

**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: Professor H. Morris (Third Party Appellant)**

**Site address: Le Rocher Rouge, Les Ruisseaux, St Brelade**

**Appeal against: Decision of the Department of the Environment to Grant Planning Permission for "*REVISED PLANS to P/2015/0632 (Demolish existing dwelling. Construct 1 No. four bed dwelling.): Remove approved ground floor extension to West elevation and construct second floor extension to North elevation.*"**

**Decision date: 24 August 2017**

**Reference: RP/2017/0760**

**Appeal procedure: Hearing – 11 December 2017**

**Site visit: 11 December 2017**

## **Introduction**

1. This report contains my assessment of the appeal made by Professor H. Morris against the decision of the Department of the Environment to grant planning permission for a 'revised plans' application to build a replacement dwelling on the site of *Le Rocher Rouge* in St Brelade. The site is close to the Appellant's home.

## **The site and its surroundings**

2. *Le Rocher Rouge* is a detached dwelling set on a sloping hillside site on the north side of a looping road on *Les Ruisseaux* estate. The estate comprises detached properties set within individual plots, with most enjoying panoramic views of the coast and sea to the south-west. The estate lies within the defined built-up area.
3. The house is set to the front of the plot and includes a terrace (above a garage) and first floor balconies. The slope of the hillside means that, when looking seawards from the site, the view is over the rooftops of dwellings to the south and south-west. The slope continues to rise behind the plot, with the Appellant's home, *Rochez*, sitting elevated above *Le Rocher Rouge*. There are neighbouring dwellings either side of *Le Rocher Rouge*, the house to the east being *Le Creux du Rocher* and the neighbouring property to the north-west being *The Beach House*.
4. A particular physical feature of note is a large rock upstand, rising to about 23 metres in height, that is situated between *Le Rocher Rouge*, its neighbour to the east (*Le Creux du Rocher*) and the Appellant's home, *Rochez*, to the north, where it rises to one side of, and above, its swimming pool<sup>1</sup>.

## **Planning history - the extant permission under P/2015/0632**

5. There is an extant planning permission for a replacement dwelling on this site granted under P/2015/0632. This scheme involved the demolition of the existing 5 bedroom house and the construction of a 4 bedroom dwelling in a modern architectural style.
6. The decision to grant permission for this development was the subject of a third party appeal by multiple appellants: Professor H. Morris (the current Appellant), Mr & Mrs D Wells, Mr & Mrs A Mauger and Mr & Mrs G Crill. Inspector Roy Foster conducted a Hearing on 11 February 2016 and his subsequent report of 3<sup>rd</sup> March 2016 recommended that the appeal be dismissed. The Minister agreed with the recommendation and the permission was confirmed by the Ministerial Decision MD-PE-2016-0044 signed on 23 March 2016.

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<sup>1</sup> The disposition of the appeal site, its neighbours and the rock upstand is clearly presented in the photograph that appears on page 6 of the Applicant's Design and Sustainability Statement.

7. This earlier appeal assessed a range of Planning issues including the proposal's effect on the character of the area; the impact on residential amenity (notably upon *The Beach House*); impact on wildlife / biodiversity and matters concerning 'excavation, construction and waste'. With regard to the latter issues, the Inspector (and Minister) appeared to be satisfied that Planning conditions 1 and 3 would provide the necessary controls. Planning condition 1 requires the submission and approval of a 'Demolition / Construction Environmental Management Plan' and Condition 3 requires a 'detailed Waste Management Plan'.

**The current application proposal - RP/2017/0760**

8. The current application, which is the subject of this third party appeal, is a similar proposal to the earlier approved scheme. The key differences are as follows:
  - The garage / carport at street level has been reduced in size. The current scheme includes 3 car parking spaces in place of previously approved 6 spaces. This revision reduces the amount of excavation required.
  - The proposed swimming pool has been relocated from the northern side (ground floor) to the north-east side (second floor). This revision also results in less excavation.
  - The front balconies and terraces have been reduced in depth and moved 500 mm further back (from the road).
9. I understand that the Planning Committee members visited the site on 22 August 2017 and formally considered the proposal at their meeting on 24 August 2017. The Committee heard representations both for and against the proposal, before reaching its decision to grant planning permission.
10. The permission included similar conditions to the earlier scheme in respect of requirements for a Demolition / Construction Environmental Management Plan and a Waste Management Plan. However, it also included an additional condition which stated:

