



Planning and Building (Jersey) Law 2002

Article 115(5)

Report to the Minister for the Environment

By

Jonathan G King BA(Hons) DipTP MRTPI

an Inspector appointed by the Judicial Greffe.

Appeal

by

Mr & Mrs A Hobson

Beauport Place, Le Chemin de Beau Port, St Brelade,

Application by Mr B and Mrs J Fairman

Hearing held on 8th June 2017 at the Employment Tribunal Offices, Bath Street, St Helier

Department of the Environment Reference: P/2016/1410

Beauport Place, Le Chemin de Beau Port, St Brelade

- The appeal is made under Article 108 of the Law against a decision to grant outline planning permission under Article 19.
- The appeal is made by Mr & Mrs A Hobson.
- The application Ref PP/2016/1410, is dated 8th September 2016. Planning permission was granted by notice dated 13th March 2017, subject to conditions.
- The development is described as: construct basement garage to north elevation and plant room to south elevation; replace pergola and remove wall to east elevation; relocate wall to east at Beauport Place, Le Chemin de Beau Port, St Brelade.

Summary of Recommendations

1. I **recommend** that the appeal should be dismissed and that permission should be granted subject to the conditions included in the Annex to this report.

Introduction

2. This is an appeal by a third party against the grant of planning permission. The appellants, Mr and Mrs Dobson, live at La Cotte View House, a neighbouring property to the site of the development.

The scope of the report

3. Planning permission was granted, subject conditions on 13th March 2017. Under Article 117(1) & (2) of the Law, the decision remains in effect, but the development may not take place until determination of the appeal.
4. Article 116 of the Law requires the Minister to determine the appeal and in so doing give effect to the recommendation of this report, unless he is satisfied that there are reasons not to do so. The Minister may: (a) allow the appeal in full or in part; (b) refer the appeal back to the Inspector for further consideration of such issues as the Minister may specify; (c) dismiss the appeal; and (d) reverse or vary any part of the decision-maker's decision. If the Minister does not give effect to the recommendation(s) of this report, notice of the decision shall include full reasons.
5. The purpose of this report is to provide the Minister with sufficient information to enable him to determine the appeal. It focuses principally on the matters raised in the appellants' grounds of appeal. However, other matters are also addressed where these are material to the determination, including in relation to the imposition of conditions, and in order to provide wider context.

Description of proposals

6. *Beauport Place* is a large 2-storey dwelling with additional accommodation in the roof and a semi-basement incorporating a swimming pool. It is situated on a sloping site and in an elevated position, taking access from a private road *Le Chemin de Beau Port*. The proposal comprises a number of elements: (a) a new double garage at basement level as an extension to the northern elevation of the property (the side towards the neighbouring property *La Cotte View House*); (b) the provision of a plant room to the southern elevation to accommodate an air source heat pump which would be relocated from its present position under a pergola at the front; (c) a replacement pergola; and (d) a number of other consequential works including providing access from the existing driveway. This is the latest of a number of planning proposals to modify *Beauport Place*, several of which affect the parking arrangements.

Planning and legal background

7. The planning and legal background to the present appeal is long and complex, but is critical to the understanding of the present situation. The more important decisions affecting *Beauport Place* are as follows.
8. The sites of *Beauport Place* and its neighbour *La Cotte View House* were formerly occupied by the Les Creux hotel. Permission for the 2 houses, in replacement for the hotel, was granted in June 2006 [P/2006/0580]. Amongst the considerations that led to permission being granted were the "substantial environmental gains and a significant contribution to the character of the area". The overall floorspace reduction compared to the original hotel was estimated at some 30%.
9. Permission was granted in July 2007 for a number of alterations to the basement (also called the lower ground floor) of *Beauport Place* to create a wine cellar and an enlarged garage which, together with other internal alterations, took the reduction from the hotel floorspace to 24% [RP/2007/0576]. Although the alterations did not increase the apparent size of the building, at a public meeting the then Minister stated that "*the increased floor space which would result ... represented the absolute maximum that the site could be expected to accommodate*". On that basis, the applicant was invited to note that "*further incremental applications requesting an increase in floor space were highly unlikely to be considered favourably*". This is the Ministerial statement that is the subject of the first main issue.
10. Permission was refused in 2011 for a garage and alterations, principally for reasons of visual impact (P/2011/0222). Later that year, permission was granted for the conversion of the existing garage on the lower ground floor to a swimming pool (P/2011/0972).
11. In 2012, permission was granted (P/2011/1423) for a garage but this was later cancelled following a successful third party appeal by the

current appellant to the Royal Court (the first RC judgment). The main reasons were a failure to consider: (a) the planning history; (b) Policy NE 6 appropriately; and (c) all material considerations

