DRAFT ONLY

MINISTER FOR PLANNING & ENVIRONMENT v JK LTD (DE LA MARE SITE)

INITIAL DRAFT SUBMISSION (FOR APPLICANT'S AFFIDAVIT)

Introduction

This appeal is against the decision of the Minister ('the Respondent') made on 8 March 2013 and issued by notice dated 26 April 2013, to refuse permission in respect of an outline planning application to redevelop the former De La Mare Nurseries site at la Rue a Don in Grouville for 25 dwellings.

Permission has been refused for seven reasons as outlined in the decision notice of 26 April 2013 (copy enclosed at JCS1/1). The first five reasons concern non-compliance with the 2011 Island Plan and the next two concern non-compliance with the 2002 Plan.

Structure of this Affidavit

My affidavit is split into the four following parts:-

Part A – this sets out the context following the previous appeal proceedings on this case, and also summarises the basis of the appeal contentions.
Part B - this provides a summary timeline of the recent site history, which is highly relevant to this appeal.
Part C - this part addresses the refusal reasons under the 2002 Plan.
Part D - this part deals with the refusal reasons under the 2011 Plan.

PART A – CONTEXT FOR APPEAL AND BROAD CONTENTIONS

Previous Appeal and Royal Court remittal back

The application forming the subject of this appeal has a protracted history.

The application was submitted on 18 January 2010, refused by the Planning Applications Panel on behalf of the Minister on 16 December 2010 and appealed to the Royal Court on 2 February 2011, this all during the period of the 2002 Island Plan. The reason for refusal in December 2010 was that the Respondent did not accept that the existing glasshouse complex was wholly redundant and derelict and therefore did not comply with Island Plan policies C6 (Countryside Zone) and C20 (Redundant Glasshouses). The appeal against this refusal was heard by the Royal Court on 29 February 2012.

In its judgement, issued on 8 May 2012, the Court allowed the appeal, quashed the refusal decision and remitted the case back to the Minister for further consideration. The Court found that the Panel's refusal on grounds that the glass was not redundant or derelict was both mistaken and unreasonable; the reason for the Court's remittal back was that the Panel, in refusing the application, had only considered the first part (the redundancy issue) of the key relevant policy of the 2002 Island Plan (Policy C20 – 'Redundant Glasshouses') and had not addressed the remaining requirements of that policy. The Minister's recent (March '13) decision follows on from the Court's (May '12) remittal back.

This application and appeal process has been the subject of prolonged delays, and a resultant complication is that, following the lodging of the appeal in January 2011, and prior to the Court hearing in February 2012, the States Assembly approved the 'new' 2011 Island Plan on 29 June 2011.

The Royal Court, in allowing our appeal and deciding to remit it back, was mindful of these circumstances and accordingly in its judgement issued advice on this matter for the Minister's required further consideration of the application.

This advice was that, although in law (under Article 19 (2)), the application now falls to be determined under the 2011 Plan, the Court is of the opinion – having been informed by our lawyer in Court that the application would not comply with the new Island Plan, and having taken into account the long delay in the processing of the application and the fact that the Panel acted unreasonably in its decision, that: '***the Minister may feel that as a matter of procedural fairness he would be justified in departing from the requirements of the 2011 Island Plan (under Article 19 (3)) to the extent that it imposes hurdles which did not exist under the 2002 Island Plan'.***

Summary basis of appeal

As previously explained, the Minister has now refused permission (March 2013) on grounds of non-compliance both with the 2011 Plan (five reasons) and 2002 Plan (two reasons).

Our broad contentions with this appeal can be summarised as follows:

(i) That for reasons set out in the Notice of Appeal and this affidavit plus enclosures, the Respondent's decision to refuse permission under the 2002 Island plan is unreasonable having regard to all the circumstances of the case; and that the proposal complies with the 2002 Plan; and

(ii) That the Appellant Company acknowledges that the proposal does not comply with the 2011 Plan, and indeed this was made clear by our lawyer at the February 2012 Court hearing. However, on the basis of our contention that the proposal complies with the 2002 Plan, and taking into account the background circumstances and delays involved with this case, to include the fact that the previous refusal was found to be unreasonable by the Court and remitted back, together with the Court's guidance on the issue of procedural fairness, then permission should be granted as a suitable departure to the 2011 Plan; and/or that, irrespective of any procedural constraints in departing from the 2011 Plan, and given the extent of the Respondent's delays in dealing with this case under the 2002 Plan, permission should in any event be granted on the basis of procedural fairness. And accordingly the Respondent's decision to refuse permission for reasons 1 to 5 regarding failure to comply with the 2011 Plan is unreasonable having regard to all the circumstances of the case.

Before summarising the recent site history (in Part B) I wish to (a) briefly clarify the position regarding the site area of the proposed housing and the existing planning conditions: and (b) briefly recap on the 2002 Island Plan policy context, since Mr Jones' affidavit only explains the 2011 Plan context.

Clarification of proposed housing area and existing planning conditions

The site location plan in Mr Jones' affidavit (at CJ1/2) does not make clear which part of the site is proposed for housing. I therefore enclose (at JCS1/2) a site location plan which shows the site area for proposed housing edged in red, with the remainder of the nursery site edged in blue.

As part of the application proposal, all existing glass within the area edged in blue, together with the polytunnels in the north eastern part of the site, would be cleared and returned to open land.

At the end of para 39 of his affidavit Mr Jones states that '*some of the current structures were approved subject to conditions requiring their removal once they are no longer in use'…* and '*that there is no reasonable argument for development in their place as an enhancement'.*

For the avoidance of doubt:

(i) The structures he refers to (as covered by the 'disuse' condition) are just the polytunnels in the north-east part of the site, which are being removed anyway; and

(ii) There are no disuse/removal conditions in respect of all other buildings, structures and glasshouse blocks on the site.

The 2002 Island Plan

Zoning

On the 2002 Island Plan, most of the application site falls within the Countryside Zone; the south east corner of the site, to include the existing shop and packing shed, lies within the Built-up Area.

A location plan showing the site in relation to the Built-up Area and Countryside Zone boundaries is enclosed at JCS1/3).

The relevant Island Plan polices are as follows.

Policy H8 (Housing Development in the Built-up Area)

Under Island Plan policy H8 there is, in short, a presumption in favour of new housing development being permitted within the Built-up area boundary.

Policy C6 (Countryside Zone)

Under Island Plan Policy C6, there is a 'general presumption' against new housing development being allowed in the in the Countryside Zone.

Policy C20 (Redundant Glasshouses)

Policy C20 thereafter deals with redundant glasshouse sites in the countryside. The policy begins by outlining a presumption against the development of redundant and derelict glasshouses for non-agricultural purposes – this fitting in with preceding Policy C6. However, C20 then goes on to state that, in exceptional circumstances, the development of redundant glasshouse sites for non-agricultural development may be permitted (as an exception to the overriding presumption against development in the countryside) provided that the development can comply with seven listed planning criteria.