*Condition 7: Prior to construction of the hereby approved dwelling, a Geotechnical Survey of the rock including the type of rock; amount to be removed; method of excavation; vibration levels; structural effect on adjacent properties and all necessary mitigation measures in relation to the stability of neighbouring properties and their foundations shall be submitted to and approved in writing by the Department of the Environment. The development shall be carried out in full accordance with the Structural Survey approved. Any variations shall be agreed in writing by the Department prior to the commencement of such work.*

The reason stated for this condition was *"to protect the amenities of the occupiers of neighbouring properties in accordance with Policy GD1 of the Adopted Island Plan 2011 (Revised 2014)."*

11. It is useful to note at this point that, whilst the application was live, the Applicant had commissioned preliminary geotechnical survey work. Much of the substance of the current appeal emanates from the July 2017 report produced by Frederick Sherrell Limited (hereafter 'the Sherrell report'), a firm of Consulting Engineering Geologists and Geotechnical Engineers based in Devon. The report assesses potential risks arising from the rock upstand and undertaking works in its proximity and makes recommendations for further investigations. I understand that the Applicant shared the report with his neighbours, including the Appellant.

### **The Appellant's grounds of appeal**

12. The Appellant states seven grounds of appeal which, to an extent, overlap. These are:

Ground 1 - Material information not submitted with the application, contrary to Article 10 of the Law.

Ground 2 - The Application should have been deferred following disclosure of the Reports, and this information should have been requested by the Department.

Ground 3 - Condition 7 on the permit is non-implementable because it relies on access onto land outside of the site ownership.

Ground 4 - Condition 7 is incorrectly drafted. (should be prior to commencement of the works)... and Geotechnical survey (as opposed to Structural survey).

Ground 5 - The rock upstand and base structure is ostensibly stable after millennia of settlement, but the new geotechnical evidence already demonstrates the poor sense of allowing the removal of hundreds of tons of supporting rock and earth together with the attendant vibration and impact of the shoring-up necessitated by this development. Insufficient or no consideration was given to the potentially disastrous consequences, yet this is a legitimate planning concern according to English law, not just a concern for the owner and developer to address.

Ground 6 - Insufficient consideration was given to the damaging physical alterations to the aesthetic appearance of the natural rockface and landscape which would arise from any mitigation measures that might be requested of the rock owners as a result of the geotechnical investigations and which would be non-implementable because they would rely on access to land outside of the site ownership.

Ground 7 - An earlier permit (P/2015/0632) is able to be commenced, as no such condition is attached, and which therefore requires to be modified in the light of new evidence.

### **The views of other interested parties**

13. Whilst the appeal is made in Professor H. Morris's name alone, a number of neighbours made representations, which I have considered in my assessment. These are summarised below.
14. Mr Wells of *The Beach House* (to the north-west of the appeal site) made three separate submissions. He supports the Appellant's grounds of appeal and raises concerns about the privacy impacts of the revised proposal on his home.
15. Mr El Raghy of *Le Creux du Rocher* (immediately to the east) supports the Appellant's case and concerns about the scale of development and the risks associated with excavating and moving such a large mass of rock in a residential area. He explains that he has worked for a mining company for many years and that the only way to secure the rockface would be to 'shotcrete, rock bolt and mesh' it and this would be irreversible and unacceptable.
16. Mr Dodds of *Innisfree* (to the north-east and next to the Appellant's house) fully supports the views of Professor Morris and Mr Wells and is "*hugely concerned with subsidence and rock fall should the base of the rock that Le Rocher Rouge currently rests on, be disturbed / removed.*" He states that his greatest concern is one of loss of life and that all development at this site should be 'cancelled'.
17. Ms. Pointing of *Elysium* (to the north) submitted that she was a geologist and had spoken at the Planning Committee to advise that due to the possible instability of the Granite rock, she did not think it would be a good idea to increase the existing platform by removing more rock material.

### **The Department's response**

18. The Department contends that the Committee decision was sound and properly arrived at. It states that the works to the rock face, and any associated disruption during construction, are not matters that are pivotal to the Planning decision. Rather, the Department considers that they are matters that the developer must take into account, and be responsible for, during the construction phase. Officers do not agree that material information was missing and the additional technical reports about the rock (by Frederick Sherrell Ltd) were neither a pre-requisite of the application submission nor would they have justified a deferral of the application.
19. The Department accepts that Condition 7 contains an erroneous reference to a 'structural survey', which should read as a 'geo-technical survey'. It

also appears to accept that Condition 7, which implies works beyond the application site and in another party's ownership, may be unreasonable and invites the Inspector to form a view on this matter. Officers confirm that they consider the earlier scheme was properly determined and that there is no case for retrospectively imposing an additional 'Condition 7'.

