Planning Tribunal

PLANNING APPEAL DECISION NOTICE

Planning Tribunal meeting held on 27th March 2019 at Les Cotils Centre, St. Peter Port, including a visit to the appeal site before the meeting

Mr J King (Presiding), Mr J Weir and Mr D Harry

Appeal Site: **Ocean Echoes, Route du Felconte, St Pierre Du Bois**

Property Reference: **F00267A000**

Planning Reference: **FULL/2018/1553**

Appeal Case Reference: **PAP/003/2019**

- The Appeal is made under the provisions of Part VI and Section 68 of The Land Planning and Development (Guernsey) Law, 2005 ("the 2005 Law").

- The Appeal is by Mr and Mrs de Garis against the decision of the Development & Planning Authority made on 10th August 2018 under Section 16 of the 2005 Law to grant planning permission for development described on the decision notice as *"change of use from agricultural land to domestic garden"* subject to conditions.

- The appeal is primarily against condition 4, which states:

  Notwithstanding the provisions of the Land Planning and Development (Exemptions) Ordinance 2007 (or any other Ordinance replacing or re-enacting that Ordinance), no wall, fences, extensions, garden structures, sheds, greenhouses, garages, outbuildings or other buildings, structures, or other development otherwise exempt within Class 1 of the Land Planning and Development (Exemptions) Ordinance 2007 shall be erected or constructed within the approved domestic curtilage extension to which this permission relates.

  For the following reason:
  The carrying out of development of this type may cause harm to the landscape character of the area.

Decision

1. The Appeal is allowed in part. Permission is granted for the change of use of land to domestic garden at **Ocean Echoes, Route du Felconte, St Pierre Du Bois GY7 9QB, subject to the deletion of condition 3 previously attached and to the remaining conditions (1, 2 and 4) being modified as follows:**

    1. All development authorised by this permission must be carried out and must be completed in every detail in accordance with the description of the development referred to above and Plan A dated 4th April 2019 attached to this decision. This permission does not imply any other approval or consent required under this Law or any other enactment or under any rule of law.

    2. The development hereby permitted shall be commenced within a period of three years immediately following the date of grant of this permission.

    4. Notwithstanding the provisions of the Land Planning and Development (Exemptions) Ordinance 2007 (or any other Ordinance replacing or re-enacting that Ordinance), no walls, fences, garages, or outbuildings exempt within Class 1 of the Land Planning and Development (Exemptions) Ordinance 2007 shall be erected or constructed within the approved domestic curtilage extension to which this permission relates, as shown on Plan A, dated 4th April 2019 attached to this decision.

Description of the site and relevant planning history

2. Ocean Echoes fronts the northern side of Route du Felconte, flanked by houses in large plots. The front part is occupied by the dwelling house together with a paved area. Behind, at a lower level, is a flat expanse of grass with a curved boundary marked by a post and rail fence. Beyond, the land broadens as it falls sharply to the north, where the boundary is delineated by a chain link fence which separates the property from a row of pine trees and open land. The slope has been roughly terraced, using sleepers or baulks of timber, allowing access to be gained to its base. It is largely unused, being covered mostly by scrub vegetation. Along the eastern boundary of the grass area is a detached glasshouse appearing to be used for domestic purposes. The appeal site comprises the land beyond the glasshouse, comprising part of the grass area together with the slope.

3. In 1997, permission was granted for a change of use to "extend domestic curtilage" at the property, relating to land lying between the rear of the dwelling and a line running to the rear of the glasshouse. This line forms the southern boundary of the area which is the subject of the present appeal.

Matters of clarification

4. Only one plan was submitted with the application, and this is identified on the permission document. This undated Plan 01.01, shows 2 aerial photographs of the site, a location plan at a scale of 1:2500 showing an area coloured red; and a block

plan at a scale of 1:500, outlining the same area in both red and blue, stated to represent respectively the property boundary and the proposed domestic curtilage. The area of the proposed extension to the garden (described as curtilage) is not separately identified. The Tribunal entered into correspondence between the parties to clarify the extent of the land subject to the appeal. From the responses, it is clear that the application does not apply to the whole of the defined land, but only to that part lying to the north of the area to which the 1997 permission relates. The Development & Planning Authority ("the Authority") has provided a plan showing the area; and this has been agreed by the appellants. It is this plan which is referenced as Plan A in the conditions as modified by the Tribunal.

