

STATES OF JERSEY

Supplementary report to the Minister for the Environment

3rd party appeal by Mr Nigel Jagger under Article 108(2)(a) of the Planning and Building (Jersey) Law 202, as amended, against the grant of planning permission to reconstruct 1 No. farmhouse to form 1 No. 3-bedroom dwelling and 1 No. outbuilding to form a garage and store and stabilise other buildings on the site of Egypte Farm, La Rue d’Egypte, Trinity. [Application ref 2015/0978]

Introduction

1 I conducted a hearing of this appeal, followed by a site visit, on 7 August 2019 and afterwards submitted a report to the Minister. A Ministerial Decision (MD) dated 10 December 2019 deferred determination of the appeal and requested me to prepare a supplementary report and recommendation upon the case after further consideration of

‘i) a comprehensive and objective assessment, informed by judgements of the Royal Court of Jersey and any other legal precedents of (a) whether the residential use of the site has been abandoned; and (b) if it is concluded that residential use has not been abandoned, whether a dwelling exists on the site; and

ii) the potential impact of the proposed development upon protected species that may be present within, or in close proximity to, the site.’

2 The reasons stated for the Minister’s request were that

‘The Minister considered that prior to the determination of the appeal it must be clearly established whether the residential use of the site has been abandoned and whether a dwelling exists on the site in order that the proposal can be properly assessed in light of policy NE6 of the Adopted Island Plan 2011 (Revised 2014).

The Minister further considered that an ecological assessment is required prior to any determination of the appeal in order to enable the potential impact of the proposed development upon protected species to be properly assessed in light of Policies GD1, NE1, NE2, NE3 and NE4 of the Adopted Island Plan 2011 (Revised 2014).’

Post-MD correspondence and procedural points raised

3 The MD prompted a number of subsequent communications with the Judicial Greffe which were entered on the Planning Register. These may be briefly summarised in sequence as set out below. I return to some of these points when considering the two matters referred by the MD.

4 **Colas Crill** (acting for the appellant) submitted a letter to the Judicial Greffe dated 24 December. This stated that *‘while it is an unusual step for us to communicate with you directly in this regard I hope you will appreciate that the situation we find ourselves in is somewhat unusual’*. The letter reiterated and summarised legal precedents concerning the issue of abandonment as set out in oral submissions and written documents at the hearing.

5 Turning to the ecological issues raised by the MD, the Collas Crill letter said that ecological assessment had not been provided in sufficient detail to enable the proposal to be judged against the IP policies. It suggested that although an initial ecological assessment (IEA) could be provided it was impossible to speculate on its findings given the nature of the site and the present unsuitable time of year for surveys to clarify whether protected species are present. If new information were sought on the matter, the terms of the application would be altered and new consultations on the matter would need to be invited. It was suggested that no process existed to enable this to occur while a live appeal was pending Ministerial determination. Without this information the appeal should be allowed and the application refused. If the hearing were to be re-opened Collas Crill would welcome the invitation to make further submissions.

6 **The Department** (in an email to the Judicial Greffe dated 6 January) acknowledged the legal tests of abandonment but said that the committee's decision was based on genuinely exceptional circumstances relating to the wartime occupation. It referred to the text of the Reason for Approval thus:

"It is considered that the grant of planning permission as a suitable exception to policy NE6 of the (IP) is justified in this instance having regard to all the circumstances of this case, in particular having regard to the extraordinary circumstances which resulted in the site falling into ruins and the circumstances which prevented the applicants from rebuilding Egypte Farm sooner.

Furthermore the residential use of the site is not considered to have been abandoned by virtue of the planning history of the site; links the applicants have maintained with the Island through the continuation of rates payments and by maintaining ownership for such a long period of time."

7 The Department stated that the circumstances here are not identical to those at large in the Maletroit case nor is there understood to be any identical mainland case for obvious historical reasons. The Inspector was asked to take these *unique* circumstances into account when considering the thrust and relevance of the other cases noted.

