

PLANNING AND BUILDING (JERSEY) LAW 2002 (AS AMENDED)

Appeal under Article 108 (2) (h) against a decision under article 51(2) to include a building or place on the List of Sites of Special Interest

Report to the Minister for the Environment

By Sue Bell MSc., BSc, FCIEEM, CEcol, CEnv, CWEM,
An Inspector appointed under Article 107

Appellant: Mrs Joy Oxenden

Reference Number: ESSI0030

Date Site Added to the List: 3 February 2020

Site Name & Location: Le Port de la Mare Coastal Strip, St Peter

Special Interest: Ecological

Appeal Procedure: Unaccompanied site inspections (12 & 15 October 2020); Hearing (13 October 2020)

Date of Report: 30 November 2020

Introduction

1. This is an appeal against the decision to include land at Le Port de la Mare on the List of Sites of Special Interest.
2. I sought further written clarification from the Department concerning the criteria to identify important ecological sites and how these had been applied to the appealed site. These points were explored further during the hearing, where the appellant was represented by Mr Nigel and Mrs Lisa Oxenden-Wray.

The appeal site

3. The location and extent of Le Port de la Mare Coastal Strip Site of Special Interest (SSI) is defined by the co-ordinates and map accompanying the Site's entry on the List of Sites of Special Interest. In broad terms it is located roughly centrally within St. Ouen's Bay. It lies between the sea wall (to the west) and La Grande Route des Mielles (also known as 'Five Mile Road') (to the east), with the Watersplash Bar to the north by the Watersplash Bar and 'El Tico' to the south. It forms one of a number of SSI located along St. Ouen's Bay.
4. Not all the land within the boundary of the Site is within the ownership of the appellant. At the hearing I clarified that the appellant's interests relate to the northern portion of the site.
5. During my site inspection I saw that the ground exhibited different types and densities of vegetation. There were areas of sandy soil with relatively dense vegetation including scrub and more open, less heavily vegetated areas. Some of the ground was bare or sparsely vegetated with exposed areas of shingle and gravel.

6. Informal footpaths were present across the site. I saw the areas used for parking near the sea wall and also observed signs of vehicle tracks across the vegetation in the vicinity of the 'Green Hut'.

Case for the appellants

7. In essence, the appellant objects to the principle of the land being included on the List of Sites of Special Interest and the limits and constraints this would introduce. They consider this would undermine their democratic rights and powers as landowners and give control of their land to the States. They also consider it is unnecessary to introduce further layers of control, given that the site lies within the National Park.
8. There is nothing unique or special on the land that does not grow anywhere else. The land receives a heavy footfall of people, which has changed the area by flattening the plants. The site does not link to other coastal dune patches; there are business complexes to the left and right of the land, which provide no room for any continuous 'dune patch link'.
9. Some of the information on which the SSI is based is out of date or inaccurate. The document "Invertebrates of the sea front strip of St Ouens Bay" is 18 years old and the most recent dated document is 11 years old. The map is wrong and not drawn correctly and is misleading as to the complexities of private land.
10. The main ecological reason for the SSI is based on the control of invasive plant species. Efforts to eradicate it are a 'lost battle' and it should be accepted as a natural progression of ecological evolution. This species benefits the ecological landscape, as it stabilises the dune structure and traps seaweed, which allows other plants to grow on top of it.
11. The appellants would be prepared to work with the Government of Jersey to remove the invasive species if they wish, but strongly reject the imposition of an SSI. The appellants have received a grant from the Countryside Enhancement Scheme, to manage the invasive species, showing that a SSI is not needed.
12. At the hearing, the appellants also raised concerns about the presence of contamination in the soil, which they consider would be incompatible with a SSI.

