

## **REPORT TO MINISTER FOR PLANNING AND ENVIRONMENT**

**By Graham Self MA MSc FRTPI**

### **Appeal by Mr Alan Massie against an approval of planning permission**

Reference Number: RP/2016/0998.

Site at: Mudros, La Rue Voisin, St Brelade JE3 8AT.

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#### **Introduction**

1. This appeal is against the grant of planning permission for development. The appeal is being decided by written representations. I inspected the site on 27 January 2017.
2. This report first records some points of planning history, then provides a brief description of the appeal site, summarises the gist of the representations, and sets out my assessment, conclusions and recommendation. The appeal statements and other relevant documents are available for you to examine if necessary.

#### **History**

3. The background history of this case includes a refusal of planning permission in October 2015 and a grant of permission in April 2016, before the grant of permission now subject to this appeal. I refer briefly below to the 2015 refusal and then in more detail to the subsequent permissions.

#### **2015 Refusal (Reference P/2015/0993)**

4. The proposal was to demolish the existing bungalow and construct a two-storey two-bedroom dwelling. Planning permission was refused on two grounds, essentially because of the increase in size of the proposed building compared with the existing, the visual impact and design of the building, and conflict with policies NE6, GD1 and GD7 of the Island Plan.

#### **April 2016 Permission (Reference P/2016/0144)**

5. The development described in application reference P/2016/0144 was: "Demolish existing dwelling and construct new dwelling in place". In the decision notice for this application, the development was described as: "Demolish single storey building and construct 1 No. two storey, two bedroom dwelling".
6. The decision notice was issued on 28 April 2016, in response to an application by Mr Harry Bonn dated 2 February 2016. Permission was expressed as granted subject to compliance with the following conditions and approved plan(s):
  - A The development shall commence within five years of the decision date.
  - B The development hereby approved shall be carried out entirely in accordance with the plans, drawings, written details and documents which

form part of this permission.<sup>1</sup>

Condition(s):

1. Prior to commencement of the development on site details of the materials to be used for the exterior cladding of the new unit shall be submitted to and agreed in writing by the Department of the Environment. Once approved the materials shall be implemented in full and thereafter retained and maintained as such.
2. Prior to the commencement of development on site Section 5 of the Planning Document referred to as: the Ecological Assessment Report, shall be implemented in full. Thereafter, the remaining details within the document shall continue to be implemented throughout the phases of development (where applicable) and thereafter retained and maintained as such. Any variations that may be required as a result of findings on site are to be agreed in writing by the Department of the Environment prior to works being undertaken.

**Application and Permission Subject to Appeal (Reference RP/2016/0998)**

7. In the application, the development was described as: "Revision of P/2016/0144 To move propose [*sic*] plan position of previously approved proposed timber 2 bedroom cottage". In the decision notice, the development was described as: "Revised Plans to P/2016/0144 (Demolish single storey building and construct 1 No. two storey, two bedroom dwelling): Alter position of approved dwelling."
8. The application was expressed as seeking detailed planning permission and as an application to discharge matters reserved by a previous outline permission - specified as application reference P/2016/0144.
9. The application was dated 21 July 2016. The decision notice was dated 10 November 2016. Permission was granted subject to compliance with the following conditions and approved plans:

A. This permission solely relates to the revisions described herein.

Condition(s):

1. Prior to commencement of the development on site details of the materials to be used for the exterior cladding of the new unit shall be submitted to and agreed in writing by the Department of the Environment. Once approved the materials shall be implemented in full and thereafter retained and maintained as such.
2. Prior to the commencement of the development on site further details must be submitted to and agreed in writing as detailed within the Natural Environment consultation response of 17.10.16. Once agreed, the details shall be implemented in full and thereafter retained and maintained as such. Following which Section 5 of the Planning Document referred to as: the Ecological Assessment Report, dated March 2015, and the details contained within the Revised Initial Ecological Assessment, dated September 2016, shall also be implemented in full. Any variations that may be required as a result of findings on site are to be agreed in writing by the Department of the Environment prior to works being undertaken.
3. If upon commencement of the works more than three mammals/reptiles/amphibians of any individual species or their roosts/dens/nests are found works shall cease pending consultation with the Department of the Environment, and upon which further survey effort may be

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<sup>1</sup> A list of the approved plans was appended to the decision notice.

required in order to confirm the suitability of the currently proposed mitigation measures.