First and foremost of these criteria (criteria no (i)) is a requirement that the development can be 'successfully integrated with the built-up area' of St Helier or an urban or key rural settlement'. This requirement effectively rules out nearly all other glasshouse sites in the Jersey countryside for non-agricultural development, but not the De La mare Nurseries site. The remaining 6 criteria mainly concern general planning requirements covering such matters as visual impact, traffic and drainage implications, etc. The policy then states that '*Proposals which do not satisfy these criteria will not normally be permitted'.*

A copy of Policy C20 is enclosed herewith (at JCS1/4).

PART B – RECENT SITE HISTORY

The recent site history, in the form of a summary timeline, is as follows:-

June 2007	- with the decline of the De La Mare Nurseries business due to changing economic circumstances, the owner Mr Roy Smith, who had worked on and managed the nursery for 35 years, sought advice from a planning consultant (MS Planning) regarding possible alternative uses. - Consultant opined that scope for a residential development under Policy C20 of 2002 Island Plan in that, although this policy outlines a presumption against redevelopment of redundant glass generally, it makes allowance for non-agricultural development alongside defined settlement areas, which applies in this instance. - MS Planning thereafter submitted pre-application enquiry to Planning.
September 2007	- Planning Director response letter 17/9/07 advising that the Minister would not grant permission for development on this site in advance of the Island Plan Review, '***notwithstanding Policy C20 of the 2002 Island Plan'*** (copy of letter enclosed at JCS1/5***).*** At that time, there were no publications regarding any Island Plan 'review'.
♦ 2008	- With the pending forced closure of the business, and on the basis of the approved 2002 Plan polices, Mr Smith decided to pursue a residential application and entered into a partnership with a local developer (forming company JK Limited).
Sept to Dec 2008	- Nursery closed down on a phased basis. Mr Smith the last person in the Channel Islands to grow flowers for a living.
November 2008	- Planning application submitted for development of 46 dwellings (31 houses and 15 apartments). Scheme comprising high quality layout and design with wide mix of accommodation, including high proportion of one and two bedroom units.
January 2009	- Following meeting with Planning Officer, Architect submits revised site layout plan incorporating amendments to car parking arrangements.
Feb to Sept 2009	- Following submission of plan amendments, no Departmental response or even acknowledgement to

	architect's repeated emails, phone calls and two letters (18/6/09 and 6/7/09) – this over a full 7 month period.
September 2009	- Meeting 8/9/09 between Case Officer (plus 2 other officers) and myself, Mr Smith and our architect. Officers raised additional detailed layout concerns (this being 10 months after submission) and suggested that layout should be further amended or alternatively application could be dealt with as an 'outline' application, with detailed layout treated as a reserved matter. Applicant agreed to 'outline' option to avoid further delays. - When questioned about the delay and lack of response to the previous amended plan, emails etc., (over 7 month period), Case Officer offered no explanation or apology and commented ' *I was not in a position to have a conversation with you'.* My file note of this meeting is enclosed at JCS1/6.
September 2009	- Minister publishes Draft Island Plan Review (25/9/09) for public consultation – which includes proposed rezoning of a large part of the site for Category A housing. Draft Plan describes the site as comprising 'redundant glasshouses'.
November 2009	- 12 months after submission of the application, permission refused by Planning Applications Panel on grounds (i) that the Minister does not accept that the glass is wholly redundant and derelict, plus that the proposal extends into an area of polytunnels, contrary to Island Plan Policy C20; and (ii) insufficient information to demonstrate no adverse impact on nearby ecological SSI.
December 2009	- Appeal to Royal Court lodged but thereafter stayed pending submission and outcome of a revised application (the current application) involving a reduced site area (and excluding polytunnels area).
January 2010	- Current application submitted – outline application for 25 dwellings with remainder of glass returned to open land.
July 2010	- Notwithstanding that the application is for Category B housing, and mindful of the proposed rezoning in the Draft Island Plan Review for Category A housing, applicant offers compromise proposal whereby part of proposed housing would be for first-time buyers. Offer declined by Minister.

August 2010	- In response to enquiry by applicant about delays in determination of application, Department advises that this is because legal advice is being sought.
December 2010	- Fully 12 months after submission of application, permission refused on grounds that Minister does not accept that the glass is wholly redundant and derelict and is therefore contrary to Island Plan Policies C1, C6 and C20.
February 2011	- Appeal to Royal Court against refusal decision.
June 2011	- With the Royal Court appeal pending, 'new' 2011 Island Plan approved by States Assembly on 29 June 2011. - 2011 Plan shows most of the site in Green Zone, with small part in the Built-up area. In short, application proposal does not comply with new Island Plan polices NE7 (Green Zone) and ERE7 (Derelict and Redundant Glasshouses). However, this application was submitted, determined and appealed under the 2002 Plan.
February 2012	- Royal Court hearing into appeal held on 29/2/12.
May 2012	- Royal Court judgement delivered. Court allowed appeal, quashed refusal decision and remitted the application back to the Minister. Court found that the refusal on redundancy and derelict grounds was unreasonable. Remittal back because Panel had only addressed first part of Policy C20 (redundancy) and not the remaining requirements of the policy regarding required compliance with seven listed criteria and exceptional circumstances issue. - Royal Court issued advice to Minister regarding procedural fairness given the long delays and the subsequent approval of 2011 Plan.
July 2012	- Following Royal Court judgement, Department wrote to applicant by letter dated 23/7/12 advising that, prior to Minister's consideration, applicant needs to provide further information to justify how the application now complies with 2011 Plan (this despite it being made clear by our lawyer in Court that the application would not comply with 2011 Plan, and despite Royal Court advice on procedural fairness).
August 2012	- Applicant response letter 10/8/12 explaining that, as a result of the Court's findings, a full supporting Planning Statement will be submitted, with a request that this be

	taken into account when the Minister determines the application.
August 2012	- In parallel with the above, and following discussions between the applicant and the late Connetable and local Deputy, applicant submits a further compromise proposal to Department and Minister – that if permission was to be granted, applicant would be willing to enter into a legal Planning Agreement requiring that all 25 dwellings would be for Category A first-time buyer and over 55's homes. Connetable and Deputy had indicated their support for this. This conveyed to officers at meeting on 14/8/12.
September 2012	- Applicant submitted Planning Statement in support of application on 22/9/12 (copy of Planning Statement enclosed at JCS1/7).
October 2012	- Meeting 26/10/12 with Minister and officers, at which Minister advises he will not support Category A housing on the site because contrary to new Island Plan and such needs can be met elsewhere. - Minister advises that he might support a revised proposal for 12 houses (not stipulating Category A) accessed off private road Paddock End – this subject to retention of the more modern area of glass and remainder cleared.
November 2012	- Applicant's letter dated 22/11/12 advising Minister that Paddock End residents would not permit access off this private road. Reminded Minister that most residents do not object to the submitted application proposal with access off the main road – and that only 3 objection letters had been submitted from the entire neighbourhood. - Requested Minister to consider application as soon as possible, as directed by the Court.
January 2013	- Applicant's letter dated 22/1/13 to Department, expressing concern that application still not considered by Minister as required by the Court, and including further supporting information re Policy C20 rationale in the context of strategic polices – with request that Minister takes this into account (copy of letter of 22/1/13 enclosed at JCS1/8).
February 2013	- Some 8 months after the Court judgement, the Minister requested that, prior to consideration, application should be readvertised. Application readvertised and only 3 objection letters received from local residents

	(as had been the case following the original advertisement).
March 2013	- Minister considered application at public hearing on 8 March 2013 and refused permission on grounds of non-compliance with both 2011 and 2002 Plan polices. - Refusal Notice issued on 26 April 2013. One of refusal grounds under 2002 Plan concerned non-acceptance by Minister that all the glass is redundant and derelict.
May 2013	- Notice of Appeal to Royal Court served 22 May 2013.
July 2013	- Minister publishes '2011 Island Plan: Interim Review 1 – Sites for Category A affordable housing' – for public consultation. Includes proposed rezoning of the De La Mare Nurseries site for Category A housing (same site area as current appeal site), comprising 80% social rented homes and 20% affordable homes. - Supporting documentation describes site as comprising 'redundant glasshouses' – this despite the refusal notice (issued 3 months earlier) stating that the Minister does not accept glass as being wholly redundant.

