PLANNING APPEALS PANEL

Planning Appeals Panel
Sir Charles Frossard House
PO Box 43, La Charroterie
St Peter Port, GUERNSEY
GY1 1FH
Telephone +44 (0) 1481 717000

Appeal Decision Notice

Planning Tribunal Hearing held on 3rd September 2012 at
Les Cotils Christian Centre, St Peter Port, Guernsey, followed by a visit to the Appeal site

Members: Mr. Jonathan King (Presiding), Mrs. Sheelagh Evans and Miss Julia White

---

Appeal Site:	**Coast View, Les Dunes, Vazon, Castel**
Property Reference:	**D006140000-P05**
Planning Application Reference:	**FULL/2011/3330**
Appeal Case Reference:	**PAP/019/2012**

- The Appeal is made under the provisions of Part VI & Section 68 of The Land Planning and Development (Guernsey) Law, 2005.
- The Appeal is by Mrs M de la Mare and Mr. G Upenieks against the decision of the Environment Department made on 16th March 2012 under Section 16 of the Law to refuse planning permission for the construction of decking in the rear garden of Coast View, Les Dunes, Vazon, Castel.
- The appellants were represented at the Hearing by Mr. Stewart Solomon, with both also taking part.
- The Environment Department was represented by Mr. A J Rowles, Director of Planning Control Services for the Environment Department and the case officer, Mr. C Holden.

Decision

1. The Appeal is dismissed.

Introduction

2. The appeal property is a semi-detached bungalow. Its rear garden was formerly occupied by glasshouses, but these have been removed, leaving only a few low walls. The garden has been re-graded and a timber deck erected on an earth mound alongside the douit which marks the rear boundary. This appeal relates to a retrospective application for those works. The application was refused because of the effect on the residential amenity of neighbouring properties, particularly by reason of overlooking.

Matters of Clarification

3. The application form described the development simply as *"construction of decking in rear garden*", but the refusal notice broadened its scope, to read: *"alter ground levels and install raised decking (retrospective)".* Although the appellants had not given any formal agreement to change the description to include the alteration of the ground levels, this does represent a more accurate description of the development which had been carried out. In the absence of any objection to the change, the Tribunal has considered the appeal by reference to the revised description.

4. During the course of the application process, a number of plans and diagrams were submitted to the Department. For the avoidance of doubt, at the Hearing Mr. Solomon confirmed that the relevant plans comprise: the application site layout plan; the application block layout plan; the decking plan view; Drawing No 1 (the application block plan showing the "path of the profiles"); Drawing No 2 (Schematic diagram showing profile lengths); Drawing No 3 (North – South profiles); and Drawing No 4 (East-West Profiles).

Main issues

5. From its assessment of the papers submitted by the appellant and the Department, and from what was given in evidence during the Hearing and seen and noted during the site visit, the Tribunal considers that there are 2 main issues:

   (a) Whether planning permission is required for the development, having regard to provisions of Class 1(15) of the Schedule to the Land Planning and Development (Exemptions) Ordinance, 2007; and

   (b) The effect of the development on the living conditions of adjoining occupiers.

Legal and Policy Considerations

6. No policy is cited by the Department in support of the reason for refusal. However, Policy RGEN11 of the Rural Area Plan (RAP) *Effect on adjoining properties* was acknowledged to be relevant. It states that in considering proposals for development, the Department will take into account any significant impact on the reasonable enjoyment of adjoining properties, particularly in relation to overshadowing, overlooking, emissions and disturbance. In practice this effectively repeats the requirements of Article 13 (1) of the General Provisions Ordinance, 2007, under which the Department must, in determining a planning application, have regard (amongst other things) to *(i) the likely effect of the development on the reasonable enjoyment of neighbouring properties*.

7. RAP Policy RH6, *Extensions and alterations to dwellings* contains a general presumption in favour of extensions or alterations to existing houses, subject to certain other policies being satisfied, none of which appear to be particularly relevant to this case.

8. Under (Class 1(15) of the Schedule to the Land Planning and Development (Exemptions) Ordinance, 2007, a hard surfaced area, including timber decking, may be created within the curtilage of a dwelling house without planning permission provided (amongst other things) that its height is not more than 50 cm above ground level.

Tribunal's Assessment of the Evidence and the Site Visit

Need for Permission

9. The appellants' primary argument is that the decking should be regarded as exempt development, not requiring planning permission, because it is not more than 50cm above ground level.

