

STATES OF JERSEY
PLANNING AND BUILDING (JERSEY) LAW 2002 (as amended)
APPEAL OF A DECISION UNDER ARTICLE 108
REPORT TO THE MINISTER FOR PLANNING AND ENVIRONMENT
by Mr Philip Staddon BSc, Dip, MBA, MRTPI
an Inspector appointed under Article 107

Appellant: Mr. C.J. Blackstone (Third Party Appellant)

Site address: Camellia Cottage, Le Mont de Gouray, St Martin, JE3 6ET

Appeal against: Decision of the Department of the Environment to Grant Planning Permission to "*Construct 3 No. 2 bed dwellings with basement parking.*"

Decision date: 23 February 2017

Reference: P/2016/0960

Appeal procedure: Hearing – 3 May 2017

Site visit: 3 May 2017

Date: 31 May 2017

Introduction

1. This report contains my assessment of the appeal made by Mr C. J. Blackstone against the decision of the Department of the Environment to grant planning permission for a three dwelling development on the site situated on the north side of Le Mont de Gouray in St Martin. The site is close to the Appellant's home.

The site and its surroundings

2. The Appeal site is located in St Martin on the north side of Le Mont Gabard (B28) opposite its junction with Le Mont de Gouray. This is about 400 metres west of the harbour (about 500 metres walked distance). Gouray Church is a short distance to the west of the site.
3. The front south-eastern part of the site was formerly occupied by a dwellinghouse, *Camellia Cottage*, the frontage of which was close to the street. The house has been demolished and cleared from the site. The remainder of the site is a disused former quarry with steep sloping faces rising up on to its north (rear) boundary and to its two sides (east and west). Various slope stabilisation works have been undertaken in recent times.
4. To the west of the site, and set on higher ground, is a large apartment building known as *La Colline Court*, which I was told was constructed in the 1980s. To the east of the front part of the site is a row of two storey cottages, which are Listed and directly front the street. To the east of the rear part of the site, and set at an elevated level, is a substantial modern dwelling house. To the south (across the road) are dwellings set directly abutting the street; the two houses immediately south of the site are Listed and one of these is the Appellant's home.

Planning history

5. There is an extant permission (P/2010/1809) for the erection of three dwellings on this site. The history of that application that led to the ultimate granting of planning permission is long and complicated. It is of significant relevance to the matters raised in this appeal and I therefore summarise the chronology and key points below.

3 December 2010 – Planning application P/2010/1809 is registered. It proposes the demolition of *Camellia Cottage* and the erection of 3 no. modern design dwellings. The accommodation would be provided over four levels with the lowest forming 'basement' parking and the upper levels the living accommodation. The three levels of living accommodation would be tiered backwards, thereby creating south facing balcony / terrace areas on the respective floors. The south elevations include substantial glazing giving views to the sea.

6 October 2011 – The Planning Applications Panel approves the application P/2010/1809. The Planning Permission is issued.

25 October 2011 - Mr Blackstone (the current Appellant) lodges an appeal through the Royal Court, challenging the legality and reasonableness of the decision to grant permission for the scheme.

8 March 2012 - The Master of the Royal Court, Judge Wheeler, issues his judgement. The appeal was allowed, as Judge Wheeler identified specific Planning matters 'that required very careful consideration' which he considered had not been given. These matters included Policy GD 2 (a subsequently deleted policy concerning building demolitions); Policy BE 3 relating to the Green Backdrop Zone and Policy GD 5 relating to skyline, views and vistas. Whilst quashing the decision to grant planning permission, the Judgement remitted the application to the Minister to consider afresh.

August – November 2012 - The Minister considered the application at a public meeting on 3 August 2012. He deferred consideration to allow for a site visit, which took place on 19 September 2012. He subsequently undertook two further site visits (19 October 2012 and 14 November 2012) to view scaffolding profiles that had been erected to illustrate the outline of the proposed development.

21 January 2013 - The Minister held a further public meeting and granted planning permission with conditions for application P/2010/1809. The officer report informing that consideration included detailed responses to the key findings of the Royal Court judgement. The Planning Permission was issued

Soon after 21 January 2013 - Following the then Minister's decision to grant permission for the scheme, Mr Blackstone filed a further appeal at the Royal Court. However, the Court ruled that a 'full session' hearing would be required. Due to the risk of extensive legal fees, Mr Blackstone decided to withdraw this legal challenge through the Court.