5. The boundary between the two areas is not defined on the ground, but runs approximately west - east directly behind the glasshouse. The flat part of the proposed garden extension has practically been incorporated into the remainder of the grass area, suggesting that this element of the development has already been carried out without permission. Technically this part of the application is therefore retrospective, but in practical terms this makes little or no difference to the way it should be considered.

6. The Authority's report refers to fencing and timber structures (part of the terracing), having been erected without planning permission, but concludes that the works cannot be enforced against owing to the passage of time. The Tribunal does not seek to address this matter, which is not part of the appeal.

7. The planning application describes the development as "extend domestic curtilage to the full extent of the property boundary". This was revised on the decision notice to "change of use from agricultural land to domestic garden". The replacement of "curtilage" with "garden" is taken as reflecting the Authority's acknowledgement that curtilage is not a use of land in planning terms, but a description of its status by reference to its relationship to a building. This follows the reasoning of the Tribunal in the recent appeal PAP/006/2018 - "Bradways", Les Tranque Sous, St Saviour.

8. The appellants take issue with the view that land "*at the extreme end of the garden*", which the Tribunal takes as referring to the sloping land beyond the plateau area, should not be classified as agricultural, as implied in the modified description. Agricultural land is defined in the 2005 Law as,

> "*(a) land used or, with the application of good husbandry, capable of being used, for: (i) dairy farming' (ii) production, rearing or maintenance of livestock, or (iii) market gardening or outdoor cultivation of flowers, bulbs or nursery stock, (b) land which is covered by a glasshouse, or (c) land which was covered by a glasshouse …".*

9. The Authority's report concludes that, owing to the topography of the land and its restrictive access, it cannot reasonably contribute or practically be used for commercial agriculture. The Tribunal agrees and, having regard to the legal definition, concludes that the land cannot be regarded as agricultural as it is

incapable of being used for the purpose. In our view, the reference to agricultural land in the modified description of the development is incorrect and serves no particular purpose. We therefore propose to delete it in our decision.

10. A letter from the appellants' agent accompanied the planning application, but provided little additional detail. It asserts that no built or other operational development would take place. The intention is to retain the tree screen at the rear of the property.

The conditions subject to appeal

11. Four conditions were attached to the planning permission. The grounds of appeal states that it is primarily against condition 4. However, the appellant has also made representations regarding the remaining three, and the Authority has agreed that the third is not relevant and is content for it to be removed. In the circumstances, the Tribunal takes the view that all of the conditions should be reviewed in the interests of completeness and certainty.

Policy

12. The introductory text to the section of the Island Development Plan ("the IDP") concerning Landscape Character and Open Land says that it seeks to balance development pressures with the need to protect the natural environment by ensuring the proportionate management of development. The Authority recognises the reasonable aspirations of householders to alter or extend their properties and the IDP affords a significant degree of flexibility to that end. Development that affects landscape character will be considered in the wider context of the landscape value of a particular locality. In assessing development proposals, the Authority will balance the character of the locality concerned with the aspirations for development.

13. Policy GP1 *Landscape Character and Open Land* supports development where (amongst other things) it respects the relevant landscape character type within which it is set. Annex 4 of the IDP summarises the landscape character of the Island, divided into categories, types and subzones, but the Authority has not referred to this in its evidence.

14. Policy GP15 *Creation and Extension of Curtilage* sets out criteria for assessing the acceptability of such creation or extension. For the purposes of this appeal, and taking into account the Authority's acknowledgement that curtilage is not to be regarded as development, its provisions may nonetheless reasonably be applied to extensions to domestic gardens. In reaching its decision on the application, the Authority has accepted that, subject to conditions, the proposed development meets the criteria of the policy. Of particular relevance to condition 4 is criterion (a) which says that the development will be supported where it would not have an unacceptable detrimental impact on the landscape character.

15. The supporting text to Policy GP15 adds that, where landscape character is particularly open and undeveloped and where it is considered that ancillary

development within a proposed extended curtilage that would otherwise be exempt would have an unacceptable impact on open character, the Authority may decide to remove the ability to carry out development without planning permission.

16. The site is within an Agricultural Priority Area. Policy OC5(A) *Agriculture outside of the Centres – within the Agriculture Priority Areas* amongst other things says that proposals for development which is not related to a farmstead or existing agricultural holding will be supported provided that it accords with all the relevant policies of the IDP. The appeal proposal is not related to a farmstead or holding.