Case for Growth, Housing and Environment - Natural Environment ("the Department")

13. The Department considers that not all the grounds of appeal are material to the decision to list the site as they do not relate to the special interest of the site.
14. Jersey has obligations under international conventions to identify and protect the Island's natural heritage. Article 51 of the Planning and Building (Jersey) Law 2002 provides for the maintenance of a List of Sites of Special Interest, on which are included buildings or places considered to have public importance by reason of their botanical, zoological, ecological or other specified interest.
15. The Minister has adopted and published criteria to be used to determine whether buildings or places are of special ecological interest, as outlined within the Biodiversity Strategy for Jersey (2000). These criteria have been applied in reaching the decision to add the site to the List. The location of the site within a National Park is not a determining factor in the listing of the site.

16. Identification as a SSI does not result in legal ownership of the land or the creation of third party rights to the land.
17. The restricted activities listed in Articles 55(1) and (2) of the Planning Act are set in law and may only be amended through approval by the States and Privy Council. The list of Permitted Activities outlines those activities for which prior consent is required due to their risk of damaging the features of special interest. It is not a statement that such activities are prohibited. Restriction of vehicles is identified in the Management Statement as necessary to achieve the long-term vision.
18. The Management Statement is an evolving document and needs to be updated in the light of changes in habitats and ecosystems over time. It recognises the existing open access and the need to allow such access to continue, but only to the extent of existing facilities. Any proposal to extend infrastructure or change in use with an impact on the special features would not be supported and would be subject to consent under the planning law.
19. The dune habitat in Jersey is of International significance due to its fragility and rarity. It is essential that measures are taken to manage the presence of invasive species and their negative impact on the dune habitat in order to meet Jersey's international commitments including those under the Bern Convention.
20. Ecosystems constantly change, but this should not be considered as justification to not control this invasive species, as its continued spread and negative impacts will only become more difficult to control. However, revised management or alternative techniques may be appropriate.

Inspector's assessment and analysis of the issues

21. The main issue in this appeal is whether the appealed site has sufficient ecological interest to be added to the List of Sites of Special Interest.
22. Article 51 of the Planning and Building (Jersey) Law 2002 Act establishes a statutory obligation on the Chief Officer to maintain a List of Sites of Special Interest, "*which shall include each building or place that has public importance by reason of (a) its special botanical, ecological, geological, scientific or zoological interest..*".
23. The Act does not specify how the special ecological interest should be assessed or quantified. Guidance on that issue is contained within Section 1, *Evaluation of Natural History Sites* of the Jersey Biodiversity Strategy (2000), which lists ten "*justification criteria for the designation of SSIs*":
 - a) Diversity (of habitat, structure, plant community and species);
 - b) Size (extent);
 - c) Ecological Continuity;
 - d) Naturalness;
 - e) Rarity;
 - f) Position in an ecological unit;
 - g) Potential Value;
 - h) Fragility;
 - i) Typicalness;
 - j) Intrinsic appeal.