2014 - Conditions 1 and 3 attached to the permission were discharged. This included a revised treatment of the former quarry face (netting in place of 'shotcrete') which was approved by officers as a minor amendment.

2015 - Although the precise date of demolition of Camellia Cottage is unclear, it is believed to have occurred 'about 2 years ago'. Slope stabilisation works have also been implemented following the house demolition.

6. It is a matter of fact that the planning permission granted under P/2010/1809 is extant and that its part implementation, notably the demolition of Camellia Cottage, renders it 'live' in perpetuity. The relevance of this to the current appeal is discussed later.

The application proposal under reference P/2016/0960 and its consideration

7. The current application, which is the subject of this third party appeal, seeks planning permission for a development described in the Department's Decision Notice as "*Construct 3 No. 2 bed dwellings with basement parking.*"

8. There can be little dispute that the current proposal is a revised version of the earlier scheme. The key difference is the repositioning of two of the dwellings which increases the distances to the site boundaries on either side. The gap on the east side to the Listed cottage would increase from 900 mm (under the P/2010/1809 permission) to 2250 mm. The gap on the west side would be increased to 4500 mm. Together these changes mean that the width of the built development reduces from the previously approved 33.4 metres to 27.3 metres i.e. the span of the buildings is about 6 metres less. These changes reduce the need to excavate areas of the site and lessen the need for retaining walls. It also increases the areas available for landscaping.
9. Other changes include a re-planned basement parking area, retention of a greater length of the frontage granite wall, revised internal layouts and other minor design refinements.
10. The Planning Committee first considered the application at its 26 January 2017 meeting, but deferred consideration to allow for a site inspection. At its next meeting, on 23 February 2017, the Committee decided to grant Planning permission subject to conditions recommended by officers. It is clear from the Committee minutes that the Appellant addressed both meetings and that the Committee was aware of other representations and views, including those of the Heritage Environment Team, which opposed the development.
11. The current appeal is made against this decision.

The Appellant's grounds of appeal

12. The Appellant's grounds of appeal stated in the initial appeal form can be summarised:

Ground 1 – the development is in breach of the following Island Plan policies:

- Policy BE 3 (Green Backdrop Zone)
- Policy HE 1 (Protecting Listed Buildings and Places)
- Policy SP 4 (Protecting the Natural and Historic Environment)
- Policy SP 7 (Better by Design)
- Policy GD 5 (Skyline, views and vistas)

Ground 2 – the Heritage Environment Team's objection has been ignored

Ground 3 – a decision to approve a similar application (P/2010/1809) was quashed by the Royal court and, again, objections and representations have not been given due consideration

13. These grounds were supported by detailed submissions and expanded to include references to Policies GD 1 (General Development Considerations) and GD 7 (Design Quality). The Appellant's submissions included objections

from The National Trust for Jersey and a copy the Heritage Environment Team's consultation response, along with photographic evidence and a copy of the Royal Court judgement (in respect of P/2010/1809).

14. The Appellant considers that the earlier scheme should not have been granted permission and that it is irrelevant to the current appeal. He considers that all policies must be applied and that there is no room for subjective judgements. He believes that, due to the various breaches of Island Plan policies, the scheme should be rejected.

The Department's response

15. The Department contends that the Committee decision was sound and properly arrived at. It states that the site lies within the defined Built-up Area where Policy H 6 presumes in favour of residential development and that appropriate schemes are not precluded by the Green Backdrop Zone Policy BE 3. It draws attention to the fact that a very similar scheme was approved in January 2013 and that this has been part implemented and could be completed at any time in the future.
16. The Department does not agree that objections have been ignored or that the approval amounts to a contravention of the law. It considers that this is simply a matter of different views and conclusions being reached.

The views of the Applicant

17. The Applicant supports the views and consideration of the Department. It draws attention to the improvements and refinements included in the current scheme, including its narrower width and greater separation from its neighbours.
18. The Applicant provides rebuttals to each of the Appellant's grounds of appeal. On the first ground, it considers that a robust policy justification has been undertaken. On the second ground, it disagrees that the Heritage Environment Team response was 'ignored' and considers that it was just the case that the Committee reached a different view. With regard to the third ground, the Applicant draws attention to the earlier scheme (P/2010/1809) and the extant nature of that permission which remains a 'default position'.