Planning guidance

17. The Tribunal is not aware of any published guidance with respect to the imposition of planning conditions in Guernsey. However, the appellants have referred to English Planning Practice Guidance with respect to the imposition of planning conditions, known as "the six tests", a long-established approach which has its origin in the now deleted Circular 11/95. These tests have no formal status in Guernsey. However, the Tribunal's attention has been drawn to the Guernsey Court of Appeal judgment in *The Environment Department v Johns* [2007]. The circumstances of that case are very different, but it is clear that the Court had regard to the six tests in reaching its conclusions. The Authority regards them as representing best practice and as relevant in the Guernsey legal context. Against that background, the Tribunal has had regard to these tests in considering the present case, albeit that we do not consider them to be determinative.

18. The six tests are that conditions should be imposed only when they are;

    (1) Necessary;
    (2) Relevant to planning;
    (3) Relevant to the development to be permitted;
    (4) Enforceable;
    (5) Precise; and
    (6) Reasonable in all other respects.

The main issue

19. The main issue in this case is whether the conditions attached to the permission have been properly and reasonably imposed.

The Tribunal's assessment of the evidence and the site visit

20. Condition 1, 2 and 3 are commonly applied by the Authority to most planning permissions. Contrary to the appellants' contention, a change of use is development under the 2005 Law and conditions may be imposed on it.

Condition 1

21. This condition states:

All development authorised by this permission must be carried out and must be completed in every detail in accordance with the written application, plans and drawings referred to above. No variations to such development amounting to development may be made without permission of the Authority under the 2005 Law.

The reason given is:

To ensure that it is clear that permission is only granted for the development to which the application relates.

22. This first element of this condition reflects the intention of Section 18(5) of the 2005 Law, which clearly anticipates the possibility of imposing conditions in order to specify the nature and extent of the development permitted. It is in principle a proper and reasonable condition. However, the Tribunal has concerns about the precise wording.

23. First, it would be wrong in this case to require the development to be carried out in accordance with the written application and plans, because the description of the development has been changed between its submission and its determination, and the submitted plan does not identify the extent of the proposed change of use. Therefore, the use of the "standard" wording would be inaccurate and confusing. The Tribunal takes the view that the condition should instead require the development to be carried out in accordance with the revised description set out in its formal decision notice, and for reference to be made to the plan supplied by the Authority showing the properly defined site.

24. Second, the explicit statement that no variations to the development may be made which would amount to development also appears to do no more than give effect to Section 18(5) of the 2005 Law. This states that planning permission is only permission to carry out the development specified in it (subject to any conditions so specified) and does not imply any other approval or consent required under the 2005 Law or any other enactment or under any rule of law.

25. However, granting permission for the change of use of land to domestic garden would have the effect of extending the domestic curtilage of the dwelling it serves. As domestic curtilage, it would benefit from the provisions of Class 1 of the Schedule to the Land Planning and Development (Exemptions) Ordinance, 2007 ("the Exemptions Ordinance"), which has the effect of allowing certain kinds of development to take place without permission. But, though exempt from the need for permission, in the words of the condition, they still remain development. Moreover, as the application makes no reference to the intention to carry out such development, and the accompanying letter states that none are proposed, if it were to be carried out, it could in principle be considered as a variation to the development permitted, which Condition 1 would prevent without permission of the Authority. The implicit effect would be the withdrawal of the rights conveyed by the Exemptions Ordinance. This unintended consequence of the erroneous wording of the condition may be overcome by substituting the relevant words of

Section 18(5) of the 2005 Law for the second element of the condition.

Condition 2

26. This condition states:

> *The development hereby permitted shall be begun within 3 years from the date of grant of this permission.*

For the following reason

> *This condition reflects section 18(1) of the Land Planning and Development (Guernsey Law), 2005 which states that planning permission ceases to have effect unless development is commenced within 3 years of the date of grant (or such shorter period as may be specified in the permission).*

27. As set out in the reason, the condition broadly reflects what is in any event required under section 18(1) of the 2005 Law. However, although section 18(1) is worded very similarly, it is not exactly the same. Section 18(1) states: "… *planning permission ceases to have effect unless the development permitted by it is commenced within a period of three years immediately following the date on which it is granted …"* (the Tribunal's emphasis). In our opinion, there is sufficient difference between the two requirements to introduce some uncertainty over the precise time that a permission would expire. The potential for confusion may be overcome by substituting the wording in the condition for that set out in the 2005 Law.