8 On the second matter raised by the Minister, the Department understood that it was not expected either to request or assess further ecological work itself, just that the MD asked that such an assessment be submitted for consideration ahead of a decision. The Minister would then assess it and seek whatever assistance he felt necessary to do so. The additional post-hearing documents are placed on the Register and not re-advertised. The Inspector has discretion to allow parties to comment on such information if he wishes to do so.

9 **Antony Gibb**, the agent for the applicant, responded on 17 January to the letter from Collas Crill on the matter of abandonment. He also said that an IEA had been commissioned and a walk-over survey completed on 8 January. The full IEA report was not yet completed but a short note of its findings was provided. The eventual IEA was issued dated 30 January.

10 **MS Planning** (for the appellant) responded on 3 February concerning the process following the MD and the subsequent submissions from Antony Gibb and the Department. He did not agree with the Department's reading of the MD which simply asked the Inspector for further consideration of the matter and said that an ecological assessment was required

prior to determination of the appeal in order to assess the scheme against the IP policies. The Inspector did not request the provision of an IEA.

11 There is a balance to be struck between the determination of the appeal as the application stands and the determination of a fundamentally different submission including information such as the IEA. Acceptance of the latter would materially alter the terms of the application and necessitate publication and public consultation on the new material, a process not provided for in a live appeal. A recent MD (MD-PE-2020-0003) in relation to Au Caprice Hotel (P/2018/1696) effectively came to the same conclusion, ie that acceptance of a bundle of amendments and corrections would *“result in the approval of a detailed development proposal that was not subject to a rigorous process of public consultation and consideration by the Department and the Planning Committee.”*

12 The **Natural Environment Team** (NET) commented on 5 February (via an email to the Judicial Greffe) that the IEA was not sufficient alone to enable a reasoned evaluation of all the protected species. Therefore a judgement against IP policies NE1-4 could not be made. Noting the results of the IEA the team stated that a Species Protection Plan based on the results of the summer surveys would need to be submitted for pre-commencement evaluation (ie before any ground clearance or demolition). The surveys should include all trees within or immediately outside the site. Adequate compensation should be provided for bats using the site for hibernation purposes. The potential ecological impact of the proposed sewage treatment plant outside the site should also be assessed.

13 **Antony Gibb** (12 February) responded to the letter from MS Planning. Since the application scheme is considered de novo the Inspector can consider additional information which is submitted to assist him and the Minister. The IEA was prepared to assist the reasonable concern of the Minister and the NET has responded. The further necessary surveys will be undertaken at the appropriate time of year. These will identify any necessary appropriate mitigation measures and the applicant will provide what is required.

14 **MS Planning** (14 February) indicated that because of their concerns about the process they were reluctant to comment further on the content of the IEA. Concerns were raised about the mechanism by which the views of the NET were sought, albeit that the Team’s feedback was useful. It is not only the public who have been excluded from the latest considerations but also the original decision maker (the Planning Committee).

15 Being asked to provide feedback on new information which may be determinative to a sensitive application 5 years after the application was lodged and 5 months after the hearing of the appeal runs counter to the principles of an open and transparent planning process.

16 Turning to the IEA, this identifies impacts which are negative and not insignificant. More work needs to be done and the impacts will need mitigation of an unknown nature other than needing new landscape proposals. Policies NE1-NE4 set a high bar in the Coastal National Park and the application does not deliver sufficient information to enable the likely impact of proposals to be considered, understood and evaluated (policy NE1). This is a serious failing warranting refusal on this ground alone.

Inspector's comments upon the above matters of process

17 Soon after the receipt of the original letter from Collas Crill the Planning Tribunal Manger was informed by Antony Gibb that an IEA was due to be completed within a couple of weeks. I had already interpreted the content of point 2 of the Minister's reference-back as making it necessary for me to seek this type of assessment in order to give further advice to the Minister on the ecological implications of the scheme. It also appeared to me that if the Minister had regarded the lack of sufficient ecological information as a deficiency which did not have at least the potential to be made good within the appeal process he would have allowed the appeal and refused the application without further reference-back. News of the impending preparation of the IEA was therefore a welcome development in my view since it was possible that it could provide the Minister with some of the advice he was seeking and therefore assist him in reaching a view on this issue.

