curtilage" implies a curtilage attached to a house or other dwelling in residential use. The opening words of Condition 1 of the 2016 permission refer to "the area of domestic curtilage hereby approved", but this is erroneous since what was being approved was not an *area*; it was, or should have been, *a change* of *use*.

4. The fact that Island Plan policy refers to "the change of use of land to extend a domestic curtilage" does not help to clarify matters, for the following reason. Where a house stands in fairly large grounds, some of the grounds (those parts not *immediately around the building*) may well be outside the curtilage of the house, even though the area outside the curtilage will typically be in residential use (or "domestic", or "ancillary residential" use, which amounts to the same thing). It would seem that what the Island Plan may really be seeking to control is the extension of residential *uses* into the countryside, and such use can be extended without extending a residential *curtilage*.[8]

5. Because a curtilage or domestic curtilage denotes an area of land rather than defining a change of use of land for the purposes of planning law, one of the possibilities I mentioned in my message to the appeal parties inviting comments was that under Article 116(2)(d) of the Planning and Building (Jersey) Law 2002, the decision to grant conditional planning permission could be reversed, and permission could be refused on the grounds that the application was not capable of proper determination. I illustrated this point with a copy of an appeal decision dealing with a refusal of an application for a certificate of lawfulness for the "use of land as residential curtilage" - the result

[6] The absence of any such judgments is confirmed in the Department's response to my email. (See also footnote 10.)

[7] I have checked the meaning with a number of sources including a modern on-line dictionary which gives the meaning as: "relating to the running of a home or family relations". I am excluding the alternative meaning: "existing or occurring inside a particular country, not foreign or international".

[8] It is of course important to note that in this type of situation, "Class A" permitted development rights do not extend to all of the land in residential use within the grounds of the house, only to the land in residential use which is within the curtilage of the house.

of the appeal was that no decision could be made since the original application using that description was found to be not valid.[9]

6. In their responding comments, the Department of Environment stated that in Jersey the term "residential curtilage" has been commonly used to describe the entire legitimate garden of a residential dwelling. If that is so, it leaves open numerous questions about what a "legitimate garden" might sometimes be. Many cases will be straightforward; but not all curtilages are laid out as gardens, and not all gardens are within curtilages.[10]

7. That said, looking at the 2016 permission as a whole (including the later text of Condition 1 which refers to use "for purposes ancillary to the occupation of the existing residential property, Mandorey Villa"), I think the permission can reasonably be translated or interpreted as granting permission for the change of use of the site to use for purposes ancillary to the residential use of the dwelling at Mandorey Villa.

8. In his comments of 14 October 2016, where he draws attention to Condition 1, Mr Manning appears to agree with this interpretation. The planning authority also appears to agree, albeit with some reluctance, with this way of interpreting the permission.

9. The previous (or "from" use as specified in the permission) was evidently not agriculture. At least, there is no evidence that the appeal site has been used for agriculture (as opposed to a probable mixed use including a significant component of non-agricultural storage, possibly combined with ancillary residential use) for many years. It seems that the planning authority may have inserted "from agriculture" as a reference to what was regarded as the *authorised* use, not the *actual* use - if so, that was an incorrect procedure, since it is the actual or existing previous use which determines the nature of a material change of use amounting to development, not an authorised but non-existent use. The application described the proposed development only as: "Change of use to domestic curtilage", with no mention of any previous use or of agriculture; and there is no evidence that the applicant agreed in writing to the description of the development being changed before the application was decided.

10. Taking the above points into account, I consider that although the description of the development permitted in 2016 is flawed, it is - albeit only just, and taking into account the agreement of both appeal parties *in this particular case* - capable of reasonable interpretation, in the terms I have explained. Whether the appeal site would or would not be physically part of the actual curtilage of the house at any one time for the purpose of rights under Class A of Part 1 of Schedule 1 of the Planning and Building (General Development) (Jersey) Order 2011 would depend on various factors which could change, such as means of enclosure, occupation, and the nature of activities being carried on.

[9] Appeal reference APP/P2365/X/14/2216414. A copy should be on the case file or could be made available to you by other means if required, as both appeal parties have had opportunity to comment on it.

[10] The Department also suggested that the Royal Court was "comfortable" with the expression domestic or residential curtilage when making judgments relating to this appeal site. However, it appears from the judgments that the court was never asked to consider how "domestic curtilage" or "residential curtilage" should be interpreted and did not inspect the appeal site, so this issue never arose before the court. Nor apparently has any Jersey court made any judgments on this point contrary to UK court findings relating to similar legislation. That is why the case law definition from UK court judgments applies.

11. Turning to the current use of the site and the related status of Condition 2, evidence relating to this comes from what I saw during my inspection and the answers by Mr Manning to my questions.

12. Mr Manning has not properly answered my questions - I asked for separate information about ownership and length of time on the land for *each of the items* I saw on the site, but he has only given a partial, generalised answer referring to "some of the items". Nevertheless his evidence confirms that some of the items are owned by his son, who does not live at Mandorey Villa. It appears from what I saw that Mr Manning's son runs a mobile crane or lifting or plant hire business. It would certainly seem very doubtful that objects such as a large excavator bucket, a commercial-sized vehicle trailer, bricks and pallets would be on the land *to serve the purpose of the dwelling in some necessary or useful way* (my italics here are to indicate the relevance of these words in defining a domestic or residential curtilage). The use of the site for purposes other than "ancillary residential" or "domestic curtilage" is more than minimal - indeed I suspect that it may be the majority component.

13. Thus the site is not used for domestic or residential curtilage purposes, or for any reasonable translation of that term such as purposes ancillary to the residential use of Mandorey Villa. A significant component of the use appears to be use for storing plant hire equipment. A mixed, semi-industrial or semi-commercial use partly carried on by an occupier not resident at the house is not a "domestic curtilage" use by any stretch of that term.

14. It follows from the above that the conditional permission granted in 2016 has not been implemented. Therefore none of the conditions attached to the permission are operative.

15. For present purposes I do not propose to go into detail about the definition of the "planning unit" as it applies to Mr Manning's land, other than to note that the planning unit appears to be the house and the attached land in the same ownership. There is no evidence that planning permission has been granted for the mixed use (residential non-residential components) of either the appeal site itself, or of a planning unit including the appeal site.

16. Although commercial storage appears to have been going on at the site for some years, it has evidently not gained immunity from enforcement because it has been subject to enforcement action, and as far as I can tell an enforcement notice directed at unauthorised storage activity is extant, although there has not been any recent prosecution. (Mr Manning's evidence records an earlier prosecution for failure to comply with an enforcement notice relating to the sale of cars, but it is not clear from the evidence whether this activity extended to the appeal site.)