This concludes the recent site history. I now turn to the Minister's reasons for refusal of this application and why the Appellant submits that the refusal decision is unreasonable.

PART C – REFUSAL GROUNDS UNDER THE 2002 ISLAND PLAN

First ground for refusal

There are three parts to the first reason for refusal under the 2002 Plan, namely, (1) that the Minister does not accept that all the glass is redundant or derelict; (2) that 'no information' has been provided to demonstrate and address visual impact and enhancement of the site together with traffic and highway safety implications, and, also if mains drainage is available; and (3) that 'accordingly' (i.e. on the basis of the aforementioned lack of information) no exceptional circumstances have advanced to outweigh the policy presumption against development on redundant glasshouse sites '*in compliance with all the requirements of Policy C20'.*

Dealing with each of these in turn.

(1) Non-acceptance by the Minister that all the glass is redundant or derelict.
The Applicant submits that the refusal on this ground is unreasonable for the following reasons:-

(i) That the Court in its judgement of 8 May 2012 found that the Respondent's previous (December '10) refusal on this basis was both mistaken and unreasonable. The Court noted that the Planning Applications Panel, in incorrectly reaching the view that C20 required the glass to be 'both redundant and derelict', had not gone on to consider redundancy, but found that, in any event, refusal on such ground would be unreasonable given:

(a) the clear advice from the Land Controls Section (following the standard required 3 month advertisement process) that the modern glass was redundant; and

(b) that the Minister was content to rely on the Land Controls advice regarding redundancy for the purposes of his published Draft Island Plan 2009 where, in proposing the rezoning of the site for Category A housing, the site was described as comprising 'redundant glasshouses'.

It is telling that, in Mr Jones' affidavit, he includes just one sentence (at para 57) regarding the Court's judgement on the redundancy issue, and this in itself is misleading in that he only states that the Court concluded 'that the redundancy of the glasshouses was not adequately considered', but does not go on to refer to the Court's conclusion that the refusal on redundancy grounds would have been unreasonable anyway.

(ii) The Appellant submits that, in refusing permission for this reason, the Minister has effectively considered the application as though it is an entirely 'fresh' application and without due and sufficient regard to the

background circumstances of this case, in particular the Royal Court ruling on redundancy and its associated remittal back in the context of a statutory appeal.

(iii) That even if the Minister was at liberty to disregard the previous Royal Court findings and consider the application and redundancy issue 'afresh' (as if a new application), the refusal on this ground is still unreasonable in that, just 3 months after issuing the refusal notice, and with the current appeal proceedings on-going, he has published the '2011 Plan Interim Review' (July 2013) which includes the proposed rezoning of this site for Category A 'affordable housing' and, in the associated documentation, he again describes the existing glass as comprising 'redundant glasshouses'.

The Applicant submits that, under the above circumstances, and having particular regard to recent events, the Minister's decision on this ground is not just unreasonable but is grossly unreasonable.

(2) <u>That 'no information' has been provided to demonstrate and address visual impact/site enhancement, traffic generation/ highway safety and 'if mains drainage is available'.</u>

The Appellant submits that refusal on this ground is again grossly unreasonable for the following reasons.

(i) That there was sufficient information and material before the Respondent to assess the specified planning matters – and hence also enable assessment of the application against the seven C20 criteria. This on the following basis:-

<u>Visual impact</u>
Although this is an outline application, it includes sufficient information and material to assess the issue of visual impact and enhancement of the area in that:

- The indicative site layout plan shows the arrangement of the buildings and open spaces on the site and the boundary and extent of the proposed housing development on the site;
- The sample elevations illustrate the design approach together with the scale and massing, comprising a mix of 2 ½ and 3 storey buildings around a central village green;
- The contextual plan shows the site and layout in relation to the existing adjacent development, showing how the proposal integrates with the adjacent built-up area;
- The supporting Planning Statement explains that the existing glasshouses on the remainder of the site, to include the large glasshouse block on the most prominent and sensitive western part of the site, will be cleared and returned to open land, thus resulting in a substantial visual improvement for the area.

Furthermore, the Minister's previously published Draft Island Plan Review (Sept 2009), in previously proposing this same site area for Category A housing, with the remaining glass removed, referred to a 'resultant visual improvement' – this statement being made without any plans whatsoever.

Traffic and highway safety issues

With regard to information on this matter, the Respondent is aware that the application immediately follows on from (and is effectively a revision to) the preceding application for a larger scale development of 46 dwellings on the site, and that a full Traffic Assessment Report had been submitted with the preceding application, with the support and approval of the highway authority (TTS Highways).

This application proposal is for (a lesser number of) 25 dwellings accessed directly off the main road La Rue a Don, in the same access position as the preceding application, as indicated on the indicative site layout plan and explained in the Planning Statement which was before the Respondent.

In these circumstances, to refuse permission on the grounds of lack of information on traffic issues is unreasonable. Even if the Department and Minister had requested a further Traffic Assessment Report (which they didn't) this would have been bureaucratic in the extreme.

Furthermore, had the Department and Minister been fundamentally concerned about any highways constraints, they would not have been recommending and proposing this same site area for Category A housing either in the published (September '09) Draft Island Plan Review – with a potential stated yield of 25 to 37 dwellings – nor in its published (July '13) 2011 Plan Review – with a potential started yield of 40 to 50 dwellings, which is up to twice the number of units of this application proposal.

Availability of mains drainage

With regard to the lack of information on this matter, it is clear from the consultation response from TTS Drainage that mains drains is available, that the public pumping station to which the site is connected does not have sufficient capacity to cater for the development, but that '*a technical solution is however available subject to contributions from the developer'.*

The Planning Statement explains that the Applicant has been in contact with TTS Drainage on this matter.

It is reiterated that this application is for outline planning permission and, as explained in the Planning Statement, it is submitted that the drainage matter can reasonably be dealt with by a condition of the

permit – such condition reserving approval of further details on foul drainage and requiring that no development can commence until the required foul drainage improvements have been agreed and implemented to the satisfaction of TTS Drainage. The TTS requested contribution of funds can be dealt with by a Planning Obligation Agreement.

Again, if there was an insurmountable drainage constraint the Department and Minister would not have been recommending the rezoning of this same site area for Category A housing.

