

THE STATES OF DELIBERATION
of the
ISLAND OF GUERNSEY

COMMITTEE *FOR THE* ENVIRONMENT & INFRASTRUCTURE

THIRD PARTY PLANNING APPEALS

The States are asked to decide:-

Whether, after consideration of the Policy Letter entitled “Third Party Planning Appeals” dated 28th February 2020, they are of the opinion:

1. To agree that, at this time, no change is made to the appeal provisions under the Land Planning and Development (Guernsey) Law, 2005 in respect of the means for third party representors to make representations to the Planning Tribunal within the current planning appeal process.
2. To agree that, before any proposals can be considered on whether or not to extend the current planning appeal regime to include provision for third party representors to appeal decisions of the Development & Planning Authority in respect, in particular, of the grant of planning permission, the approval of reserved matters or other consents under a planning permission, further and wider consultation is undertaken on the basis of the proposals and suggested matters for consultation set out in paragraphs 8.21 to 8.43 of the policy letter.
3. To direct the Committee *for the* Environment & Infrastructure, in consultation with the Committee *for* Economic Development and the Development & Planning Authority, to consult widely with States Committees, individuals, bodies and organisations:
 - (a) on the status of third party representors within the current planning appeal process; and
 - (b) whether to extend the current planning appeal regime to include provision for third party representors to appeal decisions of the Development & Planning Authority in particular, in respect of the grant of planning permission or the approval of reserved matters or other consents under a planning permission.
4. To direct the Committee *for the* Environment & Infrastructure to bring a further policy letter to the States, having considered the consultation responses, by no later than April 2021 on third party rights of appeal including whether or not to introduce a system for third party representors to appeal decisions of the

Development & Planning Authority to grant planning permission or approve reserved matters or other consents under a planning permission.

The above Propositions have been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications in accordance with Rule 4(1) of the Rules of Procedure of the States of Deliberation and their Committees.

THE STATES OF DELIBERATION
of the
ISLAND OF GUERNSEY

COMMITTEE *FOR THE* ENVIRONMENT & INFRASTRUCTURE

THIRD PARTY PLANNING APPEALS

The Presiding Officer
States of Guernsey
Royal Court House
St Peter Port

28th February 2020

Dear Sir

1. Executive Summary

- 1.1 This policy letter sets out the Committee *for the* Environment & Infrastructure's (the Committee) response to Resolution 5 on the Requête submitted by Deputy Merrett and six other States Members on 21st May 2019, entitled "Island Development Plan" ("the Merrett Requête"¹), directing it to bring a policy letter to the States, no later than April 2020, on third party representations in the Planning Tribunal ("the Tribunal) process, as described in recitals 19 and 20 of the Requête petition.
- 1.2 Resolution 5 requires the Committee to consider two different rights for third parties in the planning appeals process. Recital 19 calls for greater representation for third parties at the Tribunal in the event of first party appeals against planning refusals. Recital 20 calls for consideration to be given to whether or not to extend the current planning appeal regime to include provision for third party representors to appeal decisions of the Development & Planning Authority in respect of the grant of planning permission.
- 1.3 The policy letter provides an overview of the:
- Research undertaken into the regimes for determining third party planning appeals in other jurisdictions and, in particular those operating in Jersey, the Isle of Man and Ireland;
 - Responses to the targeted consultation the Committee *for the* Environment & Infrastructure has been able to undertake with the Committee *for*

¹ See Resolution 5 of the 19th July, 2019 on Article VI of Billet d'État No. XV of 2019.

Economic Development, the Development & Planning Authority, and the Planning Panel; and

- Estimated additional resource requirements and revenue costs for the States of Guernsey if the current planning appeal regime is extended to include provision for third party appeals against decisions by the Development & Planning Authority to grant an application for planning permission.

1.4 The policy letter considers:

- the research into other jurisdictions;
- the responses from the consultation with the Committee *for* Economic Development, the Development & Planning Authority, and the Planning Panel;
- the potential for significant legislative drafting requirements; and
- the significant gaps in evidenced understanding of the likely impact and costs of the introduction of third party appeals on the Island's planning regime and the wider implications for the economy in terms of construction sector activity, attractiveness of Guernsey as a place to do business and on the vitality and viability of Guernsey's economy.

1.5 Having considered these matters, the Committee *for the* Environment & Infrastructure has concluded that, although a third party appeal process may practically be achieved once the necessary legislation is in place, before any proposals on whether or not to extend the current planning appeal regime to include provision for third party representors to appeal decisions of the Development & Planning Authority in respect of the grant of planning permission can be considered, further and wider consultation should be undertaken to establish the full costs and impacts of introducing such a system, and particularly impacts on the planning regime and the economy.

1.6 Recital 19 seeks greater representation for third parties in the existing appeals process. It is important to note that this Recital only addresses concerns about third party representation to the Tribunal in the small number of cases where the refusal of planning permission is appealed. Since the adoption of the Island Development Plan in November 2016 only 13 refusals of planning permission have been appealed. The Committee *for the* Environment & Infrastructure has noted the endeavours of the Planning Panel to inform third party representors of the appeal process and, where a third party attends an appeal hearing, to afford them an opportunity to answer questions regarding the proposed development when they are best placed to give such evidence to the Tribunal.

1.7 It is also mindful that whilst, at first inspection, an amendment to the Land Planning and Development (Appeals) Regulations, 2008 could allow the Tribunal to permit anybody who has made a written representation in respect

of a planning application to address the appeal hearing, if such an amendment resulted in an increase in the numbers of representations received on planning applications the appeal process could become difficult to manage in a timely and fair manner. Further, such an amendment is also likely to require other amendments to the appeals provisions and these would be more efficiently handled as part of a more comprehensive review of the appeal provisions.

- 1.8 In respect of Recital 19 of the Merrett Requête, the Committee *for the Environment & Infrastructure* is not recommending, at this time, any change to the appeal provisions under the Land Planning and Development (Guernsey) Law, 2005 in respect of the status of third party representors within the current planning appeal process (see paragraphs 8.2 to 8.10).
- 1.9 In respect of Recital 20, the Committee has concluded that further consultation is required, to be undertaken in consultation with the Committee *for Economic Development* and the Development & Planning Authority, with States Committees, individuals, bodies and organisations which may have an interest in proposals to extend the current planning appeal regime to include provision for third party representors to appeal decisions of the Development & Planning Authority in respect, in particular, of the grant of planning permission. This would be to establish the full costs and impacts of introducing such a system, and particularly impacts on the planning regime and economy (see paragraphs 8.11 to 8.20). The Law Officers and the Royal Court would also be consulted in relation to any resource implications for them and on any further legal comments in relation to the proposals.
- 1.10 Further, the policy letter sets out the basis for the consultation namely that, if third party appeals are to be introduced:
 - (a) The following third parties should be entitled or be able to apply for leave to make a third party appeal:
 - The owner or occupier of a property any part of which is situated within 50 metres of the application site where that person has submitted a valid written representation to the Development & Planning Authority in accordance with the provisions of section 10 of the Land Planning and Development (General Provisions) Ordinance, 2007 (“the General Provisions Ordinance”);
 - The owner or occupier of a property any part of which is situated more than 50 metres from the application site and who has submitted a valid written representation as noted above and who demonstrates to the Planning Tribunal that there are exceptional reasons, linked to the direct impact on the character and amenity of

- the locality or the reasonable enjoyment of their property why they should be given leave to appeal;
- Any person or body who has been consulted by the Development & Planning Authority in accordance with section 11(1) of the General Provisions Ordinance and who has submitted a written representation in accordance with the requirements of section 11(2) of the General Provisions Ordinance;
- (b) The following decisions of the Development & Planning Authority may be appealed:
 - A decision to grant planning permission or outline planning permission;
 - One or more of the conditions attached to the grant of planning permission; and
 - The approval of reserved matters.
- (c) Planning applications which engage one or more of the following policies of the Island Development Plan will be excluded from matters in respect of which a third party may appeal:
 - S5: Development of Strategic Importance;
 - S6: Strategic Opportunity Sites;
 - IP2: Solid Waste Management Facilities;
 - IP3: Main Centre Port Development (only in relation to proposals for operational development required for the functioning of the Ports);
 - IP4: Airport Related Development (only in relation to proposals relating to the operation or safety of the airport);
 - IP5: Safeguarded Areas; and
 - IP10: Coastal Defences.
- (d) The appeal procedures and practices should, wherever possible, be consistent with the current process for handling first party appeals; and
- (e) An appeal fee should be payable. (See paragraphs 8.35 to 8.43)

2 Background

- 2.1 On 19th July 2019, following consideration of the Merrett Requête, the States of Deliberation directed:

“... the Committee *for the* Environment & Infrastructure to bring a policy letter to the States, no later than April 2020, on third party representations in the Planning Tribunal process, as described in recitals 19-20 to this Petition.”

- 2.2 Recitals 19 and 20 to the Requête stated:

“19. Finally, your Petitioners would like to see greater representation for third parties in the planning system. In the interests of fairness, your petitioners consider that a person who has made written

representations on a planning application should have the right to be heard by, or have their views adequately represented to, the Planning Tribunal. It is also considered that such persons should have the right to make written representations to the Planning Tribunal in the same circumstances where an appeal is determined without a hearing.

20. In the interests of fairness for those affected by neighbouring development, your petitioners also believe that consideration should be given to introducing a third party right of appeal against decisions on planning applications for owners or occupiers of land situated within 50 metres of any part of the application site who have made written representations on the planning application. This would be consistent with a similar third party right of appeal against planning application decisions in Jersey. Your petitioners consider that such appeals could be required to be made within 28 days of the DPA decision to avoid an extended period of uncertainty for landowners and developers.”

3 Current procedure for determining planning appeals

3.1 The Planning Tribunal commenced hearing planning appeals in April 2009 under section 87 of the Land Planning and Development (Guernsey) Law, 2005 (the 2005 Law) to hear first party appeals against certain planning decisions made by the Development & Planning Authority. A first party can appeal the following planning decisions to a Tribunal²:

- A refusal of planning permission or a grant of planning permission subject to conditions;
- Against the refusal of a reserved matters application or other consent under a planning permission;
- Against the grant of outline permission on an application for full planning permission;
- Against the refusal of an application for the modification or discharge of a planning covenant;
- The confirmation of a Tree Protection Order;
- The issuing of a Compliance Notice;
- The issuing of a Completion Notice;
- The insertion of, or amendment to, the entry relating to a property on either the Protected Buildings or Protected Monuments Lists;
- The issuing of a Preservation Notice;
- A failure to give notice of a decision on a planning application³;

² Appeals can also be made to an Adjudicator against certain decisions in relation to requirements of the Building (Guernsey) Regulations, 2012.

³ There is a right of appeal for such a failure under section 68(2) of the Law; this also applies to failures to make other decisions on applications listed in section 68(1).

- Against the refusal, or part refusal, of an application for a Certificate of Lawful Use; and
- Against the issue of a Certificate of Lawful Use for a modified or substituted description of use from that described in the application.

3.2 Where an appeal is made against the refusal of planning permission, section 69(1) of the 2005 Law places a statutory limitation on the evidence a Tribunal may take into consideration when reaching its decision. Section 69(1) states:

“An appeal under section 68 shall be determined by the Tribunal on the basis of the materials, evidence and facts which were before the Development & Planning Authority in the case of an appeal under section 68(1), when it made the decision appealed against.”

3.3 Therefore, the Tribunal cannot consider any evidence, facts or material which was not considered by the Development & Planning Authority when it reached its decision on the planning application.

3.4 Further, a Tribunal may only take into account considerations material to planning, in particular those under the 2005 Law⁴. Matters which are not normally planning considerations and which, therefore, cannot normally be taken into account include:

- Effect on land or property values;
- The character or identity of the applicant or objectors;
- Boundary or property disputes;
- How the application affects a private view (as opposed to the wider effect on public amenity which may include the effect on public views);
- Issues of commercial competition;
- The status of property under other legislation; and
- Moral or ethical issues or judgements.

3.5 The policy letter⁵ which led to the 2005 Law made no provision for third party appeals as the focus was on a new system for appeals to go to a specialist appeal body rather than to the Royal Court.