4. Prior to commencement of the development hereby approved, a scheme of landscaping shall be submitted to and approved in writing by the Department of the Environment.

The scheme of landscaping (to include the marked areas of the residential curtilage) shall provide details of the following;

- i) all existing trees, hedgerows and other plants, walls, fences and other features which it is proposed to retain on the site;
- ii) the position of all new trees and/or shrubs, this must include the species of plant(s)/tree(s) to be planted, their size, number and spacing and the means to be used to support and protect them;
- iii) other landscape treatments to be carried out including any excavation works, surfacing treatments, or means of enclosure;
- iv) the measures to be taken to protect existing trees and shrubs;
- v) the presence of any invasive plant species on site, and if present, a detailed method statement for the removal and long-term management/ eradication of the species; and,
- vi) A landscape management plan for the maintenance of the landscaped areas. Once agreed, the approved scheme shall be implemented in full and thereafter retained and maintained as such.

#### **Procedural Matters Relating to Planning History**

10. The layout of the sub-paragraphs setting out the conditional permissions above is similar to the decision notices, and the content is the same except that I have omitted the stated reasons for the conditions. I draw attention to this here because it seems an odd way of setting out a decision, with the heading "Condition(s)" apparently relating only to the sub-paragraphs numbered 1 and 2, not to those lettered A or B. The conditions labelled with a letter A or B may have standardised wording, but they are just as much conditions as those numbered 1 and 2.
11. As noted above, the application subject to this appeal was stated as seeking (in part) approval of reserved matters following a previous outline permission. As far as I can see from the available evidence, this is incorrect - application reference P/2016/0144 did not seek "outline" permission<sup>2</sup>. Moreover, the position of the proposed dwelling would not be the same as was proposed under the previous application and the application sites are not the same - the later application site is larger than the earlier one and the western boundary has a different alignment. Even though it may have been treated as a so-called "free go" for the purposes of the application fee, and is described in the Department's appeal statement as "seeking to amend an existing planning permission", this later application has to be regarded as a fresh application for planning permission for the construction of a dwelling.
12. I return to these points later when making recommendations.

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<sup>2</sup> Question 8 in the application form relating to this application was answered "Detailed", not "Outline", and there were no "reserved matters". Although the application has been categorised as a "Revised Plans Application", the "revision" of something is not development as defined in the 2002 Law. The development which requires planning permission here is the construction of a new dwelling which is proposed as a replacement for an existing dwelling.

### **Appeal Site**

13. The appeal site is located in an area which has an irregular but generally steep slope down towards the beach at Portelet Bay. Much of the slope is covered in vegetation which consists partly of shrubs or rough scrub and partly pine and other trees. Some dwellings are interspersed along the level land at the top of the slope, though the main feature in this area are the four-storey blocks of what appear to be flats and maisonettes which stand on a site referred to in evidence as the former Portelet Bay Holiday Village. The general appearance of the area is illustrated in photographs submitted in evidence which are in the case file.
14. A single-storey timber-built dwelling stands on the appeal site. The dwelling has two bedrooms, a living room, kitchen, bathroom and toilet. Access to it is along a short length of footpath from a point where there is an area just large enough for parking two small cars, at the end of a track reached from La Rue Voisin.