On the basis of the above, it is submitted that the refusal ground on lack of information on each of the aforementioned matters is unreasonable. It is further submitted:

(ii) That even if there was insufficient information to enable reasonable assessment of these matters, the refusal on this ground is further unreasonable in that, if the Respondent was minded to refuse permission on this basis he should have first , prior to determining the application, requested and provided the opportunity for the applicant to submit further information, this especially given that:

(a) the whole reason for the Court's remittal back was for the Minister to address the application against the remaining requirements of Policy C20;

(b) that following the Court's remittal back, the Department actually wrote to the applicant (letter dated 23/7/12 enc JCS1/9) requesting further information to justify the application under the **2011 Plan polices** (this despite it being clear to both parties that the proposal does not comply with the new Island Plan) but did not in this same letter or at any time thereafter request the applicant to provide further information to justify the application against the C20 criteria under the **2002 Plan**; and

(c) at the 8 March 2013 public hearing, the applicant/owner Mr Roy Smith, made a specific request to the Minister that, if the application was to be refused, the Minister should make it clear in the refusal notice which of the C20 criteria, if any, were not considered to be complied with – this to avoid any further Court remittal back in the event of a further appeal!. This however was not done. NOTE: Minute of 8/3/13 hearing merely records at the end that …' *On a related matter, the Minister acceded to a request from the applicant for a written statement outlining the reasons fort refusal'.* (ref. enclosure CJ1/1 with Jones affidavit).

The Appellant submits that, in any event, there is no need for any further information to enable reasonable planning assessment – this for the reasons outlined in point (i) above. The Appellant further contends that the refusal ground on lack of information

on visual impact, highways and, 'if mains drains are available' is so weak that this, in conjunction with various other circumstances relating to this case (listed below) demonstrates that the Department and Minister are aware that this application complies with all seven C20 criteria and that this is the whole reason why – given the separate 'parallel' issue of the (then) emerging new Island Plan and their own alternative plans for the rezoning of the land – they have taken so long and struggled with this application. The listed other circumstances being as follows:

(i) that in September 2007, at the pre-application stage, the Director of Planning stated in writing that the former Minister would not approve a proposed residential development on the site '*notwithstanding Policy C20 of the Island Plan'* (and not because it was contrary to Policy C20). The seven C20 criteria concern basic planning requirements, and had the Minister and Director considered it was contrary to any of these they would surely have said so at that stage.

(ii) that in refusing the first (Nov '08) application, the Respondent had gone beyond the 'first stage' of looking at redundancy, in that permission was also refused on grounds of extension into the polytunnels area and also because there was insufficient information to demonstrate no adverse impact on the nearby ecological SSI (which relates to criteria no. (iii)). If the Department considered that there were reasonable grounds for refusal in relation to the other criteria (or lack of information on these other criteria), they would and should have included them at that stage.

(iii) that in discussions between the applicant and Director of Planning in the July 2010 period, the Director advised that he was prepared to support the applicant's suggested compromise proposal (and refer it to the Minister) whereby part of the proposed housing would be for first-time buyer homes. Had the Director considered the application proposal to be non-compliant with any of the C20 criteria he would surely not have supported the compromise proposal, especially when there was at that time a published Draft Island Plan on the table proposing the rezoning of the land.

(iv) that the Respondent only sought legal advice (on the interpretation of the reference to exceptional circumstances under Policy C20) at a very late stage in the application proceedings (August 2010) – this being 22 months after submission of the first application, 7 months after submission of the second application and shortly after the Minister had declined the offer of a compromise proposal.

One could reasonably assume that this again was because the Respondent realised that, with the refusal grounds on the first application (regarding extension into the polytunnels area, etc.) being overcome with the amended/revised site area, the Respondent realised that permission could not reasonably be refused on grounds of non-compliance with the 7 criteria, and accordingly was seeking advice on whether the reference to exceptional circumstances in C20 could be construed as a 'separate' test.

(v) Most importantly, the 7 criteria under C20 concern fundamental and basic planning requirements for any new housing site/development, and the Respondent would not have been proposing this same site area for Category A housing in the Draft 2009 Island Plan Review nor for Category A housing in the recent 2011 Plan Interim 'Review if it did not comply with these same criteria.

In summary, I submit (a) that there was sufficient information before the Respondent to assess the above planning matters against the C20 criteria; (b) that if the Respondent considered there was insufficient information, he should have requested such information before determining the application, especially given that this was one of the reasons why the Court remitted it back; (c) that for reasons outlined in the supporting Planning Statement (which was before the Minister) the proposal complies with all 7 criteria; and (d) that the circumstances outlined in points (i) to (v) above collectively demonstrate that the Respondent was aware that the proposal complies with all 7 criteria and, for this reason, and given all the circumstances of this case, there is no reasonable justification for the Court to remit the application back yet again on this matter.

Comments on Mr Jones' affidavit re. Respondent's assessment of C20 criteria.

Paragraph 57

At para 57, Mr Jones states that the Royal Court judgement does not address whether the seven C20 criteria are met and ' *it certainly does not conclude that they have been met'.* (The reason for this of course is because the Applications Panel had not previously addressed the criteria, which is the whole reason for the Court's remittal back!). Mr Jones then states that … '*This therefore was also for the Minister to consider, and again this has been done'.*

In response I would comment that, if it has 'been done' it has not been done properly and reasonably. To do so would have required the Respondent to clearly outline in the refusal notice which of the C20 criteria he considered were not complied with, as indeed Mr Smith requested at the public hearing.

To instead refuse permission on grounds of lack of information, especially without first requesting such information, is I submit not only unreasonable but, taking into account all the other circumstances, is a deliberate attempt to side-step the issue, and I would further submit that this again is because the Respondent knows that permission cannot reasonably be refused on grounds of non-compliance with any of the criteria.

Paragraph 67

At paragraph 67, Mr Jones takes a slightly different line to the refusal notice in that, instead of referring to the issue of 'no information' he simply states that the '*application failed to demonstrate'* how the proposal ….. '*would not unreasonably impact on the character and amenity of the area*' and '*failed to adequately demonstrate that drainage and highways issues could be addressed'*

I consider this again to be a deliberate 'fudging' of the issue. If the Department and Minister had concerns and objections on these grounds they could and should have simply refused permission on grounds of (1) unacceptable visual impact on the character of the area, contrary to criteria no. (ii), (2) unacceptable traffic and highway safety implications, contrary to criteria no. (iv); and (3) lack of adequate mains drainage facilities, contrary to criteria no. (vi). Our appeal response would then have been that such refusal grounds are untenable on the basis of the points outlined under the previous respective headings *visual impact, traffic/highway safety* and *availability of mains drainage.*

Procedural point regarding 'outline' application.

On a procedural point, I wish to briefly refer to the Minutes of 8 March 2013 hearing which, in partly quoting from the Officer's Report, states that…. '*the application still failed on grounds that the submitted scheme was in outline and that insufficient information had been provided..'*

With regard to the 'outline' application issue, I make the following points:

(a) Firstly, even though this is an outline application, there was sufficient information to enable reasonable assessment of the specified planning issues – this for the reasons explained in (2) (i) above.
(b) The seven criteria against which the application needs to be assessed under C20 are broad-based and not detailed planning criteria;
(c) The fact that this is an outline application does not prevent the Department, if it sees fit, from requesting further required information to enable reasonable assessment against the policies.