20. The Department provides a separate response in respect of the comments made about privacy impacts on *The Beach House*. It submitted plans that it says demonstrate that the west side of the new house and terrace was no closer to the neighbour's boundary, albeit that the terrace area had been slightly enlarged. It considers that the privacy impacts are akin to the previously approved scheme and are not unreasonable.

### **The views of the Applicant**

21. Mr Newton, the Applicant, largely supports the views and consideration of the Department. He rebuts each of the Appellant's grounds of appeal. He maintains that there was no missing information and the Frederick Sherrell Ltd report was only prepared two months after the application had been submitted. He also considers Condition 7 to be unreasonable, as it relates to areas outside the Applicant's control and explains that requests for access (to the rock) from the owners have been declined.

### **Inspector's assessment**

#### *The 'fallback' scheme – relevance and weight*

22. The earlier permission and appeal under P/2015/0632 have established the principle of a replacement dwelling of a similar style and scale to the current proposal. The presence of an extant permission is an important starting point in this assessment, as it is in this case a genuine 'fall back' position for the Applicant i.e. it is capable of implementation (and it does not require the 'condition 7' geotechnical survey and associated details). UK case law<sup>2</sup> establishes that such a fall back permission is a material consideration.
23. For reasons that I will explain later, I do not agree with suggestions that the permission granted under P/2015/0632 should be cancelled or modified in any way. I consider it to be a legally valid extant planning permission. This permission is a material consideration that carries significant weight in this case.

#### *The revised scheme – design and amenity implications*

24. In design and amenity terms, the revised scheme is, in my view, preferable to the earlier approved scheme. It entails less excavation of the site, reducing the need to export waste material. It also retains more boundary planting and lessens impacts on neighbours. In terms of the relationship with *The Beach House*, I consider that the revised scheme would, on

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<sup>2</sup> R v Secretary of State for the Environment ex parte Ahern (London) Ltd [1998].

balance, represent a very marginal improvement over the earlier approved scheme.

*The rock – Planning background and implications*

25. The main issue in this appeal relates to concerns about risks arising from constructing the development. These relate, in particular, to the required site excavations and the potential implications for the stability of the rock upstand, and whether the Applicant's technical report is material to the Planning decision.
26. It is important to note that concerns about the stability of the rock outcrop were raised by the Appellant in respect of the earlier application<sup>3</sup>. The Planning Committee considered these views, but did not feel the need to impose any particular bespoke Planning controls. That earlier application was supported by a short 'Structural Survey' report and its conclusion stated:

*"The proposed development involves excavation into the ground and retention of that excavation in the temporary condition. This is not an unusual construction activity. As a design team we have carefully planned the design around the known site constraints to minimise rock excavation where possible and to enable safe retention and ease of construction for the excavation phase. The planned construction activities to enable this are commonly used systems that have been used in close proximity to much more sensitive building structures than these with no damage from vibration. The expected ground conditions have been studied and considered and the structural solution for these works is tried and tested and appropriate to this particular site."*

The Structural Survey is listed as one of the 'approved' application documents on the P/2015/0632 decision notice.

27. The issues of 'excavation, construction and waste' were also examined through the subsequent third party appeal. The Inspector's report<sup>4</sup> recorded in some detail the views expressed by the parties, including Professor Morris's allegations of negligence by the Planning Committee in not requiring a geotechnical survey, and his concerns about 'disastrous consequences'.
28. The Inspector assessed that *"it is understandable that appellants have concerns about the proposed redevelopment, especially issues of safety, noise and other disturbance factors to do with excavation and whether or not this would prolong the normal construction process. However, the applicants have provided a reasonable amount of information at this stage*

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<sup>3</sup> Professor Morris's comment letter dated 19 August 2015

<sup>4</sup> Planning Appeal P/2015/0632 – Report of Inspector Roy Foster dated 3 March 2017

*and indicate their willingness to adopt safe and considerate methods of working. To the extent that it is the function of the planning process to engage with such matters the content of conditions 1 and 3 provide a framework for their resolution.”* The Inspector’s assessment clearly indicates his view that the role of the Planning system in this area is quite limited.