3.6 In June 2002, following consideration of a policy letter entitled “Review of the Island Development (Guernsey) Laws, 1966-1990”⁶, the States agreed to establish a Planning Panel to consider first party planning appeals. This policy letter proposed a very different appeal system to the one which was finally approved. The 2002 proposals were for appeals to be considered on their

⁴ In certain circumstances human rights considerations may also be relevant.

⁵ Billet d'État No. XI of 2002

⁶ Billet d'État No. XI of 2002

individual merits by a single independent and impartial adjudicator. The 2002 proposals also provided for certain third parties, i.e. those who had made written representations, to be able to submit representations to the adjudicator and for the appellant and the Development & Planning Authority to comment on these submissions. It was also proposed that a third party would also be entitled to be heard at a hearing.

- 3.7 The proposals for the appointment of a single independent adjudicator were amended and replaced with the present tribunal-based system and the right of representation at a planning appeal for those submitting written representations was omitted.

4 The current position for third party representors

- 4.1 There is currently no right under the 2005 Law for a third party to make representations to a Tribunal in an appeal against the refusal of planning permission or where aggrieved by a decision of the Development & Planning Authority to grant planning permission to appeal to a Tribunal.
- 4.2 The only route for third parties to challenge such decisions is to the Royal Court by judicial review. The costs associated with a judicial review are significant for all parties and considered beyond the means of most third parties. In addition to any court costs and legal costs, the third party, where such an application is unsuccessful, may also be required to pay the legal costs of the other parties, including the person whose planning application is the subject of the application, if he/she joined the proceedings as an interested party.
- 4.3 Where there is an appeal against the refusal of planning permission, the Tribunal will consider all of the valid third party written representations submitted as part of the planning application process. Although representors do not have a right to address a Tribunal, it is the Tribunal's practice to mitigate the feeling of a lack of representation within the appeals process. Appendix 1 provides a synopsis of how it works to include representors when a refusal of planning permission is appealed.
- 4.4 Tribunals regularly invite third party representors to attend a hearing to observe the hearing and provide clarification on particular planning considerations raised in their letter of representation which could not otherwise be properly and fairly considered.
- 4.5 On the occasions when this has happened, the third parties have generally responded to the questions the Tribunal members have asked them. The general feedback from those third party representors who have given evidence at an appeal hearing has been largely positive but there has invariably been

some frustration that the matters they were invited to address the Tribunal on was limited.

- 4.6 It is fully accepted that the above approach addresses only the situation when a refusal of planning permission is appealed and will not satisfy those third party representors who wish to have full appeal rights, including the right to challenge decisions of the Development & Planning Authority on applications they have objected to but which are approved.

5 Third party planning appeals against the approval of planning permission in other jurisdictions

- 5.1 In responding to Recital 20 of the Merrett Requête, the Committee *for the Environment & Infrastructure* has reviewed third party rights of appeal against the approval of planning permission in other jurisdictions. Appendix 2 provides a comparative overview of third party planning appeal systems in Jersey, the Isle of Man and Ireland. These jurisdictions having planning systems which are broadly similar to Guernsey's system under the 2005 Law but which are different. There are no British jurisdictions whose systems are directly comparable to that of Guernsey.
- 5.2 In considering the provisions for third party planning appeals in Jersey, Ireland and the Isle of Man, it is important to note that third party appeals are generally limited to appeals against decisions to grant planning permission, including the grant of outline permission or permission in principle decisions and approval of reserved matters.
- 5.3 Guernsey's planning law and system is broadly similar to that of England and Wales. Despite various proposals to introduce third party appeals in England and Wales and Scotland, there are currently no provisions for third party planning appeals in these jurisdictions.
- 5.4 In September 2013, the then coalition Government confirmed that it would not be introducing a system for third party planning appeals for England and Wales concluding,

“We consider it would not be appropriate to introduce a right of appeal against the grant of planning permission for third parties. The planning system is centred on community involvement. It gives statutory rights for communities to become involved in the preparation of the Local Plan for the area, and to make representations on individual planning applications, and planning appeals. Objections to planning applications are considered by the local planning authority or on appeal by an

Inspector, on behalf of the Secretary of State. All views are taken into account in reaching a final decision to allow or reject an application.”⁷

5.5 In May 2018, the Scottish Local Government and Communities Committee issued its Report on the Planning (Scotland) Bill which included proposals for the introduction of third party planning appeals, i.e. equal rights of appeal for all parties in a planning application. However, during the examination of and debate on the Bill the proposals for third party appeals were not supported and amendments to re-introduce them were all defeated.

5.6 Appendix 3 provides an overview of the debate around the 2018 Report on the Planning (Scotland) Bill.

(a) *The Jersey approach to third party appeals*

5.7 The Jersey planning appeal system is very different from Guernsey’s a number of important procedures. A single planning inspector conducts the hearing. He/she submits his/her written recommendation on whether the appeal should be allowed or dismissed to the Environment Minister. The final decision rests with the Minister. This approach applies to both first and third party appeals.

5.8 Table 1 provides an overview of planning appeals for the three full years of the Jersey planning appeal system for planning appeals.

Table 1	2016	2017	2018	2019
Number of all planning appeals ⁸	51	30	24	45 ⁹
Number of third party appeals	18	13	8	23 ¹⁰
Number of third party appeals upheld by a Planning Inspector	6	4	3	6 ¹¹
Number of third party appeals dismissed by a Planning Inspector	11	8	4	8
Number of recommendations of a Planning	1 ¹²	1 ¹³	1 ¹⁴	1 ¹⁵

⁷ Department for Communities and Local Government, Technical Review of Planning Appeal Procedures: Consultation: Summary of Responses, September 2013: page 11

⁸ The total number of appeals includes appeals against enforcement notices and other planning decisions for which there are no third party rights of appeal.

⁹ 42 appeals related to the grant or refusal of planning permission and 3 were against the issue of Compliance Notices

¹⁰ 11 appeals are due to be heard in Quarter 1 of 2020; 6 of which are third party appeals

¹¹ The outcome of 1 appeal is pending the issue of the decision notice; 1 other appeal was withdrawn before a decision notice was issued; and in 1 further case, the Environment Minister has referred the matter back to the Planning Inspector for further consideration

¹² In this case the Planning Inspector recommended that the appeal be dismissed but the Environment Minister decided to allow the appeal

¹³ In this case the Planning Inspector recommended that the appeal be upheld but the Environment Minister decided to dismiss the appeal

Inspector varied by the Environment Minister				
--	--	--	--	--

- 5.9 The principle criticism of the Jersey approach has been in relation to who may lodge a third party appeal, i.e. the limitations imposed by the requirement to live, own, or have an interest in property within 50 metres of the planning application site.
- 5.10 The Jersey system has also been criticised because it does not allow for special interest groups (e.g. La Société Jersiaise, National Trust of Jersey, Jersey Heritage, etc.) to bring third party appeals against a grant of planning permission unless the group owns, occupies or has an interest in land within 50 metres of the site.
- 5.11 The appeal fee for a third party in Jersey is £525. There has also been some criticism that the level of this fee is a barrier for some potential appellants.

(b) The Irish approach to third party appeals

- 5.12 The Irish system for third party appeals provides a broader base for any person who may bring a third party planning appeal as there is no property-ownership limitation on who may appeal. Under the Irish system, anybody, including representative groups and bodies, may appeal planning decisions if they made representations on a planning application. It also provides a right to apply for leave to appeal for the owners or occupiers of land or persons with an interest in land adjoining the application site regardless of whether or not that person submitted written representations.
- 5.13 However, the third party appeal rights are only available in Ireland in relation to decisions of local planning authorities and not those of the Planning Board. All applications relating to strategic infrastructure development, which appears to be fairly widely defined, are decided by the Planning Board and their decisions may only be challenged by way of judicial review.
- 5.14 The Irish system would require a significant and fundamental amendment to the planning appeals process in Guernsey. Further, during the debate on the Merrett Requête several Deputies made reference to the complexity of Guernsey's current planning legislation and policy. The Irish planning system is significantly more complex and so adopting approaches from the Irish system may have additional unforeseen and potential unwelcome consequences.
- 5.15 The appeal fee for a third party in Ireland is €220.

¹⁴ In this case the Planning Inspector recommended that the appeal be upheld but the Environment Minister decided to dismiss the appeal

¹⁵ In this case the Planning Inspector recommended that the appeal be dismissed but the Environment Minister decided to allow the appeal

(c) *The Isle of Man approach to third party appeals*

5.16 The Isle of Man approach for third party appeals is, in some ways, a hybrid of the Irish and Jersey systems. The scope of matters a third party may appeal is wider than decisions on planning applications and includes applications for works affecting the demolition of a Protected Building or buildings within Conservation Areas and the display of advertising signs¹⁶. However, whilst the range of matters that can be appealed is wider, the eligibility of someone to lodge a third party appeal is restricted to those who have made a representation on:

- living conditions (including outlook, privacy, traffic, noise, light, dust, and smell);
- land contamination, flood risk, highway safety and/or risk of crime; and/or
- prejudicing the use or development of adjoining land in accordance with the relevant development plan.

5.17 Further, a third party must also explain how the proposed development would impact, negatively or positively, on the appellant's land.

5.18 The appeal fee for a third party in the Isle of Man is £276.

6 Arguments for and against third party appeal rights

6.1 The Committee *for the* Environment & Infrastructure acknowledges that there is merit in investigating the full impacts and costs of introducing third party rights of appeal in order to investigate and address issues of fairness in the planning appeal system, whether that be actual or perceived. In researching third party planning appeals, the Committee *for the* Environment & Infrastructure has identified a range of arguments for and against affording appeal rights to representors as part of the planning process.

6.2 Generally the most common arguments for providing third party rights of appeal against the grant of planning permission include:

- (a) fairness for the owners or occupiers of properties and neighbouring developments where the amenity or enjoyment of their property may be affected by a development;
- (b) independent assessment of policy application where policies are open to interpretation;

¹⁶ In Guernsey, the demolition of all buildings, including Protected Buildings and those within Conservation Areas and the erection and display of advertising signs require planning permission subject to any available exemptions.

- (c) planning decisions need to take into account public opinion in as meaningful way as possible;
- (d) third party appeals facilitate greater public participation in land-use decision-making;
- (e) appeals provide a forum where individual rights and concerns, where relating to material planning considerations, particularly of those who are likely to be affected, can be weighed against collective concerns;
- (f) third party appeals can improve the transparency of the decision-making process ;
- (g) third party appeals can provide an additional means of checking that Government is acting consistently, fairly, and transparently.

6.3 Generally the most common arguments against allowing a third party the right to appeal decisions to grant planning permission include that such appeals may:

- (a) add significantly to delays in the planning system for both large and small developments with consequential costs to the economy;
- (b) add to the cost of development;
- (c) be a deterrent to investment in the local economy;
- (d) add further layers of complexity, bureaucracy, and legal requirement to the planning system;
- (e) delay the overall planning decision process as the same officers are likely to be responsible for considering planning applications and responding to planning appeals;
- (f) provide an opportunity for a vocal minority, not representative of the local community, to dominate;
- (g) provide a route to significantly delay strategically important development;
- (h) reinforce an adversarial and negative approach to planning and development;
- (i) undermine the positive opportunities for genuine community involvement in the planning policy formulation process;
- (j) result in disputes between neighbours which may have wider ramifications for community cohesion; and
- (k) discourage early and pro-active engagement throughout the planning process.

7 Actions following Resolution 5 on the Merrett Requête

7.1 Following the States Resolution 5 in July 2019 on the Merrett Requête, the Committee *for the* Environment & Infrastructure considered a briefing paper on 10th September 2019 which examined the practicalities of introducing a third party right of appeal and which:

- (a) Explained how third party planning appeals are handled in Jersey, Ireland, and the Isle of Man;

- (b) Proposed the categories of planning decisions against which a third party appeal may be possible; and
 - (c) Set out practical options for how third party representors may be afforded greater rights, as referred to in both Recitals 19 and 20 of the Merrett Requête.
- 7.2 Having considered this briefing paper the Committee agreed that, having considered the practicalities of introducing third party appeals the next step was to assess the potential impacts, and costs. It therefore resolved to consult with:
- the Committee *for* Economic Development;
 - the Development & Planning Authority; and
 - the Planning Panel.
- 7.3 The briefing papers did not indicate a Committee *for the* Environment & Infrastructure preference or position on whether or not third party appeals should be included in the current planning appeal regime but invited the consultees to indicate whether or not they would support the system outlined in the briefing paper and invited general comment about the potential impacts of third party appeals as set out in Recitals 19 and 20 of the Merrett Requête petition.
- 7.4 The full responses from the above consultees are appended to this policy letter (see Appendix 4). However, the main points from each of the letters are summarised below.
- 7.5 The Committee *for the* Environment & Infrastructure has been unable to undertake a wider consultation with developers, architects, and other relevant professionals, the construction industry or with other stakeholders and the wider community due to time and resource constraints. The very short time frame within Resolution 5 on the Merrett Requête for returning this matter to the States of Deliberation by April 2020 has not allowed for the complexity and potentially wide ranging and significant implications to be adequately researched and properly taken into account.