24. The guidance states *“To qualify as a SSI the area should score highly according to as many criteria as possible. However, few sites will rate highly in all qualities. Due to the lack of choice of important habitats in Jersey, some sites may be selected for a combination of factors, while others may be chosen for a single important attribute.”*
25. Whilst each criterion is accompanied by some general explanatory text, there is no guidance or explanation as to how ‘scores’ for that criterion should be applied and hence no definition of how to assess whether a site is considered to ‘score highly’ for a particular criterion. Indeed, based on the evidence provided by the Department at the hearing, it appears that the evaluation of a site against each criterion is based on a qualitative assessment, rather than the allocation of a numerical score or rank.
26. The ‘Statement of Significance’ states *“the site forms a significant proportion of the Island’s remaining coastal dune system and is identified in the Jersey Biodiversity Strategy as a priority habitat which requires conservation management.”*
27. The ‘Description’ on the schedule sets out that dune habitat is of international significance due to its fragility and rarity. It also refers to the coastal dunes being of high value for the diversity and rarity of flora and fauna species that have been recorded and the importance of the dunes of St. Ouen’s Bay to local people and visitors to the Island.
28. Whilst these statements do not specifically refer to each of the ten criteria, they appear to suggest that the Le Port de la Mare has been selected in terms of the presence of a rare habitat type, the diversity and rarity of species and fragility of the habitat.
29. I sought further clarification from the Department about the reasons why the site is considered to be of special interest. In its written response, the Department indicated that the site scored highly against the criteria for rarity (in terms of the rarity of habitat types present and rarity of faunal species including invertebrate species); the site’s position in an ecological unit; potential value (in relation to the site’s function in linking other coastal dune patches together with the inland dunes); and fragility. At the hearing, the Department provided a broader assessment which also addressed size, ecological continuity; and naturalness, in addition to the criteria listed in its written response.
30. In assessing whether the site is of Special Interest, the Department has relied heavily upon botanical survey information dating from 2008 and invertebrate survey information dating from 2002 and 2008. Whilst I accept that there is no formal guidance for the acceptable age for survey data, it is probable that changes may have occurred since those surveys were completed. Nevertheless, based on the information provided and my site inspection, I am content that the broad habitat types as described are still present at the site.
31. The proposed site is relatively small, totalling 3.76 ha. Whilst I accept that dune habitat has a restricted distribution within Jersey, with most of this occurring within St. Ouen’s Bay, I cannot see any justification for the statement that this site *“forms a significant proportion”* of the Island’s remaining coastal dune system.

32. I accept that the dune habitat is long established and hence there is ecological continuity. The invasive species detract from the naturalness of the site.
33. Dune habitat is a rare habitat of International significance which is recognised through its inclusion in Resolution No. 4 (1996) of the Bern Convention and inclusion in Annex 1 of the EU Habitats Directive. In addition, it has been identified as a priority habitat which requires conservation management within the Jersey Biodiversity Strategy. It has a limited distribution within Jersey as does saltmarsh/splash zone habitat. I therefore accept that rare habitat types are present.
34. In terms of rarity of species, the Schedule refers to a Red Data Book plant species associated with the marram grass communities. The Department's additional written response refers to various rare and/or protected plant, invertebrate, amphibian, reptile and mammal species found within the survey area. However, looking at the survey report (Penny Anderson Associates, 2008), it appears that the named rare plant species were not recorded within the proposed site. In addition, I note that the invertebrate survey did not include the land subject to this appeal and I have not been provided with any supporting information about the presence of the other species on the site. At the hearing, the Department was unable to name any species that were only found at the proposed site and not elsewhere within the bay. I am not therefore persuaded that this particular site would score highly in terms of rarity of species.
35. I accept that there are built features and development to the north and south of the site, which provide incursions into the natural habitats. During my site inspection I saw that these are relatively restricted in area and that there is a degree of connectedness or only short gaps between areas of vegetation. The site's position, towards the centre of the bay, where there are extensive areas of dune habitat to both the north and the south, leads me to conclude that it does occupy an important linking position between habitats within the bay.
36. Although there are some signs of erosion and there is an invasive species present, I accept that the habitat retains value and that this value has the potential to be improved through removal of pressures and by active management. I accept that the presence of these pressures contributes to the fragility of the habitat.

Grounds of appeal

37. The appellants object to the list of permitted activities including the restriction on the use of a vehicle on their land.
38. Article 55 (1) and (2) of the Act set out those activities that are restricted on Sites of Special Interest and Article 54 allows for the control of certain operations, not amounting to development. Exemptions to these restrictions are possible if they are undertaken with the Chief Officer's permission or if they are specified as a permitted activity in the entry on the List of Sites of Special Interest relating to the site.
39. I accept that the appellants would need to seek permission to carry out some activities that are currently unrestricted. However, it is often the case that ownership of land or property does not confer unqualified or unlimited use of that land or property, without the need to seek the relevant consents or permissions. Ownership of the land would remain unchanged.