On this basis I submit that the reference to the 'outline' issue is a red herring.

Supplementary note re. information accompanying preceding Nov 08 application

It is relevant to briefly refer to the information contained in the 'first' November 2008 application (from which the current application immediately 'follows on') and the procedural circumstances of that application.

The November 2008 application was a full detailed application for the development of 46 dwellings (31 houses and 15 apartments) on the site. This application was accompanied by:-

- a site layout plan and full detailed elevations of all dwellings
- a detailed schedule of house types/bedroom numbers
- aerial visual image of proposed development
- contextual site layout plan showing how the development integrated with the adjacent built-up area
- a Design Statement explaining the design philosophy and principles
- a Planning Statement explaining the agricultural circumstances/forced closure and how the application complied with the 2002 Island Plan, to include Policy C20 and the listed criteria

- a Waste Management Report
- a detailed Traffic Assessment Report – which was submitted to and approved by TTS Highways during the application process

The point I wish to make is that the same officers who dealt with the 'first' November 2008 application also dealt with the current appeal application, which was effectively a revision of the first application (involving a reduced site area and lesser number of units) and hence, in their assessment of this 'second' application, they were familiar with all the previous submitted details and planning issues and not 'new' to the case.

NOTE: At a late stage in the proceedings of the first Nov '08 application and as a result of detailed layout concerns raised by the officers (these concerns raised 10 months after submission of that application) we agreed to the officers' suggestion that, rather than further amend the detailed plans the application could be considered by the Panel as an 'outline' application with detailed layout and design treated as 'reserved matters'. We agreed to the suggested 'outline' option to avoid further delays, but for reasons separately explained in attached Appendix A were totally misled on this matter. The point remains that the Department's officers had before them all the above listed information and material to enable a full and proper assessment of that application.

I mention the above for completeness and so that the Respondent's consideration and determination of the current application can be seen in context.

(3) Respondent's refusal on ground that – on the basis of the stated lack of information (on visual impact, traffic and mains drainage) … 'accordingly no exceptional circumstances have been advanced to outweigh the general policy presumption against new development on such a site'… in compliance with the required criteria of Policy C20 of the 2002 Island Plan.

The Court will recall that one of the issues addressed in its May 2012 judgement was the interpretation of C20 with regard to the reference to exceptional circumstances – specifically whether the 7 listed criteria collectively constitute the exceptional circumstances allowing permission to be granted or whether the exceptional circumstances is a separate stand-alone test.

Although the Department's original intention in formulating Policy C20 was that the 7 criteria collectively constitute the exceptional circumstances the Court concurred with the view of the Solicitor General, construing the policy as written as allowing the Minister to retain a discretion even if the criteria are met. However, in so doing the Court also stated that '*he (the applicant's lawyer) is right to say that if the criteria are met then permission* ***will normally be granted*** *but the Minister retains a discretion'* (emphasis added).

The first point I would make on the exceptional circumstances issue is that the Respondent's reason for refusal, as stated on the notice dated 26 April 2013, is **not** based on his views that, aside from compliance or otherwise with the listed criteria, there are insufficient exceptional circumstances to justify granting planning permission. The refusal notice does not say this. The reference to exceptional

circumstances in the notice solely and directly relates to the issue of insufficient information to satisfactorily demonstrate compliance with visual impact, traffic and drainage requirements.

This appeal is against the Respondent's decision to refuse permission for the reasons specified on the formal notice dated 26 April 2013. Indeed, Mr Jones' affidavit, at paragraph 54, states that '*The Respondent refused the planning application as specified on the formal notice dated 26 April 2013'.* For this reason the Respondent or his representatives cannot now reasonably argue 'after the event' that, even if it was conceded that the redundancy and listed criteria hurdles had been overcome, the proposal fails to meet the separate exceptional circumstances test under Policy C20 of the 2002 Plan.

I would also remind the Court that the Respondent's previous refusal notice on the November 2008 application includes reasons which went beyond addressing redundancy but did not separately state that there are insufficient exceptional circumstances to justify granting permission.

If an application for planning permission is refused, my understanding is that the Planning Authority (in this case the Minister) is required to provide full and clear grounds for the refusal on the decision notice, and the Department and/or Minister cannot thereafter, in the event of a challenge, raise other reasons for refusal on the basis that they did not think of them at the time or did not go on to consider them.

Having made this point, the Appellant submits that, <u>even if</u> the Respondent had refused permission on grounds that there were insufficient exceptional circumstances to grant permission, then refusal on such ground would still be unreasonable on the basis that insufficient account has been taken of the applicant's submitted Planning Statement which was before the Minister and which not only demonstrates how and why the proposal complies with all 7 of the C20 criteria but also advances further exceptional circumstances to justify granting permission. These further exceptional circumstances being as follows:-

1) <u>Compliance in itself</u>
   Firstly, the compliance with the 7 listed criteria in itself makes this case exceptional. In this respect, virtually no other glasshouse site on the Island can comply with all 7 criteria. At best there are no more than two other sites, and it is questionable that these could comply with criteria no (i) regarding required 'successful integration' with a defined settlement area. This of course excludes those glasshouse sites which are <u>specifically zoned</u> as sites 'for further consideration for Category A housing sites' (H3 sites) or 'safeguarded for future Category A housing need' (H4 sites) under the 2002 Island Plan, **which is not the case with the De La Mare Nurseries site.**

2) <u>Substantial environmental gain</u>
   In addition to compliance with all the criteria, the proposal involves a substantial visual improvement with the associated removal of a very large area of glass on the most prominent and sensitive western part of the site. This, together with the layout and design of the replacement development on the south-east area of the site, will actually enhance the Countryside Zone.

It is reiterated that the Minister's Draft Island Plan document (Sept '09), in proposing this same site area for Category A housing, with the remaining glass to be removed, referred to a resultant visual improvement.

Hence this is a further 'exceptional ground' to grant permission under Policy C20.

3) Site partly within Built-up Area
   Unlike other glasshouse sites throughout the countryside Zone, a small part of the site actually lies in the defined Built-up Area, further making this case exceptional.

Given the combination of these circumstances, a question raised in our supporting Planning Statement was – 'what other exceptional circumstances are there?' In the Planning Statement we submitted that the Department and Minister cannot reasonably argue that exceptional circumstances under C20 should include only proposals for 'Category A' housing – our argument being that, because this is such a fundamental planning issue, any such requirement should have been referred to within Policy C20 itself (within the listed criteria), or alternatively the site should have been specifically zoned or 'safeguarded' under the 2002 Plan for Category A housing. However, neither of these circumstances apply.

Notwithstanding the preceding point regarding Category A housing, we have now put forward (in our Planning Statement following the Court judgement) a further offer of a compromise solution whereby, if the proposal was supported, we would be prepared to enter into a Planning Obligation Agreement requiring that all 25 dwellings would be for Category A first time buyer homes or a mix of first time buyer and over 55's homes – this following discussions with and the support of the late Connectable and local Deputy. In the context of Policy C20, this is another 'exceptional circumstance' to take into account.