Response from the Committee *for* Economic Development

- 7.6 The Committee *for* Economic Development, by majority, is concerned about the risk of a potential negative impact on the economy of a more complex and lengthy planning process. In its letter of comment, the Committee *for* Economic Development recognises that, in the interests of fairness for those affected by neighbouring development, a right of appeal to a planning tribunal might appear to be desirable. However, it argues this must be balanced against the

potential negative impact to the Island's economy if the planning process is made more complex and lengthened through the introduction of third party planning appeals.

7.7 The Committee *for* Economic Development's response highlights the following matters:

- (a) The significant negative impact of any further delay in the planning process on the attractiveness of Guernsey as a place to do business and to live;
- (b) Views expressed to the Red Tape Working Party have highlighted concerns that actual and perceived delays in the planning process are a major concern for those looking to establish new or extend existing businesses in Guernsey;
- (c) The importance of confidence in the ability to obtain planning permission in a timely manner on the success of the economy through attracting new investment; and
- (d) The importance of a swift and responsive planning system when competing to attract high net worth individuals to relocate in Guernsey.

7.8 The Committee *for* Economic Development concludes that further complexity, expense, and delay to the planning system could act as an unnecessary drag on investment in the economy. It expressed concerns that this would have an undesirable and negative impact on the economy in terms of construction sector activity and is likely to act as a deterrent to investment in the Guernsey economy.

Response from the Development & Planning Authority

7.9 The Development & Planning Authority does not support the introduction of third party planning appeals.

7.10 The Development & Planning Authority highlights that there are multiple opportunities for people to engage with the planning process, starting with the preparation of policies in a development plan to making individual representations on an individual planning application. It supports the views expressed by the former Department for Communities and Local Government and the Scottish Government in response to discussions about whether or not to introduce third party appeals in England and Wales or Scotland, i.e. that public consultation and engagement should be proactive and at an early opportunity rather than reactive and at the end of the planning process.

7.11 The Development & Planning Authority's response also expressed concerns about the impact of any additional delays for those applying for planning permission as, if representations were made during the planning process, any

necessary work in relation to commencing development would be stalled for at least 28 days pending the possible submission of a third party appeal.

- 7.12 The Development & Planning Authority concludes that the introduction of third party appeals may act as a disincentive to early and positive engagement with the planning process and so result in delays, uncertainty and potentially a loss of confidence in the outcome of planning applications.
- 7.13 The Development & Planning Authority's letter also states that, if third party appeals were introduced in Guernsey additional staff would be required. Based on the experience on Jersey and applying that to Guernsey's planning application figures, the Development & Planning Authority estimates that at least one additional planning officer would be required to prepare and present the Development & Planning Authority's submissions on appeals and an additional officer to support the administration associated with responding to appeals.
- 7.14 The estimated costs of these additional posts would be between £85,000 and £110,000 (depending of the grading of the appointments) per annum.
- 7.15 The Development & Planning Authority also sought the views of agents who act on a regular basis for individuals, companies, and developers in the preparation of planning applications. One reply was appended to the Development & Planning Authority's consultation response which provides a helpful insight into the operation of third party appeals in Jersey from the perspective of a service user.

Response from the Planning Panel

- 7.16 The Planning Panel is generally supportive of allowing certain third parties a right of appeal but highlights the need for any expectations to be carefully managed. The Planning Panel's letter has drawn on the experience of members who either sit as planning inspectors in Jersey to hear third party appeals or have appeared in Jersey to represent either a third party appellant or the applicant who made the planning application.
- 7.17 The Planning Panel suggests that, wherever possible, the procedure for determining third party appeals should broadly mirror that already in place for first party appeals. It also raised a number of specific matters which it believed would need to be decided if the introduction of third party appeals was to be recommended to the States of Deliberation. Many of the specific issues raised in the Planning Panel's response relate to matters raised in the September 2019 Committee briefing paper.

- 7.18 The Planning Panel also provides an indication of the additional costs which it may incur if the number of third party appeals is similar to the experience of Jersey's Planning Tribunal. The Planning Panel has based its figures on between 10 and 15 additional appeals per annum, i.e. a 50% to 75% increase of its current workload.
- 7.19 The Planning Panel has indicated that it may need to recruit at least two additional lay members to ensure that there are sufficient members to hear the additional cases. It has also stated that it may also be necessary to appoint one additional professional member. The cost per additional member would be £2,000 per annum, plus attendance fees for hearing an appeal.
- 7.20 The Planning Panel has advised that the average cost (attendance fees for Tribunal members, travel and accommodation for off-Island members and venue hire) is between £2,500 and £3,000 per appeal hearing (based on a public hearing before a Tribunal of three members). Therefore, if the estimates of third party appeals resulting in some 10 additional hearings per year, the Planning Panel's operational costs would increase by between £25,000 and £30,000 per annum.
- 7.21 Further, the Planning Panel has also stated that its Secretary is currently employed on a half-time basis but a significant increase in the number of appeals would require additional, possible full time, support. This would result in an increase in staff costs of around £40,000 based on the current grading of the Planning Panel's Secretary.
- 7.22 The above additional costs would require the Planning Panel's budget to be increase from £95,000 per annum to between £165,000 and £180,000.

8 Response to Resolution 5 of the Merrett Requête

- 8.1 Resolution 5 on the Merrett Requête (P.2019/41) directs the Committee *for the Environment & Infrastructure*:

"To bring a policy letter to the States, no later than April 2020, on third party representations in the Planning Tribunal process, as described in recitals 19- 20 to this Petition."

Recital 19

- 8.2 Recital 19 seeks greater representation for third parties in the existing planning appeals system.

"In the interests of fairness, your petitioners consider that a person who has made written representations on a planning application should have

the right to be heard by, or have their views adequately represented to, the Tribunal”.

- 8.3 In considering Recital 19, it is important to note that this Recital only addresses concerns about third party representation to the Tribunal in the small number of cases where the refusal of planning permission is appealed. Since the adoption of the Island Development Plan in November 2016 only 13 refusals of planning permission have been appealed¹⁷. Notwithstanding the small number of cases to date, the Committee acknowledges that, even if not actual, there may be a perception of unfairness attributed to the existing planning appeals system. This can be exacerbated when the situation arises that a professional recommendation to the Development & Planning Authority by a planning officer is not followed but the same professional officers appear at the appeal Tribunal on behalf of the Development & Planning Authority. Although all professional officers adhere to strict professional codes and must lay aside their own previous judgements when representing the Authority, a perception of bias in favour of the appellant may occur. Where third parties are not called to speak at an appeal hearing there may be a perception of unfairness.
- 8.4 On first inspection, amending the current appeals process to give a right for third parties to be heard in accordance with Recital 19 or to give the Tribunal a clear power to permit such a person to appear appears to offer a relatively simple change. For example, the Land Planning and Development (Appeals) Regulations, 2008 could be amended to provide for the Tribunal to permit anybody who has made a valid written representation in respect of a planning application to appear at the appeal hearing. However, there is potential that such an amendment may result in the numbers of representations received in respect of individual planning applications increasing. For example, one case which was considered by a Tribunal in 2017 had attracted representations from over 90 individuals and for two other cases 62 and 28 individual written representations were received by the Development & Planning Authority. The planning application for the rehabilitation of the airport pavements in 2011 attracted 43 written representations.
- 8.5 Accommodating significant numbers of people wishing to address a Tribunal could inhibit its ability to deal with an appeal efficiently and in a timely manner. This could be detrimental to the effective and timely administration of the appeals system. For example, individuals may have to sit through long proceedings whilst waiting to be called to make their representations and setting the date for the hearing could involve many more people. Further, where the appellant is represented by an advocate, architect or planning

¹⁷ One case in 2017 which did not proceed to a hearing after a revised planning application was approved; six cases in 2018, of which two did not proceed to a hearing (both appeals being withdrawn by the appellants); and six cases in 2019, all of which were determined by a Tribunal.

consultant his/her costs would be increased if the time required for a hearing was significantly longer than is currently the case. Although the issues presented by a potential increase in the numbers of representations or numbers of people wishing to address a Tribunal are not insurmountable, there would be a potentially significant impact which would need to be considered and addressed. For example, an increase in the number of people submitting representations may mean the Development & Planning Authority's determination of the planning application will take slightly longer to allow for the proper consideration of the representations. Similar, an appeal hearing may take longer if the number of parties wishing to be heard increases.

- 8.6 Further, section 69(1) of the 2005 Law provides that an appeal must be determined on the basis of the materials, evidence and facts which were before the Development & Planning Authority when it reached its decision. Therefore, a Tribunal cannot consider any new evidence. It would therefore be inconsistent with the 2005 Law to invite additional representations on new material at the hearing stage. In affording third party representatives a right to be heard at an appeal hearing, there is a risk that third parties may wish to introduce matters which were not addressed in their original representations, especially where there has been a time delay between when the person submitted their written representations and when the Development & Planning Authority determined the planning application which can occur with complex or major planning applications.
- 8.7 In the event of an appeal against a planning refusal the Tribunal in any case receives all letters of representation pertaining to that planning application. In addition, as set out in section 4 and Appendix 1, Tribunals currently exercise their discretion under Regulation 5(h) of the Land Planning and Development (Appeals) Regulations, 2008 to allow a third party to be heard in certain circumstances. Changes to legislation would be needed to confer a right for a third party to be heard or for the Planning Tribunal to have a clear power to permit a third party who had made a written representation to appear. Such an amendment is likely to require consequential amendments in particular to the Land Planning and Development (Appeals) Ordinance, 2007 and the Land Planning and Development (Appeals and References) Rules, 2009 relating to appeals and references to the Royal Court.
- 8.8 The Committee *for the* Environment & Infrastructure is confident that the Planning Panel will continue to work fairly, impartially and consistently to ensure that third party representors' views are fully considered as part of the appeal process against refusal of planning permission. It has noted the endeavours of the Planning Panel to inform third party representors of the appeal process and, where a third party attends an appeal hearing, to afford them an opportunity to answer questions regarding the proposed development when they are best placed to give such evidence to the Tribunal. The

Committee has also noted the current small number of instances when appeals against the refusal of planning permission are lodged and therefore the current low number of representors who would benefit and considers that, at this time, the legislative drafting required is disproportionate to the benefits gained particularly in view of the discretion being exercised by the Planning Panel.

- 8.9 Recital 19 considers that a person who has made written representations on a planning application should have the right to be heard by, or have their views adequately represented to, the Tribunal. Taking into consideration that the representor cannot introduce new matters at the hearing, that the Planning Panel receives all valid letters of representation relating to a planning application and exercises its discretion to invite representors to appear at hearings the Committee considers that, at this time, the current procedures and legislation fulfil this purpose. Notwithstanding this, the Committee is aware that the provisions under existing legislation that allow the Tribunal to call representors, and the process for doing so, are not widely understood and it would like to produce guidance in collaboration with the Panel to provide clarity.
- 8.10 The Committee *for the* Environment & Infrastructure proposes to consult on the status of third party representors within the current planning appeal process in the further consultation proposed in Recommendation 3.