29. On a general note, I share that assessment as it appropriately addresses what can be a rather grey area between strict land use planning considerations and matters and responsibilities of scheme implementation and construction, which lie beyond the Planning system and fall into other legal remits. This distinction between what is and is not a ‘Planning’ issue is a complex area because the legal scope<sup>5</sup> of what can constitute a ‘material consideration’ in Planning is very broad and will depend on the circumstances of each case.

*The Sherrell report – Planning relevance and weight*

30. The key issue in this particular case is whether the further evidence contained in the Sherrell report (which was not before the P/2015/0632 decision makers) is a material consideration and, if so, whether it provides a Planning basis for a different decision.
31. The Sherrell report’s conclusions<sup>6</sup> explain how a preliminary inspection, with limited access, indicates that the rock looks ‘*reasonably stable*’. However, it goes on to advise that there is ‘*some potential*’ for ‘*topple failures, and to a lesser extent sliding failures and wedge failures. Smaller-sized blockfalls are more likely*’ and it identifies some potential block fall hazards on the neighbours’ land (north and east of the appeal site). It continues to explain that excavation works could cause vibration, which might be sufficient to trigger rock falls but that it would be virtually impossible to predict whether the work, or natural processes, were responsible.
32. The Sherrell report is clearly heavily caveated by its preliminary nature, limited data and restricted access. It therefore recommends further, more detailed, assessments, including an abseil survey with appropriate safety precautions. I understand that the Appellant has declined requests to allow access to enable the survey work to be undertaken. I also understand that the Applicant is seeking access via a submission to the Royal Court, but I am not familiar with the details of these matters which, in any event, lie beyond the scope of this Planning appeal.
33. In my view, there is no question that the construction of a replacement dwelling on this site will face some technical challenges. These arise due to

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<sup>5</sup> The leading UK case being *Stringer v Minister of Housing and Local Government* (1971) and subsequent related judgements that have clarified and interpreted its key principles.

<sup>6</sup> Section 7 of the *Preliminary Report on the Stability of a Large Upstand of Rock at Rocher Rouge, Jersey* by Frederick Sherrell Ltd – July 2017.



the sloping nature of the site and its context, including that presented by the rock upstand, which sits between the site and neighbouring properties.

34. These challenges would have also been present and faced when the estate (including *Le Rocher Rouge*) was constructed some years ago. Similar challenges would also arise on many other development sites in Jersey. *Les Ruisseaux* estate, within which the appeal site lies, is now an established part of the defined built-up area, where the Island Plan makes a positive presumption in terms of new development. No evidence has been presented to me that would suggest that there is any history of inherent instability of the hillside, or the rock upstand, in this part of the built-up area such that new development would be precluded in Planning terms.
35. The Applicant's commissioning of the Sherrell report was a sensible due diligence step in preparing for the development of the site (which already has an extant permission). The Applicant's sharing of the report with his neighbours seems helpful and transparent.
36. Whilst much has been said about, and quoted from, the Sherrell report, it is essentially a preliminary risk assessment. Nothing contained within the report suggests that the proposed development (either under P/2015/0632 or RP/2017/0760) cannot proceed. Indeed, the report identifies likely construction methods and protection measures that will be required, such as the use of rock anchors during excavations to ensure sufficient support. I also note that a number of the risks (of rock falls) identified by the report may exist whether or not the development proceeds. The recommendations for further investigations are unsurprising and sensible and, again, form part of an iterative due diligence process of a responsible developer.
37. The fact that third party land access may be required for such further investigations, and that such access may be denied, has limited relevance to the Planning merits of the scheme. I explore these matters further by reference to the Appellant's specific grounds of appeal

*The specific grounds of appeal*

38. The Appellant's ground of appeal are inter-related. They begin by alleging that the material information i.e. the Sherrell report was not submitted with the application and this breached the law. I disagree, as there is nothing contained in Jersey Planning law, the Island Plan or the published Guidance<sup>7</sup> that requires the submission of geotechnical surveys and reports with such an application. This is unsurprising, as these matters are much more within the remit, and responsibility, of the developer in terms of implementing the scheme with proper legal regard to site safety responsibilities, third party

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<sup>7</sup> Supplementary Planning Guidance Practice Note 11: Information Required for a Planning Application (January 2016)

interests and potential liabilities, including insurances for any off-site damages or other impacts.