12. In 2013, permission (P/2012/1423) was again granted for a garage. This too was cancelled consequent upon another third party appeal to the Royal Court by the present appellant, for the reasons of inconsistency and breach of Policy NE 6 ([2014]JRC028) (the second RC judgement). An appeal to the Court of Appeal was made by the Minister of Planning and Environment and the applicants, but this was dismissed for the reason that insufficient justification had been shown to depart from policy (the CoA judgment).

The grounds of appeal

13. The appeal form lists 3 grounds of appeal, as follows. The proposal:

- *is inconsistent with the Ministerial statement of 2007;*
- *is contrary to Policy NE 6 relating to the Coastal National Park; and*
- *does not safeguard against damage to La Cotte View House or the private road during the construction contract.*

Main Issues

14. From my assessment of the papers submitted by the appellants, the Department and the applicant, and from what was given in evidence during the Hearing and seen and noted during the site visit, I consider that the main issues are:

- (a) *the materiality and weight to be attached to the Minister's statement of 2007;*
- (b) *whether the proposed development is consistent with Policy NE 6 of the Island Plan;*
- (c) *the effect of the proposed development on the character, appearance and purposes of the Coastal National Park; and*
- (d) *the effect of the proposed development on the living conditions of neighbouring occupiers.*

Reasons

Issue (a) The Ministerial statement

15. The appellants' position is that the Ministerial statement should continue to carry very significant weight. In other words, that further incremental applications requesting an increase in floor space at Beauport Place (of which the present proposal is the latest) should not

be considered favourably; and that to allow such increase would be inconsistent.

16. First, in my view, I am in no doubt that the statement is material to this appeal. It was a public statement by the Minister responsible for planning; it related to the appeal property and specifically addressed the question of the acceptability of additional increases in floorspace, a matter which is the subject of a criterion in a relevant policy [Policy NE 6, 1(c)]. The matter of floorspace had previously formed part of the reasoning supporting the replacement of the Le Creux Hotel by the appeal property; and Policy NE 6, 1(c) requires regard to be had to the planning history of the dwelling when considering the increase in its size.

17. As to the matter of consistency, the second RC judgment (para 72) says:

"... it does seem to us to be right to acknowledge, when reviewing a complaint about inconsistency, that purchasers of property are entitled to expect at least for a reasonable period assertions which have been made by a Planning Minister in relation to the property which they are purchasing or the neighbouring properties will not be departed from unless there is good reason to do so. This point has not been fully argued in this case, but these considerations emphasise the extent to which the appellants are entitled to rely on grounds of inconsistency in advancing the present appeal".

18. In reviewing the inconsistency point, the CoA judgment (paras 106-112) amongst other things states:

"The Minister was entitled to reach a decision that was inconsistent with previous decisions, but if there is a departure from a previous decision, he ought to have regard to that decision and to give reasons for departing from it". (para 106)

"... unless (which is not the case here) there is a clear promise sufficient to found a legitimate expectation in law, the previous statements of a Minister are merely a part of the background – a matter to have regard to, if brought to the attention of the later decision maker". (para 107)

"... the Minister ... would have acted unlawfully if the application had been rejected solely on the basis that a Minister, some years ago, had said that applications for increase in floor space were 'highly unlikely' to be granted. In any event, Policy NE 6 expressly recognises that even in the context of the strong wording of the constraints to development, 'extensions to existing residential buildings' demonstrated not to cause serious harm to the landscape character of the area (and satisfying other requirements), may be permitted". (para 108)

"It seems clear to us that the Fairmans (the applicants) were not

prevented by precedent from presenting their application for consideration ... and the Panel was not prevented by the planning history from giving full consideration to that application on the merits". (para 110).