### **Case for Appellant**

15. The appellant contends that the proposal fails to meet Island Plan policy, and in particular fails three of the four tests under policy NE6. This permits the redevelopment of an existing dwelling where (in summary) the proposal would be within the domestic curtilage of a property, would not be larger than the building being replaced, would not facilitate a significant increase in occupancy, and would give rise to demonstrable environmental gains.
16. The proposed dwelling would be outside the domestic curtilage as defined in earlier applications and would be outside the footprint of the existing building. Policy NE6 provides that there will be the strongest presumption against all forms of development including the change of use of land to extend a domestic curtilage. The floorspace would be on two levels and would be increased. The proposed building would be longer, would have a higher ridge height, and would be more prominent and visually intrusive in local views than the existing building.
17. Vegetation has already been removed from the site and the possible need for additional access would further damage the local environment and wildlife. The poor quality of the application plans makes assessment difficult but it seems likely that the survival of important trees would be affected by root damage.
18. The proposal would be contrary to policy NE1 on conservation and enhancement of biological diversity. The proposal would also conflict with policies GD1 and SP4 because the character and amenity of the coastal national park and green zone would be unreasonably harmed.

### **Case for Planning Authority**

19. The Department and planning committee considered on balance that this proposal was an acceptable amendment to the existing planning permission. The appellant's view that the scheme would not achieve environmental gains is not accepted. The overall development would be sensitive to its context and environment.
20. The demolition of the existing modest dwelling and its replacement by another modest dwelling would not have an unacceptable visual impact. The proposal must be viewed in the context of other development. The redevelopment of the former Portelet Holiday Village north-west of the application site dominates the headland, and in this context the proposal would not have any detrimental impact on the coastal national park.

21. The extent of residential land associated with the house is not prescribed by formal boundary features. The proposed dwelling would partly stand within an area of scrub adjacent to the existing dwelling, but the planning committee noted this on a site visit and considered that with the mitigation proposed, the scheme was an acceptable alternative to the existing permission.

### **Case for Applicant**

22. The applicant submits that the objections raised by the appellant have already been considered by the Department for Environment and planning committee but permission was granted. The existing building is very old and is in need of replacement. Changes have been made in communication with the DoE following decisions on previous proposals. Ground investigations have shown that the position of the dwelling as approved in April 2016 would be unsuitable because of the depth of potentially unstable material above rock. Probe drilling has shown that the location now proposed where the rock head is near the surface would be more secure and sustainable.
23. This is an application by a local family to provide affordable housing. Great care has been taken to safeguard and improve the natural environment. There are numerous examples of development in the coastal national park where much more intrusive development has been permitted.
24. The red line in the application plan was intended to denote the application site, not the curtilage of the dwelling. The property has no fixed physical boundaries and in an area of natural scrub the concept of curtilage as argued by the appellant does not apply. The area around the existing dwelling has been left in a less ornamental state than some others in the area as the applicant's family seek to promote native vegetation, more than offsetting the limited clearance which has taken place with the full knowledge of the DoE.
25. The revised initial ecological assessment which has been carried out was formulated by qualified specialists and demonstrates that environmental gains would result from the development. Trees and other vegetation have already been planted. Other measures which would be taken would enhance the natural environment, to a much greater extent than had been required for other developments in the area. Other developments, notably the Portelet Bay apartment blocks, had caused the removal of numerous trees. The application was not of poor quality; the officer's report commended the applicant's comprehensive response to the comments raised.
26. The proposal would not transgress the requirements of Island Plan policy, but even that were to be deemed so, developments such as the Portelet Bay apartments would be a transgression to a massively larger scale. The visual impact of the proposed building would be minimised because of its location closer to existing structures (including the pumping station and the apartment blocks) than the previous permitted scheme.

### **Representations by Other Parties**

27. The available records indicate that at application stage, about eight written comments were submitted by individuals, either objecting to or supporting the proposed development.<sup>3</sup> I cannot tell whether the persons who submitted these

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<sup>3</sup> I refer to "about eight" here because some representations were made by individuals, some were made jointly by two people and some submitted more than one representation. The dates recorded in the electronic records do not correspond with the dates stated on the representations. I do not know the reason for this, although it seems that the former may be the dates of receipt.

comments are local residents, because the representations are stored electronically and the addresses have been blacked out. The objectors mainly refer to the visual impact of the proposal or its ecological effect on vegetation and wildlife. The supporters consider that a location for the dwelling more structurally stable than the previous scheme would be acceptable and that the proposal should be seen in a positive light.