Recital 20

- 8.11 Recital 20 makes direct reference to the Jersey system for third party planning appeals and commends a similar system be provided for Guernsey. The analysis in Section 5 and Appendix 2 highlights that there are fundamental differences between the Guernsey and Jersey planning systems and a number of difficulties with the third party planning appeal regimes in Jersey, Ireland, and the Isle of Man. Further, the planning processes and legislation in each of these jurisdictions are very different from Guernsey's. For this reason, it is not possible to effectively "import" one of these models into Guernsey's planning appeal system so that adjustments would need to be made for the Guernsey context.
- 8.12 In the short time since Resolution 5 on the Merrett Requête was approved by the States, the Committee *for the* Environment & Infrastructure has been unable to undertake a wider consultation on the significant issues which have been highlighted nor has it had the opportunity to adequately research and properly take into account the complex and potentially wide ranging and significant implications of introducing a system of third party appeals as proposed in Recital 20.

- 8.13 The responses from the Development & Planning Authority and the Committee *for* Economic Development raise serious concerns about the potential wide-ranging impacts and costs of implementing a third party appeals system as well as costs for applicants for planning permission, both in terms of the uncertainty and potential delay over the planning process and the direct costs of defending a third party planning appeal. In addition, as referred to in the consultation response from the Committee *for* Economic Development, both raise concerns about the potential negative impact of third party appeals on the viability and vitality of Guernsey's economy generally and, in particular on the construction sector and Guernsey's ability to attract new businesses and high net worth residents.
- 8.14 Notwithstanding that a process could practically be possible further detailed discussions would be required with the Law Officers to establish the extent of changes to the planning legislation, or new legislation that may be required to be able to introduce third party appeals against planning approvals. As variously noted, Guernsey's planning regime is already regarded as complex. The legislation is not the easiest to follow and this means that any new provisions require careful and detailed consideration to ensure that drafting instructions do not result in any unintended consequences for existing provisions, including the current planning appeal regime.
- 8.15 The Committee *for the* Environment & Infrastructure firmly believes that, although it has investigated the practicalities of introducing such a system, before making any firm recommendation to the States on whether or not the current planning appeal system is extended to give third party representors a right of appeal, further consultation should be undertaken to be able to give adequate and proper consideration to the concerns raised and to be able to assess the level of support for extending the current planning appeal regime.
- 8.16 The Committee *for the* Environment & Infrastructure is mindful that, prior to the introduction of the 2005 Law, there were several consultation periods with representatives of the building and construction industry, those representing and advising people applying for planning permission and the community generally. Similarly, prior to the adoption of the Island Development Plan in November 2016, there were several opportunities for all interested parties to comment on the draft policies.
- 8.17 The Committee *for the* Environment & Infrastructure is also mindful that, although there has been a right for third parties to appeal in Jersey for nearly four years, no assessment or review has been undertaken into the impact of third party appeals on the viability and vitality of Jersey's economy generally and, in particular on the construction sector and Jersey's ability to attract new businesses, etc.

- 8.18 In reaching the decision that full and proper consultation is essential before deciding to change the current planning appeal regime or not so that all costs, impacts and benefits can be considered and a balanced decision reached, the Committee *for the Environment & Infrastructure* was also conscious that during the debate on the Merrett Requête in July 2019, States' Members made reference to the complexity of the Island's current planning process and raised concerns about the length of time between the submission of a planning application and its determination.
- 8.19 Finally, the Committee *for the Environment & Infrastructure* has noted that during 2019 there was a sharp increase in the number of third party planning appeals lodged in Jersey from 8 in 2018 to 23 in 2019¹⁸. It wishes to liaise with the Jersey Environment Minister to better understand whether there are any underlying reasons or trends for such a sharp increase in the number of third party planning appeals.
- 8.20 Having considered these matters, the Committee *for the Environment & Infrastructure* has concluded that, although a third party appeal process may practically be achieved once the necessary legislation is in place, before any proposals on whether or not to extend the current planning appeal regime to include provision for third party representors to appeal decisions of the Development & Planning Authority in respect of the grant of planning permission can be considered, further and wider consultation should be undertaken to establish the full costs and impacts of introducing such a system, and particularly impacts on the planning regime and economy. This further consultation should provide a fuller and more robust evidence basis which will enable the Committee *for the Environment & Infrastructure* to not only make informed and appropriately costed and evidenced recommendations but also, to analyse the extent of the issue and what exactly needs to be addressed based on evidence rather than perception.
- 8.21 In recommending further consultation, the Committee *for the Environment & Infrastructure* is recommending that the consultation should be based on a practical framework drawing on key provisions from the systems operating in Jersey, the Isle of Man and Ireland. This will set realistic parameters including seeking views on the following:
- (i) Who may be able to make a third party appeal;
 - (ii) What planning matters would be appealable;
 - (iii) The appeal period; and
 - (iv) The appeal procedures and fees.

(i) *Who can appeal?*

¹⁸ 14 of the 2019 third party appeals were lodged after 1st July 2019

- 8.22 In Jersey, an appellant must have made a third party representation and own, occupy or have an interest in property within 50 metres of the proposed development, whereas the Irish approach allows anybody who has submitted a written representation to appeal the grant of planning permission. In Ireland anybody who has submitted a representation is granted third party appeal rights. In the Isle of Man anybody who has made a written representation on certain specified matters and requested to have interested party status as set out in Departmental policy has a right of appeal¹⁹.
- 8.23 Recital 20 includes reference to third party representors living within 50 metres of the appeal site having a right of appeal. However, anybody who has submitted a representation could be afforded the right of appeal against a decision to grant planning permission.
- 8.24 The Committee *for the* Environment & Infrastructure proposes to consult on the basis that, if third party appeals are to be introduced, the following third parties should be entitled to appeal a decision of the Development & Planning Authority to grant planning permission or outline permission or against one or more conditions attached to the grant of planning permission:
- (a) The owner or occupier of a property any part of which is situated within 50 metres of the application site where that person has submitted a valid written representation to the Development & Planning Authority in accordance with the provisions of section 10 of the Land Planning and Development (General Provisions) Ordinance, 2007 ("the General Provisions Ordinance"); or
 - (b) The owner or occupier of a property any part of which is situated more than 50 metres from the application site where that person has submitted a valid written representation to the Development & Planning Authority in accordance with the provisions of section 10 of the General Provisions Ordinance and who demonstrates to the Planning Tribunal? that there are exceptional reasons, linked to the direct impact on the character and amenity of the locality or the reasonable enjoyment of neighbouring properties; or
 - (c) Any person or body who has been consulted by the Development & Planning Authority in accordance with section 11(1) of the General Provisions Ordinance and who has submitted a written representation in accordance with the requirements of section 11(2) of the General Provisions Ordinance.

¹⁹ The conditions for such status impose fairly strict limits relating to the location and impact on the third party's property affected by the application proposals. See Appendix 2 under "Who can appeal".

(ii) *What can be appealed?*

8.25 As noted in section 5 and Appendix 2, third party planning appeals in Jersey, Ireland, and the Isle of Man, are limited to:

- (a) The grant of an application for planning permission or outline planning permission; and
- (b) The approval of reserved matters²⁰.

8.26 Further in Jersey, a third party may also appeal one or more of the conditions attached to the grant of planning permission.

8.27 The Committee *for the* Environment & Infrastructure proposes to consult on the basis that a third party may only appeal the following decisions of the Development & Planning Authority:

- (a) A decision to grant planning permission or outline planning permission;
- (b) One or more of the conditions attached to the grant of planning permission; and
- (c) The approval of reserved matters²¹.

8.28 Under the Irish and Isle of Man systems for third party planning appeals, certain categories of developments which are considered to be of strategic importance are excluded from the planning decisions which may be appealed by a third party. The Committee *for the* Environment & Infrastructure understands that such developments are often those which attract the greatest public engagement and debate. However, by their nature, it believes that public opinion must be balanced against the wider requirement for strategically important development and benefits for Islanders. It is also mindful that such developments are usually subject to wider and more detailed consultation and scrutiny, including for example, the requirement for the preparation of an Environmental Impact Assessment, Traffic Impact Assessments, Development Frameworks and Local Planning Briefs.

8.29 The Committee *for the* Environment & Infrastructure considers that public engagement on strategically important development should be during the statutory consultation period rather than reactively after the Development & Planning Authority has determined the planning application. In this way, the Development & Planning Authority will have the benefit of the views of the professional advisors and consultees with the appropriate expertise and the

²⁰ See section 18 of the Land Planning and Development (General Provisions) Ordinance, 2007

²¹ This also covers other approvals required under a condition of a planning permission where referred to throughout the policy letter.

views of Islanders through their individual written representations before it reaches a decision on the application.

8.30 The Committee *for the Environment & Infrastructure* therefore proposes to consult on the basis that planning applications where one of the following policies under the Island Development Plan are engaged should not be included in the decisions which may be appealed by a third party representor:

- S5: Development of Strategic Importance;
- S6: Strategic Opportunity Sites;
- IP2: Solid Waste Management Facilities;
- IP3: Main Centre Port Development (only in relation to proposals for operational development required for the functioning of the Ports);
- IP4: Airport Related Development (only in relation to proposals relating to the operation or safety of the airport);
- IP5: Safeguarded Areas; and
- IP10: Coastal Defences.

(iii) *Appeal period*

8.31 Under the provisions of section 68 of the 2005 Law, the appeal period for a first party appeal against the refusal of planning permission is six months from the date of the planning decision. In the interests of fairness to the applicant and also to ensure that development is not unduly delayed because an appeal may be lodged, the appeal period for third party appeals should be relatively short.

8.32 In Jersey the period for making a third party appeal is 28 days from the date of a decision. In the Isle of Man it is 21 days and in Ireland 4 weeks.

8.33 The Committee *for the Environment & Infrastructure* recognises that, once planning permission has been granted, the applicant will want to proceed with the approved development as soon as possible. Further, for larger developments, the applicant will need to progress programmes of work, tendering, financing etc. It acknowledges that any delay because of the possibility of a third party appeal may result in additional costs, cause frustration and may also prove detrimental to the viability of a development and the vitality and viability of doing business in Guernsey. Indeed there is a risk that a third party appeal process could be seen as another obstacle to “doing business in Guernsey”.

8.34 The Committee *for the Environment & Infrastructure* proposes to consult on the basis that the appeal period for third party appeals should be within 28

days of the date of the Development & Planning Authority's grant planning permission²² or approval of reserved matters.

(iv) *Appeal procedures and fees*

- 8.35 The Committee *for the* Environment & Infrastructure proposes to consult on the basis that, if, following the consultation, third party appeals are recommended for inclusion in the Island's planning appeal regime, the procedures and practices should, wherever possible, parallel the current process for handling first party appeals.
- 8.36 The Committee *for the* Environment & Infrastructure believes that the current provisions for first party appeals under section 69(1) of the 2005 Law limiting a Tribunal to considering an appeal against the refusal of planning permission to the evidence, facts and material before the Development & Planning Authority at the time of its decision should also apply to third party appeals.
- 8.37 The Committee *for the* Environment & Infrastructure is mindful that first party appeals are generally determined within 4 to 5 months of being lodged with the Planning Panel, depending on the complexity and number of issues raised in the case. It notes that in Jersey, there is a strict timetable for the exchange of written responses²³. During this period the grant of planning permission is effectively held in abeyance pending the outcome of the appeal. This means that the applicant cannot proceed with the development.
- 8.38 The Committee *for the* Environment & Infrastructure proposes to consult on the basis that any amendments to the current appeals procedures should provide for a strict timetable for the submission and exchange of responses to all planning appeals with a power for the Committee to amend such procedures by Regulations of the Committee.
- 8.39 Finally, the consultation will also invite responses on the level of any appeal fee for making a third party appeal.
- 8.40 Under the current system, only some categories of appeal attract an appeal fee. Appeal fees only apply to appeals against the refusal of full and outline planning permission, the grant of outline permission where the application was for full planning permission or the refusal of reserved matters applications. The fee is

²² Legally, the grant of planning permission is made on notification to the applicant.

²³ Following the lodging of an appeal, the parties, i.e. the Planning Department, the applicant, and any other interested party, have 28 days to submit their written response. The appellant then has a further 14 days to make a further written response. However, despite this tight timetable, the time between an appeal being lodged and publication of the Environment Minister's decision is between 3 and 5 months for the date of the original planning decision.

the same as that for the planning application²⁴. This means that the fee can vary from no fee being payable, e.g. where the planning application relates to a matter that would ordinarily be exempt from the requirement to apply for planning permission under the Land Planning and Development (Exemptions) Ordinance, 2007 but is required to do so because e.g. the property is on the List of Protected Buildings, to several thousand pounds for a large residential development.