Main Issues and Inspector's assessment

Relevance of the earlier permission granted under P/2010/1809

19. It is important to begin this assessment by establishing the relevance of the earlier permission and the weight that should be attached to it as a potential 'fall back'. This is important because it has consequential implications for the manner in which the decision maker can reasonably approach the assessment of the more detailed grounds of appeal.
20. At the Hearing, the Appellant made plain his view that the earlier scheme was illegally granted and therefore irrelevant to the assessment and consideration of the new proposal, which is the subject of this appeal. The Department and the Applicant disagreed and regard the earlier position as relevant and having weight.

21. There actually appears to be no dispute between the parties that P/2010/1809 is an extant permission that has been rendered 'live' in perpetuity by the undertaking of substantive works on site.
22. The parties were unable to suggest any Jersey case law covering the issue of 'fall back' schemes in Planning decision making. It is therefore appropriate to refer to UK case law, where the issue has been tested and has a certain maturity.
23. The main case quoted in this field is *R v Secretary of State for the Environment ex parte Ahern (London) Ltd [1998]*. This established that in most cases, a "fall-back" would be a material consideration in the determination of a planning application, but there has to be a real prospect of that fall back occurring. If that is the case, the decision maker should then compare that fall back to the proposal for which planning permission is sought.

24. In the Judge's¹ words:

"If a fall-back or alternative use is to be undertaken it will, in most cases, be a material consideration to which regard must be had. ...

The requirement to have regard to the consideration imports a requirement on the decision-maker to have before it sufficient material so that the consideration can be assessed. In the context of fall-back cases this all reduces to the need to ask and answer the question: is the proposed development in its implications for impact on the environment, or other relevant planning factors, likely to have implications worse than, or broadly similar to, any use to which the site would or might be put if the proposed development were refused? By "might" I do not mean a mere theoretical possibility which could hardly feature in the balance ... For a fall-back suggestion to be relevant there must be a finding of an actually intended use as opposed to a mere legal or theoretical entitlement".

25. Although this 1998 case related to a use, the judgement is equally applicable to built development proposals. Indeed, it is widely quoted and generally regarded as good law.
26. Applying its principles in this current appeal, there can be no doubt that the scheme consented under P/2010/1809 is a genuine fall back position. There is nothing that would prevent or frustrate its implementation that would relegate it to a 'theoretical entitlement'. The Applicant made quite plain that, whilst the current scheme is its preferred one, it can and would implement the fall back scheme if that became necessary.
27. Whilst I do appreciate that the Appellant considers that the P/2010/1809 permission should not have been granted in January 2013, it is a matter of legal fact that it was. It is also a fact that the permission has been rendered extant in perpetuity. It is also quite apparent that the Applicant can and would implement the permission if it considered that there was no alternative.

¹ Mr Lockhart-Mummery QC (sitting as a Deputy Judge of the High Court)

28. Accordingly, I do not agree with the Appellant's assertion that the fall back scheme is irrelevant. It is a highly relevant material consideration and a decision maker simply cannot ignore it. Indeed, the test drawn from the above case law, of making the comparison between fall back and proposed schemes, must be applied. This has a consequential impact on the assessment of the more detailed grounds of appeal that I explore below.

General broad Planning principle

29. The Island Plan has primacy in decision making on planning applications. There is a general legal presumption that development in accordance with the plan will be permitted and development that is inconsistent with the Plan will normally be refused.
30. The Plan's overarching spatial strategy is set out in Policy SP 1. It seeks to concentrate new development within the Island's 'Built-up Area', which is clearly defined on the Plan's proposals map. Policy H 6 makes a positive presumption for new housing development within the Built-up Area.
31. As the appeal site lies within the defined Built-up Area, the principle of a residential development in this location is broadly supported by these high level policies.