### **Assessment and Conclusions**

28. The applicant in this case has evidently discovered land stability problems which make it impracticable, or at least very costly, to implement the earlier permission. Under that scheme, the new dwelling would be located more or less in the same place as the existing dwelling, mostly overlapping with the position of the existing dwelling though extending slightly further to the north and a little further (around 1.5 metres) westwards. Under the scheme now proposed, the new dwelling would be located in a different position further to the west, not overlapping at all with the position of the existing dwelling.
29. The design of the proposed dwelling would be essentially the same as the design proposed by application reference P/2016/0144. In the planning officer's appraisal of that proposal, some figures were recorded. These included:
- The total gross floor space of the existing unit is 78 square metres.
  - The total gross floor space of the new unit would be 110 square metres.
  - The new unit would increase the gross floor space by 32 square metres.
  - The existing building footprint is 73 square metres.
  - The proposed building footprint would be 87 square metres
  - The increase in footprint would be 14 square metres (a 20% increase)<sup>4</sup>.
  - The height of the existing dwelling is 4.5 metres.
  - The replacement dwelling would be 5 metres high measured to ridge height.
30. The above figures are undisputed, so it is reasonable to see how they relate to planning policy. The appeal site is within the area designated as Coastal National Park, where policy NE6 of the Island Plan applies. This policy provides that there will be the strongest presumption against all forms of development in the Coastal National Park, including the development of a new dwelling other than a replacement. The "replacement" exception is subject to several criteria. The demolition and replacement of an existing dwelling is excluded from the presumption against development only where the proposal would:
- a) not be larger in terms of any of gross floor space, building footprint or visual impact than the building being replaced;
  - b) not facilitate a significant increase in occupancy; and
  - c) give rise to demonstrable environmental gains, contributing to the repair and restoration of landscape character."
31. In this excerpt from the policy statement, the word "and" at the end of subparagraph (b) is important - it means that all the criteria have to be met for a proposal to meet the policy. I should also point out that Mr Bonn's interpretation

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<sup>4</sup> An increase of 14 on 73 would be a little over 19%, but the actual increase would appear to be 14.4 square metres, which is about a 20% increase. Comparing the figures written on the application site plan (existing cottage 6412x11286mm, approved cottage 7000x12400mm) also gives an increase of about 20%.

of the word "or" in sub-paragraph (a) is incorrect - here "or" is used in an inclusive (not exclusive) sense, as is apparent from the earlier words "any of".<sup>5</sup>

32. Part of the background to this case is that when asked to review the 2015 application, the planning committee evidently stated that they would be supportive of a replacement dwelling provided that the design was improved, and that the committee "would not oppose a slight increase in the building footprint and massing or a slight variation to the location of the footprint on the site".<sup>6</sup>
33. In my judgment an approximately 41% increase in floor space combined with a 20% increase in footprint would be more than "slight". The revised siting of the proposed dwelling would also be more than "a slight variation". An additional factor is the enlargement of the application site, which appears to have been linked with the recent removal of some vegetation, although this could be offset by imposing a condition requiring the re-planting of a broadly similar area.
34. During my inspection I looked at views of the appeal site from various places, including the beach and high points nearby. Some of these views are shown on photographs submitted in evidence. The existing dwelling on the site is visible from different angles from various viewpoints. The proposed dwelling and the dwelling for which permission has been granted would also be visible to varying degrees - sometimes more so than the existing dwelling, sometimes less so depending on the position of intervening vegetation and the view angle.
35. Having considered the effect of the proposed development against the planning policy criteria mentioned above, I find that there would be a conflict with Policy NE6, primarily because of the proposed building's larger size. However, there are other material considerations.
36. One factor is that looked at from different angles and distances, the proposed dwelling would be slightly closer to the urbanised backdrop of the residential blocks behind and above, and closer to the nearby pumping station building, than both the existing dwelling and the dwelling for which planning permission has been granted. To that extent the proposed dwelling would be less separated from the other much more prominent buildings in the wider scene, helping to offset the visual impact of the dwelling's larger size compared with what exists.
37. Another consideration is that the appearance and character of the coastal national park in Portelet Bay in the vicinity of the appeal site has been greatly affected by the redevelopment of the former holiday village. The available evidence also suggests that the presence of the residential blocks has led to the removal of a large area of vegetation (including trees which previously softened the visual impact of the former hotel) from the upper part of the slope in front of the flats, presumably to enhance the southerly views from the flats. A mature beech tree which may have been about 100 years old and stood near the appeal site has also been cut down, allegedly "on direction from the residents in the modern housing development to the rear of the site".<sup>7</sup>