Whilst the Court has advised that the Minister retains discretion even if all 7 criteria are met, I submit that such discretion has to be applied reasonably, especially when considered in association with the further exceptional circumstances which have been advanced in this instance. I would also refer back to the Court's statement that '*he (the applicant's lawyer) is right to say that if the criteria are met then permission will* ***normally*** *be granted'*.

Policy C20 in the context of 2002 Island Plan Strategic Polices

A further question raised in our Planning Statement was - 'if an application proposal which complies with all 7 criteria and which also includes the above exceptional circumstances is not supported, then why have Policy C20 in the first place?'

Having further read the 2002 Plan following the Royal Court judgement, I would suggest that, to fully understand the rationale for C20 one has to read this policy not just in the context of the associated preamble but also in the context of the 2002 Plan as a whole. I would submit that this further strengthens the argument that there is a strong presumption in favour of development when the C20 criteria are satisfied.

In short, Policy C20, in presuming against development of redundant glasshouse sites throughout the countryside generally and only allowing redevelopment alongside defined settlement areas, fits in entirely with the strategic policies of the 2002 Plan, specifically:-

(a) the countryside protection polices – in that C20 presumes against redevelopment of redundant glass in isolated locations in the middle of open countryside and also, by the required compliance with the criteria, ensures the safeguarding of the character and amenity of the area;

(b) it also fits in with the strategic sustainability and spatial strategy polices which underpin the plan and are aimed at directing new residential development towards the built-up area and defined settlement areas where infrastructure and amenities exist (as is the case with the De la Mare Nurseries site), which also results in reduced car journeys and accords with the sustainable transport strategy; and

(c) it fits in with the broader housing policies – in that, in addition to rezoning various sites for Category A housing, the 2002 Plan also recognised the need and made allowance for increased housing provision generally – this by a proposed loosening of the built-up area boundaries to allow for 'windfall' housing developments; in this respect, a housing development on a C20 compliant site would also logically comprise a windfall housing site. Why otherwise make allowance for redevelopment of certain glasshouse sites under C20?

Viewed in this strategic policy context I submit that, under Policy C20, whilst acknowledging that the Minister retains discretion, there is a logical and clear presumption against redevelopment of glasshouse sites throughout the countryside generally but, likewise, if the 7 listed criteria can be satisfied, there is a logical and clear presumption in favour of development – in other words that in these circumstances permission 'will normally be granted', as acknowledged by the Court.

I wrote to Planning to express this view by letter dated 22 January 2013 (enclosed JCS1/10), with an associated request that the Minister takes this into account, along with the other submitted papers, in his consideration of the application.

Procedural Point re Compliance/Departure from 2002 Island Plan

In one of our meetings with the Department, it was suggested by Officers that the proposed scale of development (25 dwellings) in the Countryside Zone would in any event be a departure from the 2002 Island Plan and as such would require rezoning by the States or a Public Inquiry before any permission could be granted.

I submit that this contention is not correct for the following reasons:-

1. The application site is not an open greenfield site in the Countryside Zone, but is a redundant glasshouse site and, as such, Policy C20 applies.

2. If a proposal is compliant with C20 it is in accordance with and not a departure from the Island Plan.

3. It is recognised that, under Policy C6 (Countryside Zone) there is a general presumption against development. However, this is a redundant glasshouse site in the Countryside Zone and, as such, Policy C20 also comes into play.

   Although Policy C20 'sits in' with C6 (and also C5 – Green Zone) in that C20 itself outlines a starting presumption against development, C20 is nonetheless a separate policy (in the same 'Countryside' section of the Plan) which specifically deals with the subject of 'Redundant Glasshouses' in the countryside. The associated criteria outlined in C20 (to justify an exception to the presumption against development in the countryside), are carefully selected criteria which also fit in with the Plan's other strategic polices and in none of these criteria, nor in the remainder of the policy, does it state that only small scale/limited development will be permitted if the 7 criteria are satisfied, nor is there any guidance on permissible quantum of development. The need to comply with the C20 listed criteria in itself ensures that any new development must be in keeping with and not harmful to the character of the area, hence safeguarding the character of the Countryside Zone (ref. in particular criteria no.'s (i), (ii), & (v).

4. Also, under the 2002 Island Plan, the former Committee and Minister have permitted larger scale residential developments on sites of existing commercial buildings in the Countryside Zone and Green Zone without rezoning or a Public Inquiry. Although Policies C5 (Green Zone) and C6 (Countryside Zone) make provision for redevelopment of existing commercial buildings in these zones, this (as with Policy C20) is against a starting presumption against development in these zones.

Supplementary point on issue of scale of development

I recall that at the previous Court hearing, the Solicitor General, in explaining the Minister's position regarding redundant glasshouse sites, referred to a couple of cases where permission had been granted under the 2002 Plan for just one or two houses on the basis of securing removal of the glass and an environmental improvement.

I should mention that in both of these cases, which I seem to recall concern the sites of Trident Nurseries and Le Houge Bie Nursery in St Saviour, the sites are in the middle of open countryside and **do not comply with C20.** Permission was granted as an **exception** to C20 on the basis of securing an environmental improvement and I can understand this. However, these cases are not comparable with this case which, unlike the other two, is located alongside a defined settlement area and can comply with C20.

It cannot reasonably be argued that, if the C20 criteria are satisfied, no more than say one, two or three houses could be permitted in that (a) the policy and associated criteria do not say this and (b) if this was the case Policy C20 need not have been included in the Plan in the first place, because such development could reasonably

be permitted as an exception to the presumption against development as has occurred with these other two cases.

Comments on para 69 of Mr Jones' affidavit re compromise proposal/rezoning issue.

At paragraph 69, Mr Jones states that the Appellant's offer of a compromise proposal for Category A housing first time buyer and over 55's homes 'effectively invites a rezoning of the site which is a matter for the Minister to consider separately'.

In response, the Appellant is not inviting rezoning of the site and I would clarify the basis of this compromise proposal as follows.

The Appellant has been and is of the opinion that, in the context of the 2002 Island Plan under which this application was submitted and initially appealed, it had a reasonable expectation that permission will be granted – this on the basis that the proposal complies with Policy C20 of the 2002 Plan and as such is in accordance with and not a departure from the 2002 Plan and therefore also does not require rezoning. And that, in the context of the appeal proceedings and all the background circumstances and planning delays associated with this case, and also on the basis of the Court's advice on procedural fairness, it should still have a reasonable expectation to receive permission for the proposed development if it is found that the proposal complies with the 2002 Plan.

It is in this context that the Appellant has put forward the aforementioned offer of a compromise proposal – simply for the proposed 25 dwellings to instead be for Category A first time buyer and over 55's homes – this to be done through a Planning Obligation Agreement if permission is granted (and providing of course this is procedurally possible under the Law). This offer still stands.

Second ground for refusal

The second ground for refusal concerns stated non-compliance with Policy C6 (Countryside Zone) in relation to large scale developments and the general presumption against redevelopment of 'modern agricultural buildings and other commercial buildings' unless, in exceptional circumstances, such redevelopment gives rise to substantial environmental gains and a significant contribution to the character of the area. This reason also states that insufficient information has been submitted to demonstrate that the proposed redevelopment of the site would give rise to substantial environmental gains and a significant contribution to the character of the area.