39. Ground 2 alleges that, on disclosure of the Sherrell report, the application should have been deferred. For the reasons stated above, I do not agree.
40. Grounds 3 and 4 concern the imposition of Condition 7. In my view, the Department's Condition 7 is unfortunate. Whilst I am sure it was imposed with the best of intentions, in terms of appeasing local concerns, it is a fundamentally flawed Planning condition, as it strays beyond the established tests of being necessary and reasonable.
41. In my view, the condition is not *necessary* because the legal responsibilities to make detailed technical investigations and ensure that the development is implemented safely, by a competent and experienced contractor, sit squarely with the developer. The condition is not *reasonable* because it requires surveying and (potentially) works beyond the application site and outside of the Applicant's control. It may well be the case that the developer will need access to the rock to satisfactorily undertake investigations and discharge the wider legal responsibilities ahead of and during implementation. However, these are matters beyond the scope and remit of a Planning condition.
42. Through the Hearing, the Department introduced a Royal Court case<sup>8</sup> in support of its (with hindsight) view that Condition 7 may be inappropriate. I do share the Appellant's view that the circumstances are not directly comparable. However, the principle that potential risks and damage from excavations and building works are not matters that are grounds for refusing Planning consent, is clearly set out in the Judgment<sup>9</sup>.
43. Ground 5 alleges that insufficient regard has been given to the implications for the rock stability and the potential consequences and that these are material Planning considerations in UK practice and should be applied here. However, I am satisfied that sufficient regard has been paid to these matters and that there are no Planning reasons that would justify withholding Planning permission, given all of the facts in this case.
44. Ground 6 alleges that insufficient consideration has been given to the visual and aesthetic implications of measures that 'might' be requested (under condition 7) in the light of further geotechnical investigations. The specific concern relates to potentially 'shotcrete' and / or netting treatments to secure the rockface. However, the need for such treatments seems somewhat speculative, given that houses have existed in close presence of

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<sup>8</sup> Webb et al v The Minister for Planning and Environment – Royal Court (Samedi Division) – Judgment dated 30 May 2012

<sup>9</sup> Paragraph 72 of Webb et al v The Minister for Planning and Environment – Royal Court (Samedi Division) – Judgment dated 30 May 2012

the rock for many years without such treatments (and I have not been advised of any issues arising). In any event, as the Appellant correctly points out, the Applicant does not have ownership control of the rock to undertake such works, even if they were to be recommended.

45. The final Ground 7 argues that P/2015/0632 should be modified and / or revoked. It will be clear from my assessment above, that I do not agree with this view. The P/2015/0632 Planning permission is legally valid and was properly assessed and determined on its Planning merits. The Sherrell report does not change that position.

### **Conclusions and recommendation**

46. A development comprising a proposed replacement dwelling on this site has been firmly established by the previous application which was granted planning permission under P/2015/0632. A third party appeal in respect of that decision provided a robust independent assessment of a wide range of matters, including the proposal's effect on the character of the area, impacts on residential amenity, the effects on wildlife / biodiversity and matters concerning excavation, construction and waste. The extant planning permission is a material consideration that has significant weight.
47. In design and amenity terms, I consider the current revised scheme under RP/2017/0760 to be superior to the earlier scheme. However, the main focus of this appeal has centred on whether a preliminary geotechnical report (the Sherrell report), commissioned by the Applicant, creates a Planning case to refuse permission and indeed revoke or modify the earlier permission.
48. I conclude that the Sherrell report, which is unapologetically preliminarily in its nature, simply identifies the potential risks, investigations and precautions that the Applicant needs to address in preparing to implement the scheme. There is no evidence presented within the report that supports a view that the development proposed is unacceptable in Planning terms. The risks, issues and measures identified in the report are implementation matters and responsibilities that rest squarely with the Applicant / developer and they sit beyond the strict remit of the Planning system.
49. Consequently, I consider that Condition 7, which required surveys and potentially works beyond the application site, to be unnecessary and unreasonable in Planning terms. I recommend that it be deleted but, in doing so, that in no way lessens the responsibilities and legal liabilities that would rightly fall on the Applicant / developer in implementing the scheme. This is no different to any other development project implementation, on a site that has its own individual constraints and challenges.
50. Accordingly, for the reasons set out above I recommend that the appeal be dismissed and that the decision to grant planning permission under

reference RP/2017/0760 be confirmed, subject to the deletion of Condition 7 (and the consequential renumbering of the current Condition 8).

*P. Staddon*

**Mr Philip Staddon BSc, Dip, MBA, MRTPI**

**30 January 2018**