"The inconsistency argument in the end collapses into a contention that there was no good reason for the Minister's decision to permit the development. If there had been sufficient justification as required by Article 19(3), (a provision allowing a decision to be taken which is inconsistent with the Island Plan) the planning history would not have prevented the grant of permission". (para 111)

"If we had decided that the Minister's decision did have sufficient justification for his decision, as required by Article 19(3) of the 2002 Law, we would not have dismissed the appeal on the basis of inconsistency of decision making ...". (para 112)

19. The CoA judgment is unambiguous in its findings. The decision-maker is not bound to follow the approach suggested by the Ministerial statement but should nonetheless have regard to it and to give reasons for departing from it.
20. In this case the appellants put forward no reasoned argument for taking a different view, save that they disagree with the CoA judgment, preferring the line taken by the lower court. That argument is contrary to the established way of approaching case law and I accord it little weight.
21. The appellants also say that they relied on the Minister's statement when purchasing La Cotte View House and on the observations of the Royal Court (Second RC judgment), as set out above (my para 18). However, the Ministerial statement was made 10 years ago and, in the meantime, the Island Plan in force at the time has been superseded and the relevant policy changed. Having regard to the CoA judgment, which says that no clear promise sufficient to found a legitimate expectation in law had been made, I consider it unreasonable to expect that policy will not change over time or that decisions will remain consistent with statements made some time ago in different circumstances.
22. In conclusion, while the Ministerial statement is a material consideration, it is not one to which substantial weight should be accorded.

Issue (b) Consistency with Policy NE 6 and (c) the effect on the National Park

23. The principal Island Plan policy at the heart of this appeal is NE 6, the primary purposes of which are the conservation and enhancement of the natural beauty, wildlife and cultural heritage of the Coastal National Park; and the promotion of opportunities for the understanding and enjoyment of its special qualities by the public. It

says that the National Park will be given the highest level of protection from development, which will normally be given priority over all other planning considerations. However, as an exception (exception 1), an extension to a dwelling may be permissible, but only where (a) it remains subservient to the existing building in terms of design and scale; (b) it is designed appropriately relative to the existing buildings and its context; (c) having regard to its planning history, it does not disproportionately increase the size of the dwelling in terms of any of its gross floorspace, building footprint or visual impact; (d) it does not facilitate significant increased occupancy; and (e) it does not harm landscape character.

24. I am satisfied that the present case relates to extensions to the dwelling. In this it may be distinguished from the previous proposal that was considered in the second RC and CoA judgments. It is common ground between the parties that the proposed development should be assessed under exception 1, focusing on criteria (c) and (e). No objection is raised by the appellants to the proposed realigned pergola and wall, which the Department regards as "Minor Development" (ie small in scale and incidental to the primary use of land and buildings), permissible under Part 9 of Policy NE 6.
25. Criterion (c) of exception 1 refers to 3 ways in which the increase in the size of the dwelling should be judged. First, the net additional *floorspace* has been agreed in the Statement of Common Ground as 104 square metres (sqm). This compares to the original floor area of the house of 646.7sqm or 744.3sqm including the additions under permission RP/2007/0576. The increase in floorspace would be 13.97% over the present situation or 31.17% when compared to the original.
26. Second, at the Hearing it was agreed that the building *footprint* should include the upper ground floor together with the part of the semi-basement extending beyond under the terrace. The size of the increase was agreed as 37%.
27. Third, so far as *visual impact* is concerned, the applicants have commissioned a Landscape & Visual Impact Appraisal (LVIA) which concludes that all (proposed) changes are site specific and confined to the well-defined domestic curtilage of the site. It says that from publically available locations the impact of the proposed changes upon the landscape and visual character of the area are very limited and judged to be of either minor significance or no significance because of the arrangement of topography and existing landscape features. The Appraisal judges that the development proposed will not have any impact upon the protected structures and places identified as having important landscape character located within the surrounding area. The appellants have not taken issue with any of these findings. Indeed, neither their statement nor their response to the applicants' statement addresses the subject.
28. I agree with the conclusions of the LVIA. The proposed development

would be largely concealed by being set into the land at the same level as the semi-basement swimming pool, beneath an existing hard surfaced area. It would have negligible visual impact from close views, for example from the road, or from La Cotte View House. It is agreed by the appellants that it would be subservient in form to the existing house.