The Appellant submits that this ground for refusal is unreasonable for the following reasons:-

(1) The application does not involve redevelopment of 'modern agricultural buildings and other commercial buildings' in the Countryside Zone, but rather the redevelopment of a redundant glasshouse site in the Countryside Zone,

and as such Policy C6 needs to be addressed also in conjunction with C20 (Redundant Glasshouses) as addressed in the preceding section.

The part of the site which includes 'agricultural and commercial buildings' in fact lies in the Built-up Area part of the site wherein, under Policy H8 (Housing Development in the Built-up Area) there is a presumption in favour of housing development being permitted.

NOTE: The submitted schematic layout for the 'Built-up Area' part of the site is exactly the same as that of the preceding detailed (Nov 08) application plans, which show 5 of the proposed 25 dwellings being accommodated in this area.

(2) With regard to Mr Jones' reference to large scale developments in the Countryside Zone, I have already addressed the issue of scale and the relationship between C6 and C20 – the main point being that because this is a **redundant glasshouse site** in the Countryside Zone, C20 also applies and that, although C20 'sits in' with C6 with regard to the starting presumption against development, it separately and specifically deals with the subject of redundant glasshouses in the countryside and sets out the basis and criteria under which permission may be granted as an exception to the presumption against development; and that there is no mention in C20 that only small scale/limited developments will be permitted if the 7 criteria are satisfied, nor any guidance on permissible quantum of development. And also that the required compliance with the C20 criteria in itself ensures the safeguarding of the character of the Countryside Zone (criteria no's. (ii), (iii) & (vi)).

If it was the case that the application proposal could simply be refused on the basis that it was contrary to a presumption against 'large scale development', the Department & Minister could and would have immediately refused both this and the preceding application on this basis rather than spending two years on them (and requesting legal advice etc.) but they have not done so. Also, the Director of Planning could and would have made this clear at the pre-application stage (September '07) when he explained that the Minister was not supportive of a housing proposal 'notwithstanding Policy C20'.

I would also reiterate that permission has been granted for larger scale developments/numbers of dwellings on sites of existing 'commercial buildings' in the Countryside Zone under the 2002 Plan.

As an example, at the former Bergerac Hotel site at Portelet, although permission for the 'principle' of a residential use (with numbers totally reserved) was permitted under the 1987 Plan, the Respondent subsequently allowed, under the 2002 Plan, the part conversion and part redevelopment of this site for 63 dwellings (44 units by conversion of existing buildings and 19 units by redevelopment/new build).

Although this case, as with the neighbouring Portelet Holiday Village, is not directly comparable with the De La Mare Nurseries site (albeit being more sensitive because it is contrary to the spatial strategy and involves larger new buildings than previous on the headland), I refer to this case just to illustrate

the Respondent's position regarding scale/numbers of dwellings in the Countryside Zone. Although C6 makes provision for redevelopment of existing commercial buildings in the Countryside Zone, this (as with C20) is against a starting presumption against development. The number of 63 units permitted in the Countryside Zone at the Bergerac site is substantially more than the proposed 20 units in the Countryside Zone at the De La Mare Nurseries site (this number excluding the proposed 5 units lying in the Built-Up Area part of the site).

In conclusion on this matter, it is reiterated that Policy C20, which specifically deals with redundant glasshouse sites in the countryside, sets out the basis and criteria under which permission may be granted as an exception to the presumption against development, and that the required compliance with the 7 criteria in itself ensures the safeguarding of the character of the countryside whilst at the same time ensuring compliance with and fitting in with the strategic spatial strategy and housing polices.

For reasons explained in the Planning Statement and preceding section, the Appellant submits that the proposal complies with all 7 C20 criteria whereby permission 'will normally be granted'. And that further 'exceptional circumstances' have been advanced to support the granting of permission in this instance.

Moreover, (and notwithstanding the statement in reason no 2 that insufficient information has been submitted to demonstrate substantial environmental gain), the proposal involves the removal of a large area of redundant glass and its return to open land, and as such will result in a substantial environmental gain and positively contribute to the character of the area.

For all the above reasons the Appellant submits that the application proposal is in accordance with the 2002 Island Plan.

PART D REFUSAL GROUNDS UNDER 2011 PLAN

The affidavit of Mr Jones mainly concerns non-compliance with the 2011 Island Plan**.** The Appellant's position is that we acknowledge that the proposal does not comply with the new 2011 Plan policies, although I should first state that, even under this Plan, the refusal grounds under reasons no. 4 (Spatial Strategy) and no. 5 (insufficient information) are considered unreasonable on the following basis.

Reason no. 4 – Spatial Strategy (Policy SP1)

Policy SP1 is a main strategic policy of the 2011 Plan, and the Appellant contends that refusal on grounds of non-compliance with this policy is unreasonable in that (i) the site is a brownfield site located alongside an existing built-up/settlement area with existing infrastructure, amenities and facilities and (ii) it is also close to the local primary school and a bus stop on the main road.

It is no doubt because of this highly sustainable location that the Respondent has previously proposed, and is now again proposing, the rezoning of the site for Category A housing.

Reason no. 5 – Insufficient information

The Appellant considers that refusal on ground 5 regarding insufficient information on foul and surface water drainage, disposal of waste material from the site, housing mix, Percentage for Art and traffic implications is unreasonable taking into account:

(i) the information submitted with the application;
(ii) the detailed information submitted with the preceding application from which this application (for a reduced site area) followed on; and
(iii) the fact that this is an outline application

The Appellant also submits that the proposal complies with Policy GD1 (as also referred to in reason no. 5) in that it:

- contributes to a sustainable form and pattern of development;
- does not seriously harm the island's natural and historical environment;
- does not detract from the maintenance and diversion of the Island's economy;
- contributes to reducing dependence on the car;
- is of a high quality layout and design.

Non-compliance with other 2011 Plan polices and issue of procedural fairness

The Appellant acknowledges that the application proposal does not comply with the 2011 Plan policies relating to derelict and redundant glasshouses (Policy ERE7) and the new Green Zone policy (Policy NE7).

However, as explained in the preceding sections, this application was submitted and (unreasonably) refused under the 2002 Island Plan, and the Appellant company exercised its legal right of appeal against the Respondent's (December 2010) refusal during the period of the 2002 Plan – the notice of appeal itself being served 6 months prior to the approval of the 2011 Plan on 29 June 2011. **A fundamental point is that, had it not been for the prior unacceptable delays in the Respondent's processing and determination of both this and the preceding November 2008 application, then the 2011 Plan would not now even be an issue for consideration.**

I wish to expand on this point by briefly explaining the implication of the delays against the position which would otherwise have ensued had the applications been processed within reasonable timescales.

Delays and reasonable timescales

(1) The first application was submitted on 14 November 2008, which was over 2 ½ years prior to the approval of the 2011 Plan.
This application took 12 months to determine - being refused on 12 November 2009. I would submit that, taking into account all the circumstances, to include the required 3 month agricultural advertisement process (to demonstrate redundancy), and the required submission and TTS approval of the Traffic Assessment Report, a reasonable timescale for the processing of this application would have been 9 months (this giving generous leeway) – hence resulting in 3 months being unreasonably 'lost'.