40. It is regrettable that discussions concerning routine activities, that might require an exemption, such as vehicle use, were not concluded with the appellants prior to adding the site to the List. Nevertheless, there is no reason why the appellant could not seek permission for the activities that they wish to carry out.
41. In conclusion, I do not find that the need to obtain permission to carry out an activity that could potentially harm the special interest of a site would be a valid reason not to include an area of land on the List of Sites of Special Interest.
42. The appellants are concerned about the vision and objectives set out in the Management Statement and the implications of this for their land, particularly as the Management Statement can be revised every five years.
43. I note that the Management Statement treats the site as a whole, rather than subdividing the requirements on the basis of land ownership or management units. This makes it difficult to understand what actions are required where.
44. During the hearing, the Department confirmed that the purpose of the Management Statement is to set out those actions that the Department considers would either retain or enhance the ecological features for which the site has been Listed. Whilst the document was issued with the official notification of the Site's listing, it has no statutory status and is an advisory document only. Landowners are under no obligation to implement the management.
45. I have considered the appellants' statements that the Department's motivation for including the site on the List of SSI is so that it can control the invasive plant species. Whilst the Department considers that control of the invasive species would be desirable, inclusion of the site on the List of SSI would not grant it any powers to carry out management on the appellants' land. In any case, I understand that there are other mechanisms that would allow control of the invasive species and that the appellants have already gained a grant to assist them with this. I do not find that the presence of the invasive species is a key determining factor in adding the site to the List, particularly as its presence detracts from the naturalness of the site.
46. I note the appellants' comments concerning the presence of contamination within the soil. Whether or not that is the case, that would not necessarily preclude the site from being included on the List of SSI, if it met the required criteria to do so.
47. Article 51(2)(a) of the Act requires that in determining whether or not to include a building or place on the List, any representations about that proposal "*shall be taken into account to the extent that such representations relate to the special interest of the building or place.*"
48. I acknowledge the appellants' long-established and deep connection to their land. Nevertheless, having considered all other points raised in the submissions, I have not identified any others which relate to the special interest of the place.

Inspector's conclusions

49. The States of Jersey has International commitments to further the protection of biodiversity. Some of these commitments are met through Article 51 of the Planning and Building (Jersey) Law 2002, which requires the Chief Officer to maintain a List of Sites of Special Importance comprising buildings and places considered to be of

public importance. The Act does not set a limit on the numbers of sites that can be included on the List.

50. I therefore conclude, that if a site meets the required standards it should be included in the List.
51. Whilst criteria for identifying sites of ecological importance have been published, there is an absence of clear guidance as to how sites will be 'scored' or evaluated in an objective manner against these criteria.
52. Article 51 (3) (a) requires that the List shall specify the site's special interest. Given that the Department must have assessed the proposed site against each of the selection criteria, it might be expected that the 'qualifying' criteria would be listed in the special interest. However, that is not the case. There is a disjunct between the wording of the site description and the evaluation criteria. This makes it more difficult for members of the public to understand the basis on which decisions have been made.
53. Understanding the decision-making process has been further hampered during this appeal by the lack of consistency from the Department in setting out which criteria have been the determinative factors in concluding that the land had special interest and, in its failure to provide me with a clear audit trail of the evaluation against each criterion. Some useful information was provided in the Department's written response to my queries, but additional criteria were mentioned at the hearing. Furthermore, some of the information provided in support of the evaluation appears to relate to the whole area included within surveys, rather than specifically to the land subject to this appeal.
54. Despite this lack of consistency and opacity in decision-making, for the reasons set out above, I am satisfied that there is supporting evidence that the proposed site is of public interest for its ecological features.

Recommendation

55. I recommend that the appeal should be dismissed and that the site be added to the List of Sites of Special Interest.
56. To aid clarity, the Statement of Significance should be modified to make specific reference to those criteria that contribute to the site's special interest.

Sue Bell

Inspector 30 November 2020