28. Strictly speaking, the condition is unnecessary, as it seeks to do no more than what is already set out in 2005 Law. But that does not render it unreasonable, provided that it accurately reflects it. The Tribunal notes that the current English Planning Practice Guidance envisages a similar condition being imposed even though it is already deemed to be imposed under the relevant legislation.

Condition 3

29. This condition states:

> *The development hereby permitted and all operations which constitute or are incidental to that development must be carried out in compliance will all such requirements of the Building (Guernsey) Regulations, 2012 as are applicable to them, and no operation to which such a requirement applies may be commenced or continued unless: (i) plans relating to that operation have been approved by the Authority and (ii) is commenced or, as the case may be, continued, in accordance with that requirement and any further requirements imposed by the Authority when approving those plans, for the purpose of securing that the building regulations are complied with.*

For the following reason:

Any planning permission granted under the 2005 Law is subject to this condition as stated in section 17(2) of the Land Planning and Development (Guernsey) Law 2005.

30. The condition repeats the requirements of Section 17(2) of the 2005 Law. In strict terms, it is unnecessary. Moreover, it is irrelevant to the development as the planning permission is simply for a change of use, not for operational development that may require separate building regulations consent. The Authority is content for it to be removed from the planning permission. The Tribunal agrees that it should be.

Condition 4

31. This type of condition is commonly imposed in situations where the withdrawal of rights provided by the Exemptions Ordinance can be justified. In this case, the supporting text to Policy GP15 quoted above provides a clear policy basis for withdrawing such rights in certain circumstances. The Tribunal finds it disappointing that the Authority has not referred to the landscape types or areas identified in the IDP, nor does it appear to have carried out its own exercise to establish the key defining characteristics of the area in the vicinity of the site in order to provide a context for withdrawing the exemptions rights. We have therefore formed our own opinion based on our visit to the site and the area.

32. The Route du Felconte in the vicinity of the site runs close to a ridgeline, having a ribbon of houses on its southern (higher) side and a scatter of development on the other, including *Ocean Echoes.* The land falls to the north and north-west in the direction of the coast, at first steeply and then more gently, across open fields to Rue des Bordes and Rue des Mares, each of which also have a scatter of buildings at low density along parts of their frontages. Despite the development, which locally introduces a more suburban feel, the area has a strong rural character which is particularly perceptible from Rue des Bordes. From there, unimpeded views towards the elevated properties on Route du Felconte may be seen, with those on its southern side breaking the skyline. In our judgment, it is an area where the control of development is important in order to prevent further creeping "suburbanisation" at the expense of the rural character.

33. Condition 4 as imposed seeks to withdraw exempt development rights with respect to walls, fences, extensions, garden structures, sheds, greenhouses, garages, outbuildings or other buildings and structures, which descriptions cover all or most of the types of development covered by Parts 9, 10, 11, 12, 13, 14 and 16 of Class 1 in the Schedule to the Exemptions Ordinance. However, as the appellants point out, by reason of the addition of the words "… *or other development otherwise exempt within Class 1 of the … Ordinance",* the condition effectively withdraws rights relating to <u>all</u> parts of Class 1. This would appear to be an error on behalf of the Authority, as it is clear from its statements that only the rights associated with those types of development specifically listed are intended to be withdrawn. The error may easily be corrected by omitting the additional words.

34. Within the types of exempt development listed in the condition it would not be appropriate to withdraw rights relating to extensions (including porches covered by Part 9, as such development would be attached to the dwelling house, which is outside the area covered by the permission and therefore could not relate to the development being permitted.

35. With respect to glasshouses/greenhouses (Part 13), we note that the Exemptions Ordinance allows only one to be erected within each curtilage. The Exemptions Ordinance does not say that the limitation on the number relates only to glasshouses exempt under its provisions: it simply says that there should be only one glasshouse within the curtilage. On that basis, it would be unnecessary to withdraw the relevant right in this case, as one already exists.

36. Sheds (Part 12) are restricted by the Exemptions Ordinance to no more than 3 metres in height and 6 square metres in area. Only one within each curtilage is allowed as exempt. On its site visit, the Tribunal observed a number of sheds located to the rear of properties nearby. None had an impact on the landscape character that could be described as unacceptably detrimental. We take the view that such a small structure would have minimal impact on the landscape character and so would not fail to meet criterion (a) of Policy GP15. Its inclusion within the condition is unnecessary and unreasonable.

37. Garden structures (Part 11), described by the Exemptions Ordinance as structures designed and used for the support of plants, are not limited in area under its terms, but must be no more than 3 metres in height. Arguably they could introduce an element of domestication to the garden as proposed to be extended, but we do not think that they would be unacceptably detrimental to the character of the area. We consider that it would be unreasonable to withdraw this right.