18 Consequently I agreed with the Planning Tribunal Manager that (a) both the Collas Crill letter and the forthcoming IEA should be accepted as appeal documents and (b) the parties to the appeal (the appellant, the applicant and the Department) should be invited to comment upon both of these. An email dated 7 January from the Tribunal Manager to the parties set out a timetable for these exchanges. Concerning points made on behalf of the appellant about the fact that the NET had commented but the committee had not done so, in my view the Department is the principal channel of communication between the Tribunal Manager and SoJ for appeal purposes. However, it is a matter for SoJ to decide which parts of the corporate organisation should respond to the Tribunal upon particular matters.

Referred matter 1 The question of abandonment

19 As submitted by the Department's Officers, summarised at para 26 of my original report, judgements concerning the issue of abandonment must be made on a case-by-case basis taking account of the particular facts of each individual case.

20 However, as stated in my original report relevant Court judgements provide some guiding principles concerning abandonment in planning cases. In Jersey the leading case of *Maletroit v Minister for Planning and Environment* [2012] JRC027A drew upon the English case of *Hughes v SoS for the Environment, Transport and the Regions and South Holland District Council* [2000] 80 P&CR397. The latter judgement set out a 4-test approach for considering whether abandonment has occurred, namely

"1 The physical condition of the building." In the current case the building proposed for replacement (building A) is the ruinous shell of the original dwelling now in very poor structural condition, albeit that its former purpose as a dwelling is still recognisable. The current extent and height of its walls is shown in drawing 134/1/02.

"2 The length of time for which the building had not been used for residential purposes" The last residential occupation of the building was at the time it was appropriated in July 1943.

"3 Whether it had been used for any other purposes." There has been no use of the building since 1943.

"4 The owner's intentions". The factual situation concerning the above 3 tests appears to point clearly towards an indication of abandonment (see para 56 of my report). However,

as held by Kennedy LJ in the Hughes case, consideration of the 4th test requires objective assessment of the owner's intentions using the judgement of a reasonable man with knowledge of all the relevant circumstances. In making the judgement those intentions are not to be elevated to a paramount status, nor should other relevant considerations be subordinated to that intention.

21 In the Hughes judgement Kennedy LJ posed two illustrative scenarios for considering an owner's intentions in cases where a property had been ruined, indicating that the current physical state of a property is not necessarily decisive in determining abandonment. The words of Kennedy LJ are quoted in para 13 of my report thus:- In the first "*... a labourer's cottage which an immigrant and his family left 40 years ago, which has been in ruin for years....*" cannot be considered to be a residence "*so long as its owner in America or Australia cherishes the dream that some day he will return to live there. There has been, in my judgement, a clear abandonment.*" In the second, concerning a building destroyed by fire, the owner is "*...getting together the means to replace the dwelling over a limited period of time to restore it to its former glory.*" "*The objective observer, not knowing the owner's intentions, might temporarily conclude that the use of the property had been abandoned where in reality it had not been because the intention factor would be determined the other way*".

22 There is a wide spectrum of possible scenarios between the above two examples, the first which could be represented at one end of the spectrum by, say, the sparse ruins of a cottage in an abandoned former crofting community and the second by the situation of an owner actively pursuing a recovery plan only weeks after a recent disaster affecting his property. In my view the circumstances at Egypte are certainly unique and do not fit at all easily into the more clear-cut types of situations described above. Paragraphs 7-9 of my original report summarise the information provided by the Rice family concerning the intentions of the successive generations owning Egypte Farm. Initial plans for post-war reconstruction foundered for lack of sufficient compensation and funds after 1949 and then after 1961 plans were further frustrated by the imposition of South African exchange controls from 1961-94. Nonetheless the family later addressed regular documented enquiries of the Planning Department about the possibility of reconstructing the buildings at Egypte. Enquiries were made in 1984, 1998, 2005 and 2006, even though the Department always responded that it considered the buildings abandoned. Formal applications were refused in 2006 and 2014.