29. Extending my consideration to include the related criterion (e), concerning harm to landscape character, Beauport Place falls within the *South-west Headlands* landscape character area. This is described in the Island Plan as an area of spectacular coastal scenery and sense of wilderness, geological and geomorphological sites, common land, modern fortifications and high recreational value. The coastline to the front of the houses and the wooded slopes behind exemplify some of these characteristics. However, it must be acknowledged that the character of the immediate locality is also heavily influenced by the run of houses along Le Chemin de Beau Port, including the appeal property and La Cotte View House. As the LVIA says, the proposed development would be wholly contained within this residential area. Moreover, as already concluded, its visual effect would be negligible. I viewed the site from the other side of the bay at the invitation of the parties. At that distance, I would judge that the development would be all but imperceptible to the naked eye. I conclude that the proposal would not harm the character of the landscape and so the requirement of criterion (e) of exception 1 would be met.
30. The relevant supporting text to Policy NE 6 is helpful as to the approach to be adopted when considering domestic extensions in the National Park (paras 2.61-2.65). First, it says that it would be unreasonable to resist all forms of development to improve people's homes. It adds that the acceptability of an extension will be determined by its scale, design and impact on landscape character; and that each case should be assessed on its merits and, in particular, regard had to the sensitivity of the site, relative to the capacity of the landscape character area to accept change.
31. Criterion (c) says that an extension may be permissible only where it does not disproportionately increase the size of the dwelling in terms of any (my emphasis) of the 3 variables, meaning that a finding of disproportionality against any one of them could mean failing the test. But it was agreed at the Hearing that there are no absolute or relative standards against which to measure whether an increase should be regarded as "disproportionate". It is not a mechanistic process, but a matter of judgment. So, for example, a particular percentage increase in floorspace might be considered disproportionate at one dwelling but not at another, depending on the particular circumstances in each case.
32. There is no doubt that, taking the proposed and past extensions together, the size of the dwelling would be increased substantially both in terms of footprint and floorspace. I also take the view that the wider landscape character area has little capacity to accept change.

But I do not regard these findings as being conclusive as to the question of proportionality. This is because the largely concealed nature of the proposed development and its immediate domestic setting – which I do not consider to be particularly sensitive - would mean that its effect on the character of the landscape and on the National Park, whether visually or otherwise, would be practically nothing. Though substantial in quantitative terms, I consider that the extensions would be in proportion with Beauport Place and its setting, qualitatively speaking. In itself, I do not regard the substantial increases in floorspace and footprint necessarily to equate to being a disproportionate increase.

33. Taking all of the factors relating to criterion (c) into account, and particularly having regard to the very particular circumstances of the development and the specific design, I conclude, on its merits, that the increase in size of the dwelling would not be disproportionate. Moreover, I agree with the Department that the primary purposes of the National Park as set out in Policy NE 6, would not be breached.
34. I am therefore satisfied that the proposed development is a permissible exception to the Policy NE 6 presumption against development in the Coastal National Park.
35. In reaching this conclusion, I have had regard to the Ministerial statement considered earlier in this report. I recognise that the appellants place very considerable weight on it. But, having carefully considered the findings of the Court of Appeal, I do not. I have in mind particularly that the statement was made in connection with a different proposal in a different policy context. It was made in 2007, while the Island Plan 2002 was still in force and before the Coastal National Park was designated in 2011. The policies formerly applying to the Zone of Outstanding Character, which preceded the Coastal National Park, differ from those applicable today under the Island Plan 2011 (revised 2014). The present regime under Policy NE 6 is quite different and may be readily distinguished from that which applied at the time of the Ministerial statement.

Issue (d) living conditions

36. The appellants' main concern relates to the potential for the construction works for the proposed development to give rise to noise, vibration, dust and fire. To these matters at the Hearing was added concern for pollution, as the appellants believe that the site may be contaminated by waste deriving from the demolition of the hotel that formerly occupied the site. They consider the Construction and Environmental Management Plan (CEMP) is unsatisfactory because it does not require a conditions survey of La Cotte View House or the private road in advance of development starting.
37. The submitted CEMP covers the usual matters relating to: roles and responsibilities; site boundaries, access and site restrictions; working

hours; vibration and air pollution; waste management; water; and auditing, reporting and record keeping. Waste management is intended to be undertaken in accordance with the submitted Framework Waste Management Plan (FSWMP). That indicates that any hazardous waste will be handled and disposed of in accordance with the requirements of the Revised Waste Management (Jersey) Law 2005. Environmental Health had no objections to the proposed development. I am satisfied that these 2 documents are sufficient to control any likely environmental effects. However, in the interests of certainty I consider that their implementation should be required by a specific condition, should the Minister decide not to allow the appeal.