Green Backdrop Zone

32. Whilst the appeal site is located within the defined Built-up Area, it is also within the defined Green Backdrop Zone. Policy BE 3 recognises the landscape importance of the backdrops to the main built areas, including Gorey. The policy only permits development where landscape remains the dominant element, existing trees and features are retained and satisfactory new planting proposals are introduced.
33. There can be scope for some misunderstanding about the interplay between the Plan's spatial strategy (of concentrating development in the Built-up Area) and the additional restrictions imposed by Policy BE 3 in the Green Backdrop zone. There is no inherent conflict: the effect is that development is not prevented *per se* and remains acceptable in principle, but the Plan's objective of maximising development (in the Built-up Area) is tempered and mediated by the overriding landscape considerations in these defined areas.
34. The Appellant considers that "*the development would be hugely prominent and obtrusive and obscures a major part of the landscape*". On my site inspection, I viewed the site from many different vantage points which included near and far views (from the end of the pier and the beach). The buildings will certainly be visible in near views from the south, but here they will be contextualised in a streetscape of building of various ages, designs, heights and sizes.
35. The dwellings will also be visible in more distant views but, in my judgment, they will not be unduly prominent or jarring. Indeed, they will be seen in the context of the surrounding built form, which includes substantial buildings set on higher ground to the east and west. The buildings will not be seen to break the skyline and the slopes behind, topped with trees (beyond the

site), will prevail. In my judgement, the balance struck by the scheme accords with the objectives of Policy BE 3.

36. Furthermore, the fall back scheme was bulkier and would have presented more building mass. In particular, the more slender Unit 3 now proposed retains more view of the 'backdrop'. Given the weight that must be attached to this permission, it would be illogical to reject a superior scheme in this particular policy respect.

Heritage Considerations

37. Policy HE 1 sets a presumption in favour of preserving and enhancing the special interest of Listed buildings and places and their settings. It states that proposals that do not 'preserve or enhance' the special or particular interest of a Listed building or place and their settings will not be approved. This policy is supplemented by the provisions of Policy GD 1 (3) and Policy SP 4, which similarly seek to protect historic environment.
38. There are a number of Listed Buildings in the vicinity of the site. The closest are the three late nineteenth century cottages (Grade 4 Listed) to the east, the immediately adjacent being *La Maisonette*. To the south is a stone guide post (Grade 3), a nineteenth century cottage *Beau Site* (Grade 4) and a late eighteenth century house *Le Vallet* (Grade 3).
39. The Appellant argues that the development neither preserves or enhances the settings of these Listed Buildings and that it will harm them. The Department and the Applicant disagree.
40. A heritage statement was submitted by the Applicant in the course of the application and this included references to various later alterations to the buildings. The Applicant argued that the heritage value of the buildings had been diminished, and further questioned whether some of them would pass the Listing threshold today.
41. Whilst I note the Applicant's views, the fact is that the buildings are Listed and the development does sit within their immediate settings. As a result, the proposal must be subjected to the Policy HE 1 'preserve or enhance' test.
42. It is unfortunate that the Officer report provided no assessment under Policy HE 1 nor did it provide any specific response to the objection and views expressed by the Historic Environment Team. However, officers did explain to me that heritage was duly considered and, in particular, time was taken to review and assess the Applicant's Heritage Statement which informed the decision making process. I am also mindful that the Royal Court judgement found no failings in respect of heritage policy considerations; I understand that the heritage policy regime and Listing situation was much the same at that point in time.
43. It is generally accepted that, for new building proposals, the 'preserve' test is often unattainable. New buildings, particularly those of a modern design, inevitably deliver a degree of change and cannot therefore 'preserve' a setting. Rather, the focus is on whether the development would 'enhance' the settings of the neighbouring Listed Buildings. However, this assessment

cannot be undertaken without reference to the fall-back position, and the fact that this already permitted scheme has been part implemented.

44. As things stand today, the current part implementation of the fall back scheme, notably through the demolition of *Camellia Cottage*, does not enhance the setting of the Listed Buildings. Indeed, the result is that the site is a harsh open bowl in the vicinity of heritage assets. Reintroducing appropriate built form would certainly be an enhancement of the current settings. The design and nature of what might be 'appropriate' built form inevitably divides opinion and I discuss that more fully under the *Design* sub-heading below.
45. In this particular case, the 'enhance' judgement has to be a relative one, benchmarked against the permitted fall back scheme. This is a straightforward exercise, as there can be no dispute that the current scheme is superior. In particular, it gives greater breathing space to the closest Listed Building, retains more granite wall and reduces the overall bulk of the south facing elements. Applying the principles of the *Ahern* case, it would be perverse for a decision maker to reject this scheme on heritage grounds, when it represents an enhancement over the fall back scheme.