23 The available pure documentary evidence therefore contains a gap of some 35 years between the estimate for reconstruction obtained in 1949 and the first of the written series of enquiries of the Department in 1984. There is no documentary evidence of any actions or potential actions casting light on intention either during the period 1949-61 up until the start of exchange control or during the following 23 years after that up to 1984 when written enquiries of the Department began. However, those enquiries began 10 years before the progressive relaxation of exchange control in 1994 and have continued on a regular basis ever since.

24 Over the 76 years since 1943 the ownership of the appeal site has been vested in three successive generations of the Rice family, all resident in South Africa. Setting this factor alongside the sporadic documentary history it is not straightforward to understand how far

any ambition to rebuild has been sustained as an unbroken, concerted family intention over the entire period or whether the intent perhaps strengthened from about 1984 as reconstruction of a long-retained family asset became a more realistic ambition in the economic sense.

25 However, approaching the issue of abandonment de novo the Minister has to consider the overall balance of the owners' expressed actions over the long period since 1943. It is exceptionally unusual for a case involving a decision on abandonment to cover events over such a very long time-span since the building's sudden forced vacation. This is not a wholly clear-cut matter and in my view any final determination of the issue here requires the exercise of fine judgement. However, from the information available I conclude (a) that there is no clear documentary evidence one way or the other whether or not the owners abandoned all intention to rebuild in the period 1949-84 despite the condition of the structures, but that (b) the circumstances said to have prevented progress towards securing rebuilding over the period can, as the committee decided, be viewed as credible and therefore not undermining the owners' claimed underlying intentions.

26 Applying the Hughes tests I narrowly reach the conclusion that residential use of building A has not been abandoned. Consequently it should be regarded as an "existing dwelling" for the purposes of Island Plan (IP) policy NE6 (2). The proposal is therefore one of the "exceptions that may be permissible" where no harm is caused to landscape character. It is unfortunate that the committee's Reasons for Approval lack some clarity by not specifying more precisely that it is policy NE6 (2) (permitting the demolition and replacement of existing dwellings and ancillary residential buildings and/or structures where the proposal meets three criteria) which is brought into play in this case.

27 Criterion (a) requires that the proposal be no larger in terms of gross floorspace, footprint or visual impact than the building being replaced. In this case the new house and store are on about the same footprint as original buildings A and E, while the proposed reconstruction of building A would create a dwelling of similar scale and character to the original farmhouse, slightly adapted to meet modern needs. Its visual impact would therefore be broadly comparable with the replaced dwelling.

28 Criterion (b) requires the redevelopment not to facilitate a significant increase in occupancy. In this respect the replacement 3-bedroom house would offer much the same potential occupancy as the original one.

29 Criterion (c) states that the redevelopment should give rise to demonstrable environmental gains contributing to the repair and restoration of landscape character. This issue is covered in paragraph 64 of my original report. The building works in the permitted scheme would simply return the structures to their former general character as a house and outbuilding at the same location within the landscape of the National Park. The site is mostly quite enclosed from the surrounding landscape by the topography and by trees both within it and nearby, so the rebuilt house would not become visible from new viewpoints.

30 Concerning "*demonstrable environmental gains contributing to the repair and restoration of landscape character*", I indicate in paragraph 65 of my original report that the sketchy 'landscape appraisal plan' 134/1/06B submitted with the application does not itself provide detailed proposals fully satisfying policy criterion (3). However, conditions 2 and 3

imposed upon the permission require the pre-commencement submission for approval of detailed landscaping proposals. If exercised with appropriate care and thoroughness these conditions will provide the Department with the opportunity to ensure that the landscaping of the site does provide appropriate environmental gains and enhancements of the landscape character of the National Park.