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<sup>5</sup> The words "and" and "or" can both have inclusive or exclusive meanings depending on their context. For example, the operator of premises which are "licensed to sell wines and spirits" can sell a bottle of whisky without being forced to sell wine with it! So "and" in this phrase in effect means "or".

<sup>6</sup> This quotation is from the "Relevant Planning History" section of the planning officer's report on application reference P/2016/0144.

<sup>7</sup> The quotation is from the Department's statement. It is perhaps surprising that the tree was not subject to any preservation order. Be that as it may, apparently no enforcement action requiring a replacement has been taken following its removal.

38. The fact that the character or appearance of an area designated as a coastal national park has been affected by built development is not normally a good reason for allowing even more such development. In most circumstances the reverse should apply - as is argued for the appellant. But here, the white-painted blocks of flats catch the eye as very prominent urban features, dominating the landscape to such a jarringly obtrusive extent as to minimise the likely effect of the scheme subject to this appeal.
39. Moreover, there has to be a reasonable degree of consistency in the operation of planning control. It seems to me that given what has been permitted in this locality in the recent past, refusing permission for what is now proposed on grounds largely of visual or ecological impact and conflict with policy would appear blatantly inconsistent.
40. Mr Massie's representative at the site inspection (a neighbouring occupier) asked me to look at the view from Mr Massie's flat, which I did. This request suggests that Mr Massie and his neighbour are concerned that the upper part of the proposed dwelling would impinge into the southerly view from their dwellings. If so, that point has little weight, since it is not a proper function of planning control to preserve the view from a dwelling over someone else's private land.<sup>8</sup>
41. Measures for species protection and wildlife enhancement have been put forward in support of the application. Mr Bonn has stressed that he and his family are keen to safeguard ecological interests. The intentions of the applicant or his family are not in themselves a compelling factor, since the property could be sold at any time to someone who would not have the same attitude. The lack of precision about which trees could be preserved is also a weakness in the applicant's case. However, on balance I judge that requirements for safeguarding existing vegetation, additional planting and wildlife protection would help to repair and restore the landscape and could be satisfactorily covered by conditions.
42. In deciding on my recommendation, I have had regard to all the other matters raised in evidence, including all the policies referred to by the parties. Some vegetation would be lost as a result of the development, but the replacement and enhancement measures proposed would meet the requirements of Island Plan policies NE1 and SP4. The design of the building would be sufficiently appropriate to its surroundings to comply with policy GD1.
43. Various arguments have been raised about the curtilage of the existing and proposed dwellings. Mr Bonn's description of a curtilage ("the boundary within which a homeowner can have a reasonable expectation of privacy") is, *for the purposes of planning law*, not correct.<sup>9</sup> Nevertheless in my judgment the curtilage issue is not a compelling point either for or against the appeal.
44. I find that although the proposed development would have some adverse effects and cause some policy conflict, these are outweighed by other material considerations. I conclude that the planning authority's decision to grant planning permission as an exception to normal policy should not be overturned.

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<sup>8</sup> The effect on a dwelling's outlook in such a way as might be overbearing or cause loss of light is a different matter.

<sup>9</sup> This is not the place to go into full detail, but the term "curtilage" has a specific meaning for planning law purposes, as defined in UK court judgments applicable in Jersey, going back to the old case of *Sinclair-Lockhart's Trustees v Central Land Board* [1950] and including later judgments such as *Dyer v Dorset County Council* [1988] and *McAlpine v Secretary of State for the Environment* [1995].