10. Naturally, this requires an understanding of what should be regarded as "ground level", since it is from this datum that the critical distance should be measured. In this case, matters are complicated by the fact that ground levels have changed. At the Hearing, considerable time was spent considering these matters. Initially, Mr. Rowles thought that "ground level" should refer to the <u>original</u> ground level. But this presents a number of difficulties. First, there is no formal indication or guidance as to the date to which "original" applies. Second, ground levels could be changed lawfully, for example through the grant of planning permission, or through *de minimis* development – that is, so small that it is immaterial or insignificant; and third, unlawful changes in ground level could have taken place which have become immune from enforcement action owing to the passage of time. Mr. Rowles was content to consider "original" as meaning "lawful". For the purposes of progressing this case, The Tribunal broadly agrees.

11. However, the present matter is complicated by the fact that no record of surveyed historical or present levels exist. The Department has made reference to a plan of spot heights for the locality dating from 1996. But their value for present purposes is very limited. Although there are heights given for positions on, or towards the edge of the site, no information is available for its centre or where the decking has been erected. It would be misleading to use the boundary heights as an indication of heights elsewhere on the site. There are also a number of other uncertainties. For example, although the series of spot heights along the southern boundary appear to follow the bottom of the douit, it is possible that they could follow the top. At the site visit, the Tribunal members noticed that the back garden of the property *Braithwell* immediately to the east of the site is significantly lower than the site and its other neighbour to the west *Margion*, but the spot heights seem to suggest differently. Overall, the Tribunal feels that it cannot rely on the spot heights as being accurate.

12. The appellant has submitted cross sections ("profiles") intended to show ground levels before work commenced; after "initial site smoothing" and "after the addition of a layer of topsoil". But Mr. Solomon acknowledged that these were not the result of any professional surveying operation. Rather the earlier profiles were based on memory and on photographs. Although said to be drawn by reference to a datum point "N" (being a point described as being on the eastern wall of the house where the rear flat roof extension joins the original structure) this does not provide an accurate vertical datum. Against that background, the Tribunal has serious reservations about the accuracy of these cross-sections in determining the ground levels either before or after the development took place. Photographs were also submitted on behalf of the appellants: some historical, which are of very limited value, and others showing the garden being re-graded. These are of interest, but are far from being conclusive in determining the former and present ground levels.

13. The Department's case rests largely on photographs, showing the site at various times from 2001 (probably) through to 2012. While these are useful in showing the state of the land and ground levels by reference to fixed points such as walls, the confusing effect of using lenses with different focal lengths was amply demonstrated at the Hearing.

14. In all of the photographs submitted it is also difficult to judge whether the ground shown represents temporary storage of material or whether it shows pre-existing levels. The slope of the land is also hard to judge. The evidence clearly demonstrates the limitations of photographs in describing ground levels and the desirability of having proper land surveys where ground levels are a critical factor in planning decisions.

15. This presents the Tribunal with a difficult task in determining whether the decking is more than 50cm above ground level. In reaching our conclusions, we have had regard to all of the evidence presented, while noting its limitations, but we have also taken particular note of what we observed at the site visit.

16. On our visit, a number of measurements were taken of the height of the decking above what could reasonably be described as the present general ground level of the surrounding lawn. We did not measure to the ground level immediately at the edge of the decking, because this is acknowledged as being somewhat higher, clearly sloping upwards from the lawn to the base of the decking structure. Instead, it was measured at points a few metres away.

17. The appellants say that, where terrain is uneven, an "integrative" approach should be adopted when choosing an appropriate point from which to measure the height of the decking. This should be based on averaging heights across the entire site, including the front garden. The Tribunal firmly rejects this argument. The purpose of setting a maximum height for exempt development is not given in the Ordinance. But we may reasonably suppose that it has been set in the interests of ensuring that the scale of the development should not create a visual intrusion or otherwise give rise to a loss of amenity. That may be judged principally by relating the height to that of the land around the structure, not to a notional height calculated having regard to levels some considerable distance away.

18. The measurements taken on the site all showed the decking to be more than 50cm above the general level of the present lawn – in one case as much as 57cm. It follows that, provided the present general level of the lawn is no lower than the levels before the deck was constructed, then the deck falls outside the allowances of the Exemption Ordinance, and planning permission is required.

19. An examination of the Department's photographs shows that in September 2007 and August 2008 the rear garden was somewhat unkempt, with some unevenness in its surface. This may relate to the excavations which Mr. Solomon says were undertaken in order to recover granite when the former glasshouses were removed. But, if so, they do not appear substantial. There is no obvious sign of a more general depression in the centre of the land.