Design

46. Strategic Policy SP 7 requires that all development must be of a high design quality that maintains and enhances the area. This is reinforced in Policy GD 7 which deals in more detail with design quality issues. The quality design theme is also covered under Policy GD 1 (6).
47. The Appellant considers the design to be completely out of character and 'like chalk and cheese' when judged in its context. The Department consider the scheme to be a successful contemporary design, a view understandably supported by the Applicant.
48. I do share the views expressed by officers that the character and appearance of buildings in Gorey is mixed and indeed 'eclectic'. That reflects its long history and its continuing evolution, which is today mediated by the Planning system. There are a number of examples of buildings of modern architecture, some sitting in close proximity to older more traditional styles.
49. The design context of the appeal site is unusual, given its legacy as a quarry site, which creates a large 'bowl' to the north of the otherwise built-up street. Whilst there are traditional domestic scale buildings in the vicinity, there are also some very large more recent buildings set on much higher adjoining sites, employing more recent architectural styles. In principle, I see no fundamental objection to a contemporary design approach on the appeal site, given its mixed and varied context.
50. In terms of the merits of the precise design proposed, again, I must revert to making the relative judgement against the fall back scheme. The current scheme retains the design philosophy of the earlier scheme but refines and improves it. It is simpler, less bulky and will sit more comfortably in its setting than the already permitted scheme. As such, I do not see how a design based objection to the current scheme could be reasonably sustained.

Skyline, views and vistas

51. Policy GD 5 seeks to protect 'skyline, views and vistas' and states that development that has a 'seriously detrimental impact' will not be permitted. The policy includes specific reference to impacts on landmark and Listed buildings.
52. There is clearly a degree of overlap here with the assessment against other policies set out above. Given my findings in respect of the Green Backdrop Zone and Heritage and Design considerations, it follows that I do not consider that there would be any 'seriously detrimental impact' on the skyline, views or vistas.

Conclusions and recommendation

53. My conclusions are the assessment of the proposal cannot be extricated from the site's planning history. As a direct consequence of the previous application, many of the key areas of policy consideration have been rigorously tested and have, without doubt, benefitted from the scrutiny of the Royal Court.
54. Whilst I respect the difference of views about the policy merits of the decision following the Royal Court judgment (ultimately made in January 2013), there can be no doubt that the Department and the then Minister, addressed each and every point of failings identified. The fact that the Appellant disagreed with those assessments and the decision they led to, does not render the permission 'illegal' nor does it erode its significant material weight in the consideration of the current scheme.
55. The extant permission (P/2010/1809), which can realistically be implemented as a fall back, is therefore a significant material consideration. This means that the current proposal simply cannot be considered 'afresh' as the Appellant wishes. It requires some relative judgements to be made, comparing what already has permission and could (and would) be built, with the current scheme.
56. Put simply, the current scheme is superior in Planning and environmental terms to the fall back scheme. It is simpler, less bulky, more elegant and refined, and involves more spatial separation from its immediate neighbours, one of which is a Listed building. Indeed, at the Hearing, the Appellant appeared to acknowledge that the revisions embodied in the current scheme represent improvements (albeit caveated by his view that the earlier scheme was illegally granted).
57. In this context, I have reviewed the proposal against each of the policies cited by the Appellant and carefully considered his detailed grounds and supporting documentation. However, I find no undue tension with the Island Plan policies, either individually or with the Plan as a whole.
58. However, in the spirit of encouraging best practice, I do make the closing observation that the Officer report lacked a full analysis of heritage matters. Where proposed developments are immediately adjacent to heritage assets, it would be wise to include a section dealing specifically with the 'preserve or enhance' test.

59. Accordingly, for the reasons set out above I recommend that the appeal be DISMISSED and that the decision to grant Planning permission under reference P/2016/0960 be confirmed, subject to the Planning conditions set out in the Department's decision notice.

P. Staddon

Mr Philip Staddon BSc, Dip, MBA, MRTPI