38. Part 14 of the Exemptions Ordinance allows one freestanding garage or other outbuilding to be built within a curtilage without planning permission, up to 20 square metres in area and up to 4 metres in height. Taking account of the openness of the land to the north of the site and the relative elevation of the grassed area within the proposed extension to the garden, the Tribunal is of the opinion that a building of that not insignificant size would have the potential to appear intrusive in the landscape. Depending on its location, it could be visible from Rue des Bordes. We recognise that at present the pine trees close to the lower boundary provide a degree of screening to the land, but they are located outside the curtilage of the house on land which the appellants have not indicated as being theirs. Consequently there is no certainty that the screening they presently afford would be retained. We also acknowledge that views towards the site from Rue des Bordes are at some distance and that some of the photographs provided by the Authority do not accurately represent what is visible with the naked eye. Nonetheless, we consider that a building exempt from planning permission under Part 14 of the Exemptions Ordinance could, depending on its location within the flat grass area, be regarded as unacceptably detrimental to the landscape character of the intervening land. In short, it could contribute to the

piecemeal erosion of its open, rural appearance. We therefore consider that the rights under Part 14 should be withdrawn.

39. Part 16 of the Exemptions Ordinance allows walls and fences to be built along the boundary of a curtilage of a dwelling house. The Exemptions Ordinance would limit the height of such structures to 2 metres and their materials respectively to natural stone, rendered blockwork and timber. Depending on their design they would have the potential to extend the suburban influence of the house and thereby similarly adversely affect the landscape character of the adjoining open land. Again, the Tribunal believes that the withdrawal of the exempt rights is justifiable.

40. By reference to the "six tests", we are satisfied that withdrawing these limited rights the condition would be necessary in order to protect the character of the locality, which is both a matter relevant to planning and contemplated by the IDP. It is clearly relevant to the development permitted, as it would apply solely to the land in question; and we are in no doubt that if it were to be breached the DPA could enforce its provisions. As proposed to be reworded it would be precise, so that there would be no doubt about what would be required, and reasonable, having regard to the policies of the IDP, including the objective to manage development in a proportionate way.

41. We do not say that all development under Parts 14 and 16 of the Ordinance would necessarily be harmful in landscape terms, rather, depending on their design and location, the potential exists for such harm. The withdrawal of exempt development rights does not mean that the appellants or any successors in title to the land would necessarily be prohibited from erecting anything on it that otherwise would benefit from those rights, only that they would have to apply for planning permission. If it could be shown in any particular case that the development would not have an unacceptably detrimental effect, for example by reason of choosing a sensitive location or design, then it would be possible to obtain planning permission. No fee would be payable for any such application, meaning that the applicants would not be financially disadvantaged. The condition would not affect the appellants' ability to maintain their property.

Other matters and overall conclusion

42. The Tribunal has considered all other matters raised in the written submissions, including the appellants' indication that they have no intention to carry out any development on the land. However, planning permissions run with the land and it is important that account should also be taken of what any future occupiers may wish to do. We note other development has been carried out nearby, but are unaware of the circumstances surrounding it. While it is important that planning control should be exercised fairly and consistently, we cannot regard other development as setting any kind of firm precedent. We have therefore considered this appeal entirely on its own merits. It is noted that in the past planning officers may have said or given the impression that the whole of the land could be regarded as curtilage to the dwelling without any restrictions. But in the interim, the 2005 Law and the relevant Development Plan have altered considerably. It is

not unreasonable that the Authority should take a different view today. It cannot be bound by statements made under different circumstances.

43. A number of the matters considered in this decision have a wider bearing on good practice for the imposition of conditions. The Tribunal urges the Authority to review its practices in order to avoid the repetition of the errors highlighted, particularly with respect to the use of so-called "standard" conditions.

44. We have considered the present appeal entirely on its own merits and by reference to relevant policy. These matters do not affect our conclusion under the provisions of Part VI Section 69 of the Land Planning and Development (Guernsey) Law, 2005 that the appeal is allowed in part, subject to the modifications to the permission and the conditions set out in detail in the formal decision above.

Jonathan G King BA(Hons) DipTP MRTPI
Professional Member

Date of issue of decision: 4th April 2019

PLAN A – This plan is referred to Planning Panel Decision Notice PAP/003/2019 of 4th April 2019