38. As for a conditions survey, the applicants would be prepared to undertake one, in connection with the application of Third Party Non-Negligent Insurance. It is not, however, something that would normally be a matter to involve the Planning system. Rather it would be for the parties to arrange between themselves.
39. Further concern was expressed at the Hearing about the potential for noise from the mechanical turntable which would be used to enable vehicles to be turned within the garage. Bearing in mind that the garage would effectively be underground and that La Cotte View House is situated some distance to the rear, away from the access doors, I have no reason to believe that any such disturbance would arise.
40. The applicants claim that the proposed garage would result in improved living conditions because, amongst other things, the parking of vehicles in the open as they are at present would cease. On the basis of experience, the appellants doubt this. However, under policy NE 6 (1) it is not necessary to demonstrate benefits for a development to be acceptable.
41. I have some sympathy for the appellants in that a number of construction projects have been under way recently on properties also taking access along Le Chemin de Beau Port, which together have given rise to heavy vehicle traffic and the need to have traffic controls installed. It is understandable that they should not wish to see these conditions made worse or prolonged. But all development to a greater or lesser extent can give rise to temporary disturbance of one sort or another during the construction phase; and the applicants cannot be held responsible for the consequences of the other developments. It would not be right, in my view, to oppose the present proposal on these grounds

Other Matters

42. A number of other matters have been raised by the appellants, including questioning the applicants' motives for first building a garage, then converting it to a swimming pool, only to seek to construct another garage. Various alleged inconsistencies between

what has been claimed at various times about vehicle parking have been alluded to. I make no comment on this matter. I have considered the present proposals on their merits. The motivations of the applicant are not material.

43. Reference was made at the Hearing to the potential for the proposed development to adversely affect wildlife, including the Jersey Crapaud, which is said to inhabit land to the rear of La Cotte View House. But no evidence was brought to bear on the matter. I have no reason to conclude that wildlife would be disturbed by the development.

Conditions

44. In the event that my recommendation is accepted and permission granted, certain conditions should be imposed to ensure that the development is carried out satisfactorily. I include my recommended conditions in the Annex to this report, based on the conditions attached to the permission issued on 13th March 2017 which were ere discussed at the Hearing on a without prejudice basis and agreed between the parties as appropriate. I have amended the wording slightly in some instances in the interests of clarity and enforceability. I have also added condition (4), as discussed under the final main issue, relating to the work being in compliance with the CEMP and the FSWMP.
45. *Conditions A and B* are standard for all planning permissions, setting the timescales for commencement and conformity with approved plans and documents. They are necessary in the interests of certainty and so that unimplemented permissions should not compromise the ability of the Minister to reconsider the planning of an area. Condition (1) requires details of the garage door to be submitted and approved in order to ensure an appropriate standard of design. Condition (2) requires details of hard and soft landscaping to be submitted an approved, in order to achieve an appropriate setting for the development. Condition (3) seeks to ensure the success of the planting scheme by requiring failed trees and shrubs to be replaced. Condition (4) is intended to mitigate the environmental impact of the construction works.

Overall Conclusion

46. For the reasons given above, I **recommend** that the appeal should be **dismissed**.

Jonathan G King

Inspector

ANNEX

CONDITIONS THAT MAY BE IMPOSED ON THE PLANNING PERMISSION IN THE EVENT THAT THE APPEAL IS DISMISSED

A. The development shall commence within five years of the date of this decision.

B. the development hereby approved shall be carried out entirely in accordance with the plans, drawings, written details and documents which form part of this permission.

1. Notwithstanding the indications on the approved plans, large-scale details of the garage door to be used shall be submitted to and approved in writing by the Department of the Environment. The development shall then be carried out in full accordance with the approved details.

2. The development hereby permitted shall not be commenced until there has been submitted to and approved in writing by the Department of the Environment, a scheme of hard and soft landscaping. The scheme shall provide details of the following:

i) the position of all new trees and/or shrubs, this must include the species of plant(s)/tree(s) to be planted, their size, number and spacing and the means to be used to support and protect them; and

ii) other landscape treatments to be carried out including any excavation works, surfacing treatments, or means of enclosure; and

ii) the timescale for implementation .

The scheme shall be implemented as approved and in accordance with the approved timetable and retained as such.

3. Any trees or plant(s) planted in accordance with the approved landscaping scheme which die, are removed or become seriously damaged or diseased within a period of five years from the date of planting shall be replaced in the next planting season by others of a similar size and species unless the Department of the Environment gives written approval to a variation of the scheme.

4. The development hereby permitted shall be carried out in accordance with the approved Construction and Environmental Management Plan and the Framework Site Waste Management Plan.

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