- 8.41 Further, section 4B(3) of the Land Planning and development (Fees and Commencement) Ordinance, 2008 provides for the appeal fee to be reduced by 25% where the appellant has given his or her consent to the appeal being determined on the basis of written representations without a hearing by a single professional member.
- 8.42 The appeal fees for third party appeals in Ireland, the Isle of Man and Jersey vary from €220 in Ireland, to £276 in the Isle of Man and £525 in Jersey.
- 8.43 The appeal fee for appeals under the Land Planning and Development (Certificates of Lawful Use) Ordinance, 2019 is £250 and the appeal fee under the High Hedges (Guernsey) Law, 2018 is £350.

9 Costs associated with third party planning appeals

- 9.1 As noted above, in the time available the Committee *for the* Environment & Infrastructure has not been able to fully assess the costs likely to be associated with the introduction of third party planning appeals. From the limited consultation, it has been possible to estimate the likely additional staff costs and resources for both the Planning Panel and the Development & Planning Authority although there are also likely to be some additional costs and resources for the Law Officers in giving advice on appeals.
- 9.2 Based just on the submissions in the consultation letters from the Development & Planning Authority and the Planning Panel, the introduction of third party appeals would result in significant recurring costs totalling between £155,000 and £195,000 per annum.
- 9.3 These costs would be partly offset by the income from appeal fees. Based on the estimates of 10 third party appeals per year the income would be between £2,000 and £5,350 (based on the appeal fees levied in the Isle of Man and Jersey. If the appeal fee was set at that currently levied for appeals under the High Hedges (Guernsey) Law, 2017, i.e. £350 per appeal, the income would be £3,500 from 10 appeals.

²⁴ The planning application fee is doubled where the application is seeking retrospective planning permission.

- 9.4 The Committee *for the* Environment & Infrastructure estimates that the public consultation proposed in this policy letter (see Recommendation 3) will cost between £3,000 and £5,000. It is satisfied that these costs can be managed using the Committee's existing resources.

10 Summary of Recommendations

- 10.1 In summary, the Committee *for the* Environment & Infrastructure is making the following recommendations in response to Resolution 5 of the Merrett Requête:

Recommendation 1

To agree that, at this time, no change is made to the appeal provisions under the Land Planning and Development (Guernsey) Law, 2005 in respect of the means for third party representors to make representations to the Planning Tribunal within the current planning appeal process.

Recommendation 2

To agree that, before any proposals can be considered on whether or not to extend the current planning appeal regime to include provision for third party representors to appeal decisions of the Development & Planning Authority in respect, in particular, of the grant of planning permission, the approval of reserved matters or other consents under a planning permission, further and wider consultation is undertaken on the basis of the proposals and suggested matters for consultation set out in paragraphs 8.21 to 8.43 of the policy letter.

Recommendation 3

To direct the Committee *for the* Environment & Infrastructure, in consultation with the Committee *for* Economic Development and the Development & Planning Authority, to consult widely with States Committees, individuals, bodies and organisations:

- (a) on the status of third party representors within the current planning appeal process; and
- (b) whether to extend the current planning appeal regime to include provision for third party representors to appeal decisions of the Development & Planning Authority in particular, in respect of the grant of planning permission or the approval of reserved matters or other consents under a planning permission.

Recommendation 4

To direct the Committee *for the* Environment & Infrastructure to bring a further policy letter to the States, having considered the consultation responses, by no later than April 2021 on third party rights of appeal including whether or not to

introduce a system for third party representors to appeal decisions of the Development & Planning Authority to grant planning permission or approve reserved matters or other consents under a planning permission.

11 Compliance with Rule 4

- 11.1 Rule 4 of the Rules of Procedure of the States of Deliberation and their Committees sets out the information which must be included in, or appended to, motions laid before the States.
- 11.2 In accordance with Rule 4(1), the Propositions have been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications.
- 11.3 In accordance with Rule 4(4) of the Rules of Procedure of the States of Deliberation and their Committees, it is confirmed that the propositions above have the unanimous support of the Committee.
- 11.4 In accordance with Rule 4(5), the Propositions relate to the duties of the Committee in respect of land use and planning and its duties under the Land Planning and Development (Guernsey) Law, 2005, as amended.

Yours faithfully

B L Brehaut
President

M H Dorey
Vice-President

H L de Sausmarez
S Hansmann Rouxel
S L Langlois

APPENDIX 1 – CURRENT PROCEDURE OF PLANNING TRIBUNALS IN RELATION TO THIRD PARTY REPRESENTORS

(a) *Pre-hearing actions*

When an appeal is lodged against the refusal to grant planning permission or outline permission or the conditions attached to the grant of planning permission, the Tribunal notifies all those who have made third party representations made in accordance with section 10 of the General Provisions Ordinance in respect of the relevant planning application. The letter informs the third party that an appeal has been submitted and of the time, date, and venue of the hearing (if the appeal is to be determined at a public hearing) and invites the third party to inspect the appeal bundle ahead of the hearing.

The letter also advises that, if the Tribunal believes there are matters in their letter of representation on which the Tribunal requires clarification, this will either be undertaken by inviting written responses to questions from the Tribunal or by oral evidence at the hearing.

(b) *Procedure at an appeal hearing*

The procedure for the determination of an appeal by the Tribunal is set out in Regulation 5 of the Land Planning and Development (Appeals) Regulations, 2008.

Regulation 5(b)²⁵ limits those parties who have a right to make representations to the Tribunal to the principal parties, i.e. the appellant and/or his/her representative/s and the Development & Planning Authority. Therefore, other parties with an interest in the appeal, including anybody who may have made a written representation of the Development & Planning Authority as part of the planning process, neighbours to the appeal site, etc., do not have a right to make representations, written or oral, to the Tribunal unless the Tribunal specifically invites them to.

The Tribunal also has a power to permit "interested parties"²⁶ to appear. This is defined to include, for appeals in relation to planning and reserved matters applications, an owner or occupier of the land who is not an appellant. This does not give a right to appear but gives the Tribunal a clear discretion to permit other people to appear where fair to do so.

²⁵ (b) where a hearing is held the principal parties are entitled to appear and the Appellate Body may also permit -

- (i) any interested party, and
- (ii) in relation to an appeal against a compliance notice, any other person who in the opinion of the Appellate Body is affected by the breach of planning control which is alleged in the compliance notice, to appear,

²⁶ That is, other than the appellant, any person who is the owner or occupier of the land subject of the appeal

Regulation 5(h)²⁷ allows the Tribunal to examine such persons as appear likely to afford evidence which is relevant and material to any question to be determined. Examples of who may be called under this Regulation include:

- The author of any expert report which was submitted as part of the planning application;
- The appellant's architect, design consultant, etc.;
- Any party, including other States' Committees or service areas, who may have provided a consultation report for the Development & Planning Authority as part of its assessment of the planning application; and
- Any other party, who may be able to assist the Tribunal in answering any question to be determined.

This last group may include somebody who made a written representation to the Development & Planning Authority when the planning application was advertised for consultation.

The decision about who may be called to give evidence rests with the Tribunal.

²⁷ (h) the Appellate Body may call for such documents and examine such persons on oath, affirmation or otherwise as appear likely to afford evidence which is relevant and material to any question to be determined by the Appellate Body,

APPENDIX 2 – COMPARATIVE OVERVIEW OF THIRD PARTY PLANNING APPEALS IN JERSEY, IRELAND, AND THE ISLE OF MAN

	Jersey	Ireland	Isle of Man
Who can appeal?	<ul style="list-style-type: none"> - Has made third party written representation on planning application; <u>and</u> - Owns, has an interest in or occupies land within 50m of application site 	<ul style="list-style-type: none"> - Any other person, body or interested group etc. who made submissions or observations in writing; or - Where a prescribed body was entitled to be notified of a planning application and was not, the body may appeal without having made submissions or observations on the planning application; or - Where an environmental impact assessment report was required to be submitted with the application, a body whose aims or objectives relate to the 	<ul style="list-style-type: none"> - Anybody having “interested person status²⁸”; this is decided by the Department of the Environment, Food and Agriculture - Person making written representation must own or occupy land that may be impacted by the proposed development; and - The land must be within 20m of the boundary to the application site²⁹; and - Representation must relate to specified issues. <p>When submitting a representation on a planning application, the third party must request to be afforded “interested person</p>

²⁸ Under its current policy, the Department for the Environment, Food and Agriculture will only afford Interested Person Status to those persons who submit a written representation(s) which complies with ALL the criteria set out below.

A. Representations must clearly identify the land which the person making the representation owns or occupies and which they consider would be impacted on by the proposed development (On an appeal it is necessary to state the reasons why a person's land is impacted by the matters set out in C below).

B. The land referred to in (A) above must be within 20 metres of the red line boundary of the application site, unless the proposed development exceeds the criteria set out in Appendix 5 of the Strategic Plan (2016) to automatically require an Environmental Impact Assessment.

C. Representations must relate to the relevant issues set out below.

C1. For Planning Applications, the relevant issues are:

- living conditions (including outlook, privacy, traffic, noise, light, dust, and smell);
- land contamination, flood risk, highway safety and/or risk of crime; and/or
- prejudicing the use or development of adjoining land in accordance with the appropriate Area Plan.

C2. For applications for Works affecting Registered Buildings or Demolitions in Conservation Areas, the relevant issues are limited to one or more of those set out in Environment Policies 30 to 35 (inclusive) and 39 of the Strategic Plan (2016).

C3. For applications for the Display of Advertisements, the relevant issues are limited to those set out in Regulation 5(1) of the Town and Country Planning (Control of Advertisements) Regulations 2013.

D. Representations which relate to: Planning Applications; Works affecting Registered Buildings; or Demolitions in Conservation Areas, must explain how the proposed development could impact (positively or negatively) on the lawful use of the land referred to in (A) above in relation to the issues set out in (C) above.

²⁹ Unless an environmental impact assessment is required.

	Jersey	Ireland	Isle of Man
		<p>promotion of environmental protection and which meets certain other requirements may appeal the decision without having made submissions on the planning application; <u>or</u></p> <ul style="list-style-type: none"> - A person with an interest in land (e.g. a landowner or occupier) adjoining the application site may apply to the Planning Board for leave to appeal a grant of permission without having made submissions or observations to the planning authority. 	<p>status” and must include reasons in their representation.</p> <p>For planning applications "interested persons" automatically includes:</p> <ul style="list-style-type: none"> - the owner or occupier of any building which is the subject of the application; - certain Government Departments; and - local authority in whose district the land is situated; <p>For applications for works affecting registered buildings or demolitions in a Conservation Area, “interested persons” automatically includes:</p> <ul style="list-style-type: none"> - Manx National Heritage - Local authority in whose district the building is located - the owner or occupier of any building which is the subject of the application.
What can be appealed?	<p>Decisions relating to:</p> <ul style="list-style-type: none"> - Grant of full planning permission - Grant of outline planning permission - Approval of reserved matters 	<p>Decisions of a local authority relating to:</p> <ul style="list-style-type: none"> - Grant of full planning permission - Grant of outline planning permission - Conditions attached to the grant of planning permission 	<p>Decisions relating to:</p> <p>Grant of planning permission where relevant representations relate to -</p> <ul style="list-style-type: none"> - living conditions (including outlook, privacy, traffic, noise, light, dust, and smell); - land contamination, flood risk, highway safety and/or risk of crime; and/or - prejudicing the use or development of adjoining land in accordance with the relevant development plan.
How long is the appeal	28 days from date of the planning decision	4 weeks from date of the planning decision	21 days from date of the notice of the planning decision

	Jersey	Ireland	Isle of Man
period?			
How much does it cost to appeal?	£525	€220 – where the appellant has made an observation or submission as part of the planning application €110 – for leave to appeal (if leave is granted a further fee of €110 will be payable to proceed with the appeal)	£276 ³⁰
Mode of appeal	By hearing but with a power for the Inspector to deal with the appeal by written representations ³¹ .	The Appeal Board has the power to decide whether or not to hold a hearing which are generally held for complex cases. A party may request a hearing but the decision is that of the Board. An additional fee of €110 is payable.	The appellant can request an inquiry hearing or for the matter to be considered by written representations.
Who makes the decision on the appeal?	An independent planning inspector makes a recommendation to the Minister for the Environment and the Minister makes the final decision.	The Board makes the decision ³² .	An independent planning inspector makes a recommendation to the Department of Environment, Food & Agriculture and the Department makes the final decision.
How long does appeal process take?	Once an appeal is lodged, the appellant and the other parties (applicant, Planning authority and any other third party appellants) have 28 days to submit their statement of case. [All parties then have 14 days to respond]. No new issues can be raised at this stage. A hearing is general held with 6 weeks of all submissions being received.	The planning authority, applicant and any other appellant have 4 weeks to submit their response to the appeal. Hearings appear to be held within 6 to 8 weeks of all submissions being received. The Board's objective is for appeals to be determined with 18 weeks of the date of receipt ³³	Appeals are general determined with 3 months of an appeal being lodged.