(2) The second (current) application was submitted on 19 January 2010, this being just two months after the refusal of the preceding application.
This application again took fully 12 months to determine, being refused on 16 December 2010. I would submit that, given the circumstances (effective revision to preceding application plus fact that the officers were familiar with the site and all planning issues having just spent 12 months on the preceding application), a reasonable timescale for the determination of the application would have been a maximum 4 months – hence resulting in 8 months 'lost'.

(3) In addition to the above, the period between the lodging of our appeal (Feb '11) and the Royal Court hearing (Feb '12) was itself 12 months. This was partly caused by our lawyer requesting directions hearings (regarding procedures if the Minister was to be called for questioning in Court etc.) but I also recall there was an administrative error/delay in the Judicial Greffier's office caused by this appeal being mistakenly confused with a 'stayed' appeal on the first application.
Be that as it may, even allowing for the 12 month period for our appeal to be heard by the Court – then had it not been for the 11 months 'lost' in the processing of these applications the appeal would have been heard in April 2011, which is **prior** to the approval of the 2011 Plan.
If one was to reasonably include just 3 months 'lost' with the Court hearing, the appeal would have been heard in January 2011, which is 6 months prior to the approval of the 2011 Plan.

I consider it is important for the Court to be aware of these timescales in addressing the issue of procedural fairness.

Contentions re. refusal under 2011 Plan/procedural fairness
On the basis of our submission that the proposal complies with the 2002 Plan, the Appellant contends:

(i) that the Respondent's decision to refuse permission on grounds 1 to 5 regarding failure to comply with the 2011 Plan is unreasonable having regard to the Respondent's unacceptable delays and handling of the case during the period of the 2002 Plan and the issue of procedural fairness; and

(ii) that although in law the application now falls to be considered under the 2011 Plan, the Respondent has failed to take into account and/or has taken insufficient account of the 'material consideration' of the background history/circumstances/delays in the determination of the application under the 2002 Plan, together with the May 2012 Royal Court judgement and comments regarding procedural fairness.

Comments on Mr Jones' affidavit regarding procedural fairness

At paragraph 58, Mr Jones refers to the statement in the Court's judgement that the Minister '**may**' feel that as a matter of procedural fairness he would be justified in departing from the 2011 Plan, and he then states that that … '*This however is a matter of judgement for the Minister'.*

I would suggest that the Court's advice to this effect is based on the principles of reasonableness, fairness and natural justice. However, the distinct impression we gained from the Minister and officers at our meeting on 26 October 2012 (following the Court judgment when we put forward our compromise proposal) was that, irrespective of the previous history and delays, all bets were off now that the 2011 Plan had come into force, and that the Minister was now considering this matter afresh. Indeed, the refusal notice itself gives this impression with the statement that '*Had the Minister considered the application under the 2002 Island Plan….* ' (emphasis added). Moreover, the fact that the Respondent did not request further information regarding the assessment of the application against the seven C20 criteria under the 2002 Plan (which is a fundamental issue with this application) further supports the Appellant's contention that the Respondent failed to take sufficient account of the 2002 Plan/site history/Royal Court judgement and was simply refusing permission anyway under the 2011 Plan, when in fact the background circumstances/procedural fairness issue constitute important 'material considerations' in this instance.

At paragraph 59 of his affidavit Mr Jones, having referred to the Court's advice on procedural fairness, states that '*with regard to procedural fairness, however, the circumstances are not on all fours with those discussed in the judgement of Webb v Minister for Planning & Environment and Dixon and Minister for Planning & Environment'.*

I am perplexed on this point in that the Court in its judgement does not refer to these cases nor has our Notice of Appeal referred to them. I am not familiar with these cases but would in any event find it astonishing that **any** other cases could be comparable with this one given the extent of the delays and circumstances associated with this case.

Further comments

On the issue of procedural fairness, I would add my own layperson's view that applicants for planning permission should have a reasonable expectation that their application is dealt with in a timely manner, especially when it involves a large application fee, and should also have a reasonable expectation that their application is going to be determined under the policies applying at the time the application is submitted.

Given the lengthy timescales and circumstances associated with this case during the period prior to the 2011 Plan – then reasonableness and fairness surely dictates that an exception to the 2011 Plan policies is justified if it is found that the proposal complies with the 2002 Plan.

Quite simply, on the basis of the Court's guidance on procedural fairness, the Appellant submits that, if the Court was to find the Respondent's decision to refuse permission under the 2002 Plan is unreasonable, then the appeal should be allowed and permission should be granted.

Procedural point

If the Court was to find that the Respondent's refusal decision under the 2002 Plan is unreasonable and that permission should be granted as an exception to the 2011 Plan on grounds of procedural fairness, a point which will no doubt be raised by the Respondent will be that, notwithstanding the delays in the handling of this case, 'we are where we are' with the new Island Plan and that permission cannot now be granted as an exception to the 2011 Plan without a Public Inquiry.

Given that the issue of the 2011 Plan would not have arisen had it not been for the Respondent's delays and actions in dealing with this case, then in these circumstances this would further compound the procedural fairness problem. Indeed I would suggest that the Department/Minister's delays and actions, viewed in association with their 'parallel' proposals to rezone the land (and now for social rented housing) would in all the circumstances amount to an abuse of power by a public authority and be against the principles of natural justice.

I would therefore hope and suggest that, **if** the Court was to find that the Respondent's decision to refuse permission under the 2002 Plan is unreasonable, then the Court should allow the appeal and use its powers to grant permission irrespective of the constraint of 'departing from the 2011 Plan, and that the granting of permission on the basis of procedural fairness would be perfectly understandable to the public.

In terms of local public interest I would reiterate that, following the Court's remittal back (in May 2012), the Minister required that the application be advertised and only 3 objection letters were received from the entire surrounding neighbourhood; and also that only 3 objection letters had been received following the original advertisement of the application. This lack of objection is presumably because the local public recognise that the application proposal will actually result in a significant visual improvement for the area.

Conclusion

On the basis of all the foregoing I submit that the decision of the Respondent to refuse permission is unreasonable having regard to all the circumstances of the case.

SWORN by the said

JONATHON CHARLES STRATFORD

At St Helier, this_____ day of _____2013

Before me

Advocate

Bedell Cristin
26 New Street
St Helier
Jersey

ENCLOSURES

JCS1/ 1 Refusal notice dated 26 April 2013

2 Site location plan showing proposed housing area edged in red and remainder of nursery site edged in blue

3 Location plan showing site in relation to Built-Up Area boundary and Countryside Zone on 2002 Island Plan

4 Copy of 2002 Island Plan Policy C20

5 Letter dated 17 September 2007 from Director of Planning

6 File note of meeting on 8 September 2009 between Messrs. J Stratford & R Smith and Planning Officers at Planning Department offices.

7 Copy of Applicant's supporting Planning Statement submitted 22 September 2012 (following on from Royal Court judgement)

8 Copy of further supporting letter dated 22 January 2013 from J Stratford to Planning Department