Referred matter 2 Ecological assessment

31 The second aspect of the Minister’s Decision concerns his wish for further consideration of *“the potential impact of the proposed development upon protected species that may be present within, or in close proximity to, the site.”* He also considered that *“an ecological assessment is required prior to any determination of the appeal in order to enable the potential impact of the proposed development upon protected species to be properly assessed in light of Policies GD1, NE1, NE2, NE3 and NE4 of the Adopted Island Plan 2011 (Revised 2014).”*

32 Paragraph 66 of my original report stated that the appellant had *“understandably criticised the permission for the fact that it was issued without any pre-decision ecological survey being demanded or submitted, despite the fact that (when consulted on the scheme) the Natural Environment Team recommended that at least an initial pre-decision ecological assessment be required in order to enable judgement of the development’s impact on protected species. The team commented that the nearby SSI at Egypte Woods is known for its diverse range of habitats and species and that the proximity and undisturbed nature of the appeal site results in every likelihood that it plays an integral part in a continuous ecologic al unit with significant opportunity for protected species to be present on site. IP policies GD1, NE1-4 and the Conservation of Wildlife Law [were mentioned by the team] in support of this approach.”* Paragraph 67 of my report stated that *“This consultation request was reported to the committee but through an admitted oversight it was not followed through by the imposition of a suitable condition on the planning permission.”*

33 After learning that the MD required further consideration of the ecological impact of the development the applicant instructed Nuture Ecology Ltd to undertake an Initial Ecological Assessment (IEA) and Preliminary Roost Inspection (PRI). A walk-over survey was conducted for that purpose on 8 January 2020. The executive summary of the resulting report records its findings as follows:

Ecological receptor	Suitability of the site to support protected species
Habitats	The mixed on-site woodland is a key/BAP habitat; however this will not be directly affected by the approved works. Other habitats of ecological value are present including dense scrub and mature trees which will be impacted by the approved scheme.
Roosting bats	Building A – high suitability for crevice seeking bats and negligible for void dwelling bats
Birds	High - The mature trees, dense scrub and various structures on the site provide suitable nesting habitat for a range of birds
Other protected species (inc small mammals, amphibians and reptiles)	Moderate – the areas of dense scrub and habitat piles offer shelter, foraging and commuting habitat for small mammals and amphibians. Reptiles are considered to be likely absent.

34 Following these findings the IEA identified a need for further pre-commencement surveys of bats and birds undertaken in accordance with professional practice guidelines – ie, 3 bat surveys supplemented with infrared cameras undertaken between May and September and at least one breeding bird survey. The IEA then recommends that the findings of those surveys be used to produce a Species Protection Plan (SPP). It also states that in view of the site’s location in the National Park other wildlife enhancement measures should be included in the SPP such as a woodland management plan, wildlife boxes, habitat creation and bat and bird roosting/nesting opportunities within the new buildings.

35 The IEA also records the results of a search of biodiversity records which reveal no past findings of protected bats, birds, chordates or plants within the site although certain named species have been found present at various distances from it.

36 Addressing the IP policies against which the MD seeks further consideration of the proposal, NE1 seeks (1) to protect and promote biodiversity and enhance habitats and ecosystems and (2) protect and enhance the quality, character, diversity and distinctiveness of the landscape, coastline and seascape. NE2 states that planning permission will only be granted where there is no significant harm to protected species or their habitats and that where there may be an adverse effect an appropriate assessment will be required demonstrating proposed mitigation measures. NE3 seeks to ensure the continuation and enhancement of wildlife corridors. NE4 aims to protect trees, woodland and boundary features of landscape, amenity, biodiversity or historical value by various means and requires applications for proposals affecting such features to provide sufficient information to enable the impact upon them to be considered, understood and evaluated. In addition policy GD1 aims more generally to protect and enhance the natural environment.