³⁰ The appeal fee is the same for all classes of appeal; i.e. first party appellants also pay an appeal fee of £276

³¹ See Art 114(4) of the Planning and Building (Jersey) Law 2002

³² Under section 104 of the 1976 Planning Act the appellate body is a corporate Board comprised of a chairman and 9 members which decides not only appeals on local authority decisions but decides major decisions itself.

³³ Section 126(6) of the Planning Act 2013

	Jersey	Ireland	Isle of Man
Further appeals	Within 28 days of publication of decision on a point of law to the Royal Court	Within 8 weeks of publication of appeal decision on a point of law by way of judicial review ³⁴ .	There is no right of appeal against the Department's decision; any party may seek a judicial review, through a Petition of Doleance to the High Court. It is only likely to be progressed where it is believed there has been a misdirection or legal complication either during or after the appeal or its conclusion, or in relation to the decision of the Minister.
Other		Where an appeal has already been made, any person other than a party to the appeal can become an “observer” and make submissions or observations on the appeal, subject to an application being made within 4 weeks beginning on the day of receipt of the appeal by the Board.	All “interested persons” are entitled to address a Planning Inspector at a first party appeal inquiry hearing.

³⁴ The first stage is an application for leave to apply for judicial review.

APPENDIX 3 – OVERVIEW OF THE 2018 REPORT ON THE PLANNING (SCOTLAND) BILL

The Scottish Local Government and Communities Committee's Report on the Planning Scotland Bill recommended,

“Whether rights of appeal in the planning system should be equalised has been a long standing issue on which a wide range of individuals and organisations hold passionate views either for or against. The reasons cited as supporting Equal Right of Appeal (“ERA”) or for not supporting it are well established as are the views as to whether those reasons are evidence based or robust.

The evidence we heard on ERA very much replicated this long standing debate about whether ERA would:

- lead to a more robust, plan-led system which encouraged more meaningful up front engagement and agreement between communities, developers and authorities on what development should take place in local areas; or
- lead to delays, uncertainty, reduce early engagement and investment in the housing and developments necessary to support people to live and work in their local area.

It is clear to the Committee that many communities feel frustrated by the planning system. Previous attempts to front-load the system have not been successful. The Committee is not persuaded that proposals in this Bill go far enough to address that. There is an imbalance in a system whereby the applicant can appeal decisions that have been taken in clear accordance with the development plan.

The Committee has heard evidence from both sides of the argument in relation to equal rights of appeal. We want people to feel involved in the planning system at all stages and we urge the Scottish Government to look at these issues before Stage 2.”

The Scottish Government's response to the Report later in May, 2018 concluded,

“The Scottish Government recognises this long-running debate over appeal rights and the widely differing and well-established views of stakeholders. Our position has been clear and consistent on this. Stronger community engagement at an early stage is much more constructive than more adversarial appeals at the end. Having explored the issues, this was also the view of the independent panel.

The thrust of the review of the planning system is towards strengthening of planning's contribution to inclusive economic growth, through delivery of development and empowering communities to have a meaningful influence. Positive collaboration at the earliest stages is key to achieving that. Stronger engagement in development planning, and in communities; own local place plans, is a better means to influence future development and to increase confidence in what will happen. Adding further procedures for conflict and dispute resolution onto the

end of the planning process would be a disincentive to that early, positive collaboration.

The Scottish Government also understands and respects the views of those who would seek to invest in the development our communities need. We cannot afford to have Scotland at a competitive disadvantage or to put additional obstacles in the way of investment and inclusive growth. We are clear that changes to the long-established system of appeals could negatively influence investment choices, as investors would perceive conditions in other parts of the UK to be more favourable.

The Scottish Government maintains that we have the right balance in appeal rights already and that making changes would take our planning system in the wrong direction, and would be damaging to the overarching intentions of planning reform.”

The Planning (Scotland) Act 2019 received Royal Assent on 25th July 2019. During the debate on the final draft, the several amendments to include provisions for third party appeals were all defeated.



Committee *for the*
Environment & Infrastructure

Raymond Falla House
Longue Rue
St Martin
Guernsey
GY4 6HG
+44 (0) 1481 234567
environmentandinfrastructure@gov.gg
www.gov.gg

The President
Policy & Resources Committee
Sir Charles Frossard House
La Charroterie
St Peter Port
Guernsey
GY1 1FH

27 February 2020

Dear Deputy St Pier

Policy Letter – Third Party Planning Appeals

In accordance with Rule 4(1) of the Rules of Procedure for the States of Deliberation and their Committees, it is requested that the Policy Letter entitled “Third Party Planning Appeals” be considered by the States of Deliberation at its meeting on Wednesday 22nd April 2020.

The request is made to fulfil the requirements of Resolution 5 of P7/2019 – Requête – Island Development Plan which required the Committee to “to bring a policy letter to the States, no later than April 2020, on third party representations in the Planning Tribunal process, as described in Recitals 19-20 to this Petition.”

Yours sincerely

B L Bréhaut
President
Committee *for the* Environment & Infrastructure



Deputy Barry Brehaut
President
Committee for the Environment & Infrastructure
Raymond Falla House
PO Box 459
Longue Rue
St Martin
Guernsey
GY1 6AF

PO Box 451
Level 4
Market Building
Fountain Street
St Peter Port
GY1 3GX

+44 (0) 1481 743835

www.gov.gg

23rd December 2019

Dear Deputy Brehaut,

Third Party Planning Appeals

Thank you for your letter dated 29th October 2019 seeking the Committee *for* Economic Development's views on the Committee *for the* Environment and Infrastructure's proposals to introduce third party planning appeals in response to Deputy Merrett's requête. I apologise for the delay in replying.

The Committee acknowledge the view that in the interests of fairness for those affected by neighbouring development, third party rights of appeal against planning decisions might appear to be a desirable development. However, the Committee - by majority - is also concerned about the risk of a potential negative impact on the economy of a more complex and lengthy planning process.

One of the pleas that the Committee consistently receives from businesses is that Guernsey should remain very much open for business. In an increasingly global facing and complex environment, the need for businesses to comply and fulfil regulations from both on and off island is ever growing. To this extent, as a general principle, the Committee would wish to see a much more streamlined planning system that enables business development and therefore promotes economic growth.

Ensuring that Guernsey remains one of the best environments in which to do business has been a key area of work for the Committee through implementation of the States approved Economic Development Strategy. To this end a working group was formed to look at the extent to which 'red tape' affects businesses in the island and if there were further opportunities to reduce the impact of red tape on businesses. The work of the Red Tape Working Party produced a report on the ease of doing business in Guernsey. Based on a methodology used by the World Bank, we have estimated that Guernsey currently ranks 15th in the world (out of 191 jurisdictions). This is a positive reflection of the current business environment in Guernsey.

However, the Red Tape Working Party also took note of the concerns expressed by businesses and investors in the island. Perceived and actual delays in gaining planning approvals is a key area of concern expressed by businesses. An appeals process for third parties can only extend that period. The Committee's view is that there is a more pressing need to revisit the definition of development that requires permission, before adding more layers of approvals.

Onward and continuous investment in business premises is key for the continued success of the economy. Over the last few years, confidence in investment has been at relatively low levels, but we are starting to see more positive signs – such as the investment by Premier Inn in a new 100 bed hotel at Admiral Park. However, construction activity remains at subdued levels when compared with other jurisdictions – especially Jersey. Whilst there are many factors that influence this confidence level, the ability to obtain planning permission is one key part.

High net worth individuals relocating to the island bring many benefits, including the creation of local businesses and the employment opportunities that this brings. A swift and responsive planning system is a key requirement and an attraction of Guernsey to potential relocators. If there were less certainty in the planning system, or potential long and drawn out planning permission appeal processes, then this could act as a deterrent to individuals who are considering relocating to the Island. In this respect, the Committee notes with interest from the information in the position paper, that both Jersey and the Isle of Man have introduced third party planning appeals. It would appear that these have generated certain issues, cost and bureaucracy to the planning process, whilst not necessarily creating a fairer planning system. The Committee would suggest that this is something which Guernsey should avoid. Indeed it could be perceived as a potential advantage to prospective investors if Guernsey has a much more fluid planning system than its competitors.

In summary, the Committee - by majority - wishes the planning system to act as an enabler for business rather than being a drag on economic growth. It would wish to see the current system streamlined rather than further complexity being added. If proposals to allow third party planning appeals are taken forward the Committee is of the view that there would be a negative impact on the economy because of a more complex and lengthy planning process. This would have an undesirable impact on construction sector activity and is likely to act as a deterrent to investment in the Guernsey economy.

Yours sincerely,

A handwritten signature in dark ink, appearing to be 'CP', with a long, sweeping horizontal line extending to the right.

Deputy Charles Parkinson
President

The President
Committee *for the* Environment & Infrastructure
Raymond Falla House
PO Box 459
Longue Rue
St Martin
Guernsey
GY1 6AF

27 November 2019

Dear Deputy Brehaut

CONSULTATION ON THE PROVISION OF THIRD-PARTY PLANNING APPEALS

Thank you for your letter of 29 October 2019 and enclosed position paper, and for seeking the views of the Development & Planning Authority (D&PA) regarding the above matter. I am grateful for the agreement to extend the consultation period to enable the D&PA to provide its considered response.

Having considered the matter at its meeting on 20 November 2019, the D&PA does not support the provision of third-party planning appeals. The reasons for this are essentially two-fold, relating both to matters of principle and to more practical aspects such as the impact of a system of third-party appeals on costs, resources and workload.

The principle of third-party appeals

In terms of the philosophical arguments for and against third party appeals, as set out in the Committee *for the* Environment & Infrastructure position paper, the D&PA noted in particular the statement from the Coalition Government in 2013 confirming that it would not be introducing a system for third party planning appeals for England and Wales:

“We consider that it would not be appropriate to introduce a right of appeal against the grant of planning permission for third parties. The planning system is centred on community involvement. It gives statutory rights for communities to become involved in the preparation of the Local Plan for the area, and to make representations on individual planning applications, and on planning appeals. Objections to planning applications are considered by the local planning authority

or on appeal by an Inspector, on behalf of the Secretary of State. All views are taken into account in reaching a final decision to allow or reject an application.”
(Department for Communities and Local Government, Technical Review of Planning Appeal Procedures: Consultation: Summary of Responses, September 2013: page 11)

The D&PA noted that a similar conclusion was reached by the Scottish Government in 2018. Appendix 2 of the position paper provided a helpful overview of the debate around the 2018 Report on the Planning (Scotland) Bill which included the following:

“The Scottish Government recognises this long-running debate over appeal rights and the widely differing and well-established views of stakeholders. Our position has been clear and consistent on this. Stronger community engagement at an early stage is much more constructive than more adversarial appeals at the end. Having explored the issues, this was also the view of the independent panel.

The thrust of the review of the planning system is towards strengthening of planning’s contribution to inclusive economic growth, through delivery of development and empowering communities to have a meaningful influence. Positive collaboration at the earliest stages is key to achieving that. Stronger engagement in development planning, and in communities; own local place plans, is a better means to influence future development and to increase confidence in what will happen. Adding further procedures for conflict and dispute resolution onto the end of the planning process would be a disincentive to that early, positive collaboration.”

And:

“The Scottish Government maintains that we have the right balance in appeal rights already and that making changes would take our planning system in the wrong direction, and would be damaging to the overarching intentions of planning reform.”