## Conditions

45. If planning permission is granted, conditions should be imposed covering the matters similar to those covered by the planning authority's conditions which I have set out in paragraph 9 above, for the reasons stated in the authority's schedule. However the following points arise:
- The words "and maintained as such" should be deleted, because a requirement for something to be "maintained" (as opposed to "retained") is imprecise and therefore unenforceable, unless a detailed schedule of maintenance or some other means of obtaining precision (such as a manufacturer's specification) is specified. If future maintenance of a planting or landscape scheme for a defined time period is important, it is better to have this incorporated into the scheme and controlled by that means (if necessary by withholding approval of the scheme), rather than including undefined "maintenance" in the wording of the condition. This applies to the Conditions 1 and 4 in the Department's list of conditions.
  - Instead of the pre-conditions beginning with the words "Prior to commencement of the development on site..." etc, it would be better to have pre-conditions which expressly forbid any development taking place before a requirement such as the approval of plans has been met. This is because only in the latter case would the development itself be unlawful in the event of non-compliance, making the potential enforcement situation clearer.<sup>10</sup>
  - The detailed references to various documents in the Department's Condition 2 (Ecological Assessment Report, Revised Initial Ecological Assessment, etc) are not in my view necessary. A requirement for a scheme of ecological proposals to be submitted and approved is all that is needed - the scheme itself should contain all necessary details for continued implementation, otherwise as noted above, approval can be refused.
46. Having regard to those points I make the following suggestions for amendments.
47. Condition 1 in the Department's schedule should read: "No part of the development hereby permitted shall be begun until details of the materials to be used for the exterior of the new unit have been submitted to and approved in writing by the Department of the Environment. The development shall not be carried out other than in accordance with the approved details."
48. Condition 2 should read: "No part of the development hereby permitted shall be begun until details of measures to protect and enhance the natural environment have been submitted to the Department for the Environment and approved in writing. The approved details shall be implemented in full."
49. Condition 3 should read: "If upon commencement of the works more than three mammals, reptiles or amphibians of any individual species or their roosters or dens or nests are found, work shall cease pending consultation with the Department of the Environment. Work shall not be re-started until the Department has issued written confirmation that proposed mitigation measures are satisfactory."
50. Condition 4 should start with the words: "No part of the development hereby permitted shall be begun until a scheme of landscaping has been submitted to

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<sup>10</sup> There are a number of UK court judgments on this point, probably the most well-known being *F G Whitley v Secretary of State for Wales* [1992]. The principle is relevant to Jersey.

and approved in writing by the Department of the Environment. The scheme..." etc., including sub-paragraphs (i) to (v) in the Department's Condition 4. Then sub-paragraph (vi) should read: "A landscape management scheme for the maintenance of the landscaped areas. Once approved, the scheme (including its provisions for continuing maintenance for the time period specified in the plan) shall be implemented in full."

51. This is a topographically complicated area of land and it is important to ensure that the proposed building would be "tucked into" the slope as much as is reasonable rather than projecting from it. I have therefore considered whether a separate condition requiring details of site and building levels should be imposed; but Condition 4 would cover "excavation" as part of a landscape scheme and this should provide the planning authority with adequate control over site levels, which would have to be approved before any development starts.
52. Since the proposed building would not overlap with the existing dwelling, it is just conceivable that a developer (who as I previously observed, might not be the present owners) could build the proposed dwelling without removing the existing one. A suitable safeguarding condition would be: "The existing dwelling on the site shall be demolished and all resultant debris shall be removed from the land within one month of the date when the proposed dwelling becomes occupied". The stated reason for this condition would be: "To ensure that the development is carried out in accordance with the proposal as described in the application".
53. The conditions would be more straightforwardly set out by numbering from 1 upwards, instead of the first two conditions being lettered A and B, followed by a sub-heading "Conditions".

#### **Recommendation**

54. I recommend that the appeal be dismissed and that planning permission be granted subject to amended conditions as suggested above.

*G F Self*

Inspector

6 February 2017