37 Despite their interim status the IEA findings give a reasonably clear picture of the general type and nature of the site’s habitats and its degree of ecological interest and contribution to the wider area. Although further clarification is required of the detail of the site’s habitats and species, the impacts of the development, and the scope of any necessary mitigation measures, these can all be adequately established after completion of the appropriate seasonal surveys referred to in the IEA. There is therefore no reason to conclude that the ecological impacts of the proposed works would be such as to undermine the aims, objectives and terms of the above policies provided that an appropriately worded condition is imposed upon the permission. This condition could operate in tandem with the already-imposed landscape conditions and would ensure the completion of a package of ecological enhancement and mitigation measures identified as necessary in the recommendations of a full ecological assessment following the completion of the required summer surveys. I see no sufficiently strong grounds for allowing the appeal (and removing the whole permission) purely because the full ecological assessment and set of enhancement/mitigation measures are not yet available.

38 Referring briefly to the process points raised on behalf of the appellant about the MD decisions concerning Au Caprice Hotel (MD-PE-2020-0003) (P/2018/1696), this does not seem to me to raise process issues comparable with the current case. In that case the exact physical description and content of the proposed plans appear to have been changed and corrected several times after submission and were still unclear even at the hearing. The solution offered by the Inspector to the Minister for dealing with the confusion which arose at

Au Caprice cannot be compared with the situation in this case in which the Minister would simply be imposing an additional condition covering the same subject matter originally sought by the NET at earlier stages in this case (see paragraph 32 above) but then omitted by the Department through an oversight. I do not consider that the inclusion of the subject matter of my recommended condition would place any party under material prejudice since those most materially affected by it have had sufficient opportunity to comment upon the ecological issues including the IEA.

39 In order to give effect to my recommendation the appeal would (technically) have to be allowed but only to the very limited extent of imposing the additional condition.

RECOMMENDATIONS

Minister's matter 1

40 At paragraph 26 above I conclude that:

Applying the Hughes tests I narrowly reach the conclusion that residential use of building A has not been abandoned. Consequently it should be regarded as an "existing dwelling" for the purposes of Island Plan (IP) policy NE6 (2). The proposal is thus one of the "exceptions that may be permissible" where no harm is caused to landscape character and the 3 criteria at part (2) are met, which in my view they are.

Minister's matter 2

41 At paragraph 37 I conclude that in view of the ecological evidence now available there are no sufficiently strong grounds for allowing the appeal (and thus removing the whole permission) purely because the full ecological assessment and set of enhancement/mitigation measures are not yet available. The addition to the permission of an appropriate condition covering ecological matters, operating in tandem with the already-imposed landscape conditions, would ensure the completion of a package of ecological enhancement and mitigation measures which would be identified as necessary by the recommendations of a full ecological assessment following the completion of the required summer surveys. I see no sufficiently strong grounds for allowing the appeal (and removing the whole permission) purely because the final ecological assessment and set of enhancement/mitigation measures are not yet available.

42 To give effect to this the appeal would technically have to be allowed but only to the extent of attaching a new condition to planning permission 2015/0978 worded as follows:

Before the commencement of any of the works hereby permitted there shall be no works of ground clearance, demolition or construction within the application site until a full impact assessment study has been made of the impact of the development upon the ecological interest of the site. Details of the scope and methodology of the necessary surveys, the timescale for undertaking them and the format of the impact assessment report shall be submitted to and approved in writing by the Department of the Environment before such assessment work commences. The impact assessment report shall (a) identify the potential of the development for harmful impacts upon the site's habitats and any protected species making use of it and its immediate surroundings and (b) provide recommendations for any necessary enhancement and mitigation measures. The report of the ecological impact assessment shall be submitted to and approved in writing by the Department and thereafter

the recommendations in the assessment report shall be put into effect within a timescale to be specified within the assessment and subsequently retained and managed in accordance with those recommendations.

Roy Foster

Inspector

27 February 2020