In essence, therefore, the conclusion for England, Scotland and Wales, with which the Guernsey Planning system has closest affinity, was that the planning process in these jurisdictions offers multiple opportunities for third party representations and that adding additional procedures for conflict and dispute resolution at the end of the process would be a disincentive to early and positive involvement of the community in the planning process.

In Guernsey, under the Land Planning and Development Law, planning applications can only be approved where they are in accordance with the provisions of the Development Plan, currently the Island Development Plan (IDP), unless only a minor departure from that Plan. The IDP was itself subject of extensive consultation, examination in public by independent Planning Inspectors and approval by the States of Deliberation. The IDP is in

accordance with the high level direction set in the Strategic Land Use Plan (SLUP) which itself was subject to considerable public consultation; over one thousand Islanders gave their views and opinions in the 'Guernsey Tomorrow' consultation initiative which led to the SLUP.

The community also has statutory rights to make representations against planning applications although they do not, as yet, have such rights at appeals although we appreciate that you are fulfilling the current direction to examine its introduction. The D&PA has also embarked on a Communication Plan to raise awareness of the community's rights of representation and their ability to voice their views on the planning system including a workshop on aspects of the community's ability to engage with and influence planning matters.

In this context, the D&PA firmly believes that the emphasis should not be on challenging decisions taken in accordance with the States' agreed land use principles and development plan at the end of the process, but engaging at the plan making stage to influence the policies against which planning applications will be subsequently assessed. To introduce a system of third-party appeals would not only be a disincentive to early and positive involvement of the community in the planning process, but would also inherently lead to much greater disruption, uncertainty and lack of confidence in the outcome of that process.

Costs, resources and workload

The following table gives details of the number of planning applications decided each year in 2016-2018 and, of these, the number approved and refused. The number of appeals received by the Planning Panel in each of these years is also shown. Section 68(1) appeals are appeals against refusals of planning permission and against conditions attached to the grant of planning permission, the remainder consist of appeals in respect of Compliance Notices, Protected Buildings and Tree Protection Orders.

Year	Total Decided	Approved	Refused	All Appeals	S68(1) Appeals
2016	1538	1482	56	24	11
2017	1581	1553	28	19	5
2018	1537	1499	37	16	6

As an estimate, approximately one-third of applications attract representations from third parties, and depending on the criteria selected for eligibility to appeal, it is clear from this that there is potential for a significant number of third party appeals. However, it is noted

that some third party representations do not always include representations about planning matters. As a minimum, it is likely that the number of appeals will double.

It is noted that there is the suggestion that there would be a process for checking the appeals under selected criteria for their validity which may reduce the number of valid appeals. However, there will still be some involvement of the Planning Service at this stage irrespective of the criteria selected so that they can provide details of why the appeal may not be valid but the degree of their involvement may depend on the selected criteria. The D&PA would appreciate further details on such criteria in order to advise further on the ramifications on resources if it was felt appropriate for your Committee to introduce third party appeals.

For each such appeal, where valid under the selected criteria, it would be necessary for at least a statement addressing the appellant's grounds of appeal to be produced. If reflecting the procedure for first party appeals, the majority of third party appeals would be likely to be considered by a Tribunal at a hearing. It is therefore considered that the introduction of third party appeals would be likely to represent a significant increase in workload for the Planning Service and in particular for the planning officers who are dealing with planning application and related matters such as provision of pre-application advice. Unless addressed through an increase in officer resources this would inevitably lead to a decline in service and processing times for applications.

It is difficult to attempt to quantify this at this stage, however a conservative estimate of an additional resource requirement would be at least one FTE Planning Officer. There would also be an additional resource burden in terms of the administration of appeals by the relevant support officers.

In relation to delay to development arising from third party appeals, the position paper notes that in Jersey there is a strict timetable for the exchange of written responses. Following the lodging of an appeal, the parties, i.e. the Planning Department, the applicant and any other interested party, have 28 days to submit their written response. The appellant then has a further 14 days to make any further written response. However, despite this tight timetable, the time that elapses between an appeal being lodged and the Environment Minister making a decision based on the planning inspector's recommendations following an appeal hearing, is between 3 and 5 months from the date of the publication of the planning permission subject of the appeal. The implications of this potential delay on the development process and the economy will therefore be significant.

Planning agents who regularly submit planning applications to the D&PA were asked for their views in relation to the matters raised in the consultation from the Committee *for the Environment & Infrastructure*. One response, from a prominent local architectural practice, is enclosed and provides a helpful insight into the operation of third party appeals in Jersey from the perspective of a service user.

Conclusion

In summary, the D&PA does not support the provision of third-party planning appeals and is of the view that the introduction of such a right of appeal against the granting of planning permission would inevitably:

- through increased workload for planning staff, delay the overall planning decision process as the same officers will be responsible for determining planning applications and responding to planning appeals;
- add further layers of complexity and administrative burden to the planning system which is already regarded in some quarters as overly complex, litigious and burdensome;
- add consequential costs to the economy and to the cost of development; and
- reinforce an adversarial and negative approach to planning and development and de-incentivise proactive and positive engagement at an early stage in the planning process and inevitably lead to much greater disruption, uncertainty and lack of confidence in the outcome of the planning process as a result.

If, notwithstanding the above comments, the Committee *for the* Environment & Infrastructure were to recommend to the States that a form of third-party planning appeal be introduced, then it must be recognised that additional resources, including staff resources, would be required by the D&PA if there was not to be a very serious adverse impact on planning application timescales, the construction industry and the economy as a whole. The D&PA would anticipate these latter considerations will also be matters addressed through the Committee *for the* Environment & Infrastructure's consultation with the Committee *for* Economic Development.

Yours sincerely



Deputy Dawn Tindall

President, Development & Planning Authority

From:
Sent: 13 November 2019 16:51
To: Planning Services
Cc:
Subject: Re: Consultation on Third Party Planning Appeals

Dear Jim,

Many thanks for your email. Our company response is as follows:

wholeheartedly agree that Guernsey should follow the UK Government in not allowing 3rd Party appeals for the following reasons:

- Unacceptable delays to the Planning process which will damage our economy.
- Increased costs to developers in defending appeals.
- Increased costs and administration to the DPA.
- Increased costs to the States of Guernsey in defending appeals for strategic infrastructure developments.
- Potential for misuse and objections not based on material Planning considerations.

PF+A's experience in Jersey, despite it's booming construction sector, is that 3rd Party Appeals are declining in popularity with very few being successful.

We have endured one appeal which clearly illustrates the difficulties in applying the system:

1. A retrospective application to regularise a skip company's operations on a green field site was refused.
2. An amended application ,(free go),was approved at a public Planning Application Committee meeting.
3. 3rd Party appeal was lodged by a landowner within 50m of the site.
4. Independent Planning Inspector recommended that the appeal be allowed.
5. Applicant appealed to the Royal Court and lost
6. Applicant then appealed this decision to the Higher Court and won.

The whole process took three years, cost many thousands of pounds in legal costs leaving both parties aggrieved.



Planning Panel

Planning Panel
Sir Charles Frossard House
La Charroterie
S. Peter Port
Guernsey GY1 1FH

Telephone: 01481 717284
Email: planningpanel@gov.gg

The President
Committee *for the* Environment & Infrastructure
Raymond Falla House
Longue Rue
St Martin
GY4 6HG

10th December 2019

Dear Deputy Brehaut

Consultation of Third Party Planning Appeals

Thank you for inviting the Planning Panel ("the Panel") to be part of the consultation on whether Guernsey should introduce a system for third parties to appeal decisions made by the Development & Planning Authority ("the Authority").

The Panel has considered the Position Paper attached to the consultation letter and is aware that its Secretary, Ms Dene, has been involved in the preparation of the paper in her role as a member of the Policy & Resources Committee's Strategy & Policy team.

In preparing this response, the Panel members have discussed the Position Paper and also considered the input from two of the Panel's professional members who sit as Planning Inspectors in Jersey and so have direct experience of determining third party appeals, as well as the views of its third professional member, who has advised clients in Jersey in respect of third party appeals. Their particular insights into how the system operates in Jersey are reflected in this letter.

The Panel is generally supportive of the introduction of third party appeals into Guernsey's planning system. The Panel believes it will be essential to carefully manage the expectations of appellants who may believe that a Tribunal will consider the Authority's decision to grant planning permission *de novo*, i.e. to reconsider all aspects of the original decision.

The Panel notes that in the Requête, Deputy Merrett proposed a system based on the one which currently operates in Jersey. The Position Paper notes the wider differences between the Jersey and Guernsey systems for determining planning appeals. The Panel has considered

the Position Paper on the basis that any system for third party appeals should broadly parallel how first party appeals against the refusal of planning permission (i.e. appeals made under section 68(1) of Land Planning and Development (Guernsey) Law, 2005 (“the 2005 Law”)) are currently handled, namely,

- by a Tribunal or single professional member;
- on the basis of the materials, evidence and facts which were before the Authority; and
- as if it were the Authority dealing with it in the first instance.

The Panel’s letter is set out in 4 sections:

- (i) Grounds of appeal
- (ii) Procedural matters
- (iii) Resources
- (iv) Other Matters

Grounds of Appeal

The Panel notes that in Jersey a third party appellant may only refer to matters raised in his/her letter of representation. This approach would have to be followed in Guernsey as the limitation under section 69(1) of the 2005 Law requires a Tribunal to consider an appeal on the basis of the evidence, facts and material before the Authority when making its decision. This limitation prevents a first party appellant from introducing new material as part of the appeal process and the Panel believes that, unless the intention is to repeal section 69(1) for all appellants, a similar constrain should be placed on third party appellants.

When determining first party appeals, a Tribunal may deal with the case as if it were the Authority dealing with it in the first instance. The Panel suggests that, as a third party appeal will be limited to the specific issues raised in a letter of representation, a full merits review of the Authority’s decision would potentially be unfair on the applicant.

The Panel notes that in Jersey, a Planning Inspector makes a recommendation to the Minister for the Environment and the Minister makes the final decision whether or not to allow or dismiss the appeal. The decision making under Guernsey’s planning appeal system is very different. Under the Guernsey system, if a representor has only commented on some of the criteria of a particular Island Development Plan policy or the matters listed under section 13 of the Land Planning and Development (General Provisions) Ordinance, 2007 (“the General Provisions Ordinance”), the Tribunal may decide that a different decision should have been made on these matters. In such circumstances, either the Tribunal or the Authority would need to consider how this may impact on the planning decision when all matters are taken into consideration.

The Panel suggests that before progressing provisions for third party appeals consideration as to how, on what basis and by whom decisions of a Tribunal to allow a third party appeal should be handled in respect of cases where the decision requires a review or rebalancing of the original planning decision.

Similarly, consideration will also need to be given to how first party appeals against decisions which result in the original planning decision being overturned or amended. The Panel is unclear whether the applicant would retain a right of appeal to a Tribunal or whether the appeal route would be to the Royal Court on a point of law.

Procedural Considerations

The Panel appreciates that no decision on whether or not to introduce third party appeals has been reached by the Committee *for the* Environment & Infrastructure or the States of Deliberation and so the detailed comments below on procedural matters may appear premature. However, the Panel concluded that the below comments may assist when considering proposals to establish a system for third party planning appeals.

(a) Eligibility to Appeal

The Panel believes that third party appeals should be limited to somebody who has submitted a third party representation within the statutory timeframe. It notes that the Position Paper considers whether there should also be a similar limitation by proximity to or residence on the appeal site as is the case in Jersey. The Panel is mindful that a third party may not have an interest in or be resident on land, any part of which lies within the 50m of any part of the appeal site, but have his/her amenity may be negatively impacted by the development.

For example, in one recent planning appeal, a third party raised concerns about the impact of traffic in a narrow and steep single lane access road. His concerns related to a lack of any passing places and the difficulties for vehicles having to reverse up a steep incline on meeting an oncoming vehicle. These concerns were material planning considerations but his property was located more than 50m from the appeal site but shared the same access road. Similarly, where a development may result in increased noise, smells, etc., the impact on the character and amenity of the locality may extend well beyond a 50m radius of the appeal site.

The Panel acknowledges that the imposition of a fixed distance from the appeal site as the basic criteria for determining the eligibility of third party appeals makes the process easy to understand and simple to administer. However, as illustrated in the above examples, the considerations the Authority and a Tribunal must take into account are not limited to a specific distance from the appeal site. Therefore, the Panel suggests that consideration might be given to whether provision should be made for exceptions to be allowed in certain cases, if the eligibility of a representor is linked to distance from the appeal site.

The Panel suggests that consideration should be given to allowing a Tribunal to dismiss at a third party appeal where there is evidence to suggest that the appeal is frivolous, vexatious or not made in good faith. Such a power may help mitigate appeals being lodged based more on issues linked to unrelated disputes or so as to frustrate the business or activities of a competitor, rather than relevant planning considerations.

The Panel believes that, in addition to individual representors, consideration should be given to allow certain specialist groups or organisations to be included as potential third party appellants where the group or organisation has submitted a written representation.

The Panel also agrees that developments which are deemed to be of strategic importance for Guernsey should be exempt from the third party appeal provisions.

(b) Appeal Period

The Panel agrees with the proposals regarding the appeal period for third party appeals and agrees that it should be no more than 28 days from the date of issue of the decision notice.

The Panel supports the proposal to impose a strict timetable for parties to respond to any appeal. It notes that, on occasions, because of other demands on their time, the Authority's planning officers have requested extensions to the Panel's general practice of asking for a written response to a first party appeal within four weeks.

The Panel's view is that the written submissions from the Authority should only need to address the third party's grounds of appeal rather than seeking to defend or further explain why planning permission was granted. The Authority's planning decision notice already includes the reasons for the decision and so further explanation is unlikely to be beneficial.

However, even with such a strict timetable it is unlikely that a Tribunal's decision will be issued within less than four months of the date of issue of the Authority's decision. The Panel understands that in Jersey there is typically a four to five month delay before the Minister for the Environment's decision is issued. The Panel has not been able to identify a way of shortening this time period with prejudicing the legal process.

Finally, under section 69(5) of the 2005 Law, a Tribunal has a power to dismiss an appeal where, having given notice to the appellant, it appears the appellant is responsible for undue delay in the progress of the appeal. The Panel believes a similar provision should be included in any third party appeal regime to ensure that appeals are prosecuted in a timely manner.

(c) Appeal Procedures

The Panel does not foresee any particular issues in reviewing and revising its procedures and practices to ensure that all parties in an appeal lodged by a third party representor have access to a fair and impartial hearing without undue delay. Having considered the Position Paper, the Panel notes that, if approved, it is likely that the legislation will mirror much of that which directs how first party planning appeals made under section 68 of the 2005 Law are considered. The Panel believes that this is a sensible approach as the current procedures and practices are tried and tested.

The Panel notes that consideration is being given to making the third party appeal process at two stage process, whereby a single member of the Panel will review a third party's appeal papers and determine whether the appellant has satisfied the appeal requirements. The Panel considers this is a sensible approach and it reflects the current practice the Panel's Chairman or Deputy Chairman currently follow when a new appeal is received by the Secretary. The **merits** of the appeal will not, of course, be considered at this stage.

The Panel also believes that, at this first stage, the reviewing member should decide whether a public hearing is required or whether the appeal can properly and fairly be considered on the basis of written representations and a site visit.

The Panel has some reservations and concerns about how appeals will be handled where two or more third party representors lodge an appeal against the same planning decision. The Panel is mindful that whilst the number of representations received by the Authority is generally low, some applications, both for large and small developments, receive a significant number of representations. Further, the overall number of third party representations may increase if there is a Tribunal-based route for challenging a decision to grant planning permission. The Panel is conscious that judicial review currently exists as a potential remedy but this is potentially a costly route, especially as the person seeking judicial review may have a costs order made against them in the event their application is dismissed.

The Panel believes the appeal provisions should enable a Tribunal to determine how multiple appeals against the same planning decision should be handled. The Tribunal will seek to balance the rights of the appellant to argue his/her case, against those of the person whose planning application is subject of the appeal, and those of the Authority, against the overriding objective as set out in the Royal Court Civil Rules, 2007.

The Panel is mindful that the applicant may incur additional costs in seeking to persuade a Tribunal not to allow a third party appeal and so, should not have to incur such costs at two or more separate appeal hearings. Moreover, and perhaps more importantly, if such appeals were determined individually the process could take many months and result in lengthy delays before the applicant would know whether or not they would be able to proceed with a particular development.

Further, it is possible for both a first party and a third party to lodge an appeal in respect of the same planning decision. For example, an applicant may appeal one or more of the conditions attached to the grant of planning permission and a third party appeal the grant of planning permission.

(d) Appeal Fees

An appeal fee is payable for appeals against the refusal of planning permission and is based on the planning application fee. In some cases no planning fee is payable and so, if the decision is appealed, no appeal fee is levied.

In recent years, the average number of appeals has been 20 per annum¹. Therefore the introduction of third party appeals could see an increase to between 28 and 30 appeals per annum. Based on a pro-rata increase in the Panel's budget, the budget would need to increase by between at least £38,000 and £47,500. These figures do not include any allowance for an increase in the number of Panel members which may be required. In addition to the daily allowances Panel members may claim, they are paid an annual retainer of £2,000. If the estimate that the increase in the number of appeals by around 50% is sound,

¹ 24 appeals were received in 2016, 19 in 2017 and 16 in 2018 and 12 appeals have been submitted in the first 6 months of 2019.

the Panel anticipates that one additional professional member and two ordinary members may be required. The increase would be needed to ensure that the Panel had sufficient members to hear appeals in a timely manner and to allow for members being unable to sit because of potential conflicts of interest. This would add a further £6,000 to the Panel's annual operating costs.

Based on the same analysis, the additional income from appeal fees could be between £4,400 and £10,500². The income estimates are based on the third party appellant paying 100% of an appeal fee. Currently planning appeal fees are reduced by 25% where an appellant requests that the appeal be determined by way of written representations or before a single professional member. There is also provision for the appeal fee to be waived in part or in full if there are exceptional circumstances to suggest that the payment of the full fee will result in undue financial hardship to the appellant.

Finally, the Panel suggests that consideration be given to refunding part of the appeal fee, if a third party appeal is dismissed at the first stage of the process.

(e) Cost Orders

The 2005 Law currently provides for a Tribunal to make cost orders in limited circumstances. The Panel has not received any applications for cost orders nor has it considered that the actions of one of the parties in a particular case merited it making a cost order.

The Panel notes that under the Town and Country Planning Act for England and Wales, costs may only be claimed if one party has acted unreasonably and as a result, the other party has incurred additional costs. Examples of unreasonable behaviour may include:

- A failure to co-operate with the other parties or directions of the Tribunal;
- Missed deadlines;
- A failure to attend a site visit or hearing; or
- The submission of wrong material or its late submission.

The Panel believes that the applicant whose planning permission is subject of the appeal, may request cost orders where a third party appeal is dismissed. The Panel suggests consideration be given to clarifying the provisions for cost orders, including the inclusion of a test of reasonableness similar to that in England and Wales.

Resources

The Panel currently has an annual budget of £95,000. This includes the salary for the Panel's Secretary. It is acknowledged that the budget is "demand-led", i.e. the spending will depend on the number and complexity of appeals lodged in any particular year. Therefore, any

² Based on 20 appeals, the Irish fee of €220 would generate about £4,400, the Isle of Man fee would generate £5,520 and £10,500 if the Jersey third party appeal fee of £525 for a minor development was applied (N.B. the fee for an appeal against a major development (e.g. applications for 2 or more residential units, non-residential developments and change of use applications is £1,681).

increase in the number of appeals the Panel receives will add to its operating costs, including the staff resources (currently 0.5 of a FTE).

The current budget has been sufficient to cover the costs of the Panel's case load in the last three years. The number of appeals lodged has reduced since the Panel was first established in 2009 and, in particular, following the adoption of the Island Development Plan in November 2016.

The Panel believes that the introduction of third party appeals may result in a significant increase in the number of appeals but accepts it is unlikely to be a year on year. However, based on the Jersey figures, it is possible that the number of appeals could double.

The cost of running a planning appeal in Guernsey varies from case to case depending on complexity, the scale of the development and the number of planning policies engaged. A fairly straightforward case which is concluded within a single day's hearing, is estimated to cost £2,700. The costs include payments to the Tribunal members for preparation work, the hearing of the appeal and drafting of the decision notice, together with ancillary costs for travel, accommodation and room hire for the hearing itself³. The estimated costs do not include staff support and administrative costs, such as printing and postage.

However, some appeals have resulted in substantially higher costs. For example, one complex case required a number of pre-hearing meetings and site visits, a directions hearing and a two-day hearing of evidence. The overall costs were estimated to be in excess of £8,000. These costs were off-set by an appeal fee of £3,360.

Other Matters

In closing, the Panel wishes to highlight that when determining an appeal against the refusal of planning permission, section 69(1) of the 2005 Law places a statutory limitation on the evidence a Tribunal may take into consideration when reaching its decision, namely:

“An appeal under section 68 shall be determined by the Planning Tribunal on the basis of the materials, evidence and facts which were before the Authority in the case of an appeal under section 68(1), when it made the decision appealed against.”

The Panel understands the reasons for this limitation on the evidence, facts and material a Tribunal may take into consideration. It accepts that when the 2005 Law was introduced there were concerns whether, as the Tribunal is undertaking a full merits review of the decision rather than deciding whether the decision was one the Authority could have reasonably reached, there was a risk that a Tribunal could become a second planning authority unless such a statutory limitation was imposed.

The Panel and the members and officers of the Authority are familiar with this limitation. However, in its experience, it is less well understood by appellants and third party

³ The Planning Panel's three professional members are based in the UK or Jersey and one ordinary member lives in Alderney; hence the costs include flights and overnight accommodation, although every effort is made to bring the off-Island members over to hear two or three appeals per journey.

representors. It is not unusual for an appellant to submit new material with his/her appeal only to be advised that the Tribunal is unable to consider that material. In such circumstances, if an appellant believes that a different decision would have been made had the new material been before the Authority, his/her only option is to submit a revised planning application.

The Panel does not consider that section 69(1) should be repealed without the benefit of a wider review of the planning appeal system. The Panel has been considering planning appeals for just over 10 years and during this time there has been no review or significant changes, other than to extend its role to consider appeals under the High Hedges (Guernsey) Law, 2018 and following the introduction of Certificates of Lawful Use earlier this year.

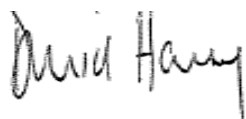
Finally, when considering resources, the Panel suggests that this may also be an opportunity to investigate how IT solutions could assist the appeal process and potentially help reduce hearing costs, etc. For example, how video conferencing for appeal hearings, the use of drones to film appeal sites and their immediate surroundings and the availability of papers and plans through an online portal could all assist a Tribunal when dealing with an appeal.

Conclusion

As set out at the start of this rather lengthy response, the Panel is generally supportive of the introduction of third party appeals into Guernsey's planning system. The Panel trusts that the comments set out in this letter will assist the Committee in its consideration of whether to recommend that Guernsey introduces a system of third party planning appeals.

Once again, thank you for giving the Panel an opportunity to comment on these proposals at an early stage. Please do not hesitate to come back to the Panel if you require any further clarification on any aspect of this response.

Yours sincerely

A handwritten signature in dark ink, appearing to read 'David Harry', written in a cursive style.

David Harry
Chairman
Planning Panel



Committee *for the*
Environment & Infrastructure

Raymond Falla House
Longue Rue
St Martin
Guernsey
GY4 6HG
+44 (0) 1481 234567
environmentandinfrastructure@gov.gg
www.gov.gg

The President
Policy & Resources Committee
Sir Charles Frossard House
La Charroterie
St Peter Port
Guernsey
GY1 1FH

27 February 2020

Dear Deputy St Pier

Policy Letter – Third Party Planning Appeals

In accordance with Rule 4(1) of the Rules of Procedure for the States of Deliberation and their Committees, it is requested that the Policy Letter entitled “Third Party Planning Appeals” be considered by the States of Deliberation at its meeting on Wednesday 22nd April 2020.

The request is made to fulfil the requirements of Resolution 5 of P7/2019 – Requête – Island Development Plan which required the Committee to “to bring a policy letter to the States, no later than April 2020, on third party representations in the Planning Tribunal process, as described in Recitals 19-20 to this Petition.”

Yours sincerely

B L Bréhaut
President
Committee *for the* Environment & Infrastructure