20. In May 2010, the rear garden was in a poor state. There are what appear to be mounds of material, grassed over, situated towards the rear. There is little doubt that this is the material referred to by the appellants as having been brought on to the land by the former occupier for the purposes of re-grading it. This material was still there in March 2011, before the appellants say that the development commenced. But closer to the house, for example that part level with the side of the blockwork garage appears reasonably flat. Photographs show the side of this garage with 4 courses of blocks below the bottom of its window. Further to the rear of the site, a low wall, presumably part of the remains of a demolished glasshouse, projects clearly above the general ground level. And adjacent to the house, the rear

extension of the adjoining dwelling *Margion* may be seen with 10 courses of blockwork visible above the ground level.

21. By November 2011, the rear garden has been re-graded but not grassed over. It appears flat, though the foreshortening effect of the long focal-length lens may be deceptive. The deck has been constructed, with 3 step risers visible above the surrounding land. In February 2012, the ground was still bare other than the mound on which the deck stands and a small area by the steps. But at least in the vicinity of the decking the ground level had been raised so that the bottom step is practically obscured. The low wall referred to earlier is still clearly visible above the ground.

22. By March 2012, the land levels in the immediate vicinity of the decking seem to be broadly unchanged, but more re-grading appears to have taken place around the low wall, so that it barely projects above the surface. That remains the position today. Critically, on the garage, just 3 courses of blockwork are visible above ground level below the window, and just 9 courses of the neighbours' extension. By reference to the only known fixed points, therefore, the land had been raised.

23. The Tribunal acknowledges that the ground which now forms the back lawn was probably never completely flat. It had, after all, formerly been occupied by glasshouses which had been demolished; and that will naturally have involved some ground disturbance. The land was not fully restored, as the remnants of the glasshouse walls show. But it does seem to have been reasonably levelled. There is also evidence that a bank once ran along the top of the douit, though this appears to have been removed some time between 2001 and 2008, as evidenced by the photograph submitted by Mr. Domaille, the occupier of the neighbouring property *Camarest*. Even if the bank were to be regarded as forming part of the pre-existing ground levels, it would not have extended so far into the garden as does the decking. It cannot, in our view, be regarded as the datum from which the decking should be measured. Later, material was certainly brought on to the site but, those rough mounds should equally not be used to demonstrate pre-existing levels, and there is no suggestion from the appellants that they should.

24. On behalf of the appellant it is claimed that when initial re-grading works were undertaken in April 2011, the land was substantially reduced in height over much of its area, so that subsequent raising of the levels simply restored its former height. But there is no evidence of any such reduction having taken place; and it seems very unlikely. Indeed there would be no practical reason connected with the exercise to reduce ground levels only to increase them again later. It is also argued that the apparent raising of levels as judged by the fixed points of the low wall and the blockwork can be explained by the land adjacent to these features being lower than the general level of the rear part of the site, for example as a result of inadequate backfilling of land next to the neighbouring extension. Whilst acknowledging the shortcomings of the photographs, there is no evidence for this. The appellants' own photographs of the machine re-grading the site show that prior to topsoiling the land

was already broadly level in the vicinity of the extension. And none of the photographs suggest that the land fell towards the side of the garage.

25. Taking all of the evidence into account, the Tribunal has been unable to establish with any precision what the pre-existing levels on the site were. Nonetheless, we have seen nothing to suggest that the general level of the land which now forms the back lawn prior to the construction of the deck was higher than it is now. Rather we are in little doubt that, notwithstanding the claims on behalf of the appellant, it was lower than at present. Although the absence of measured surveys prevents us from saying precisely what the former ground levels were, we have sufficient evidence on which to conclude with reasonable certainty that the deck has been constructed greater than 50cm above that level.

26. The Tribunal also concludes that the re-grading of the rear garden itself has gone beyond what might be considered *de minimis.* The land levels have clearly been altered over a not-insignificant area, requiring the use of a tracked mechanical excavator. This is not disputed by the appellants. We take the view that this work amounts to operational development.

27. Consequently, in relation to the first issue, we conclude that planning permission is required both for the decking and for the alteration of ground levels.

The Effect on Living Conditions

28. To the rear of the site is a property known as *Camarest*, which includes a house together with a business offering canine services. The deck is located directly adjoining its side boundary, separated from a substantial front lawn by the douit and a hedge. The Tribunal visited this property and was able to gain a good impression of the relationship between it and the deck. In our view, the deck is in un-neighbourly proximity to the boundary. When standing, its elevated position allows direct clear views to be obtained at very short range over the lawn. There are also longer oblique views towards the front of the house, which contains windows serving the sitting room, the main bedroom and a child's bedroom. The angle of view and the degree of separation means that the loss of privacy for the occupiers is unlikely to be severe. However, we are in no doubt that there would be a strong perception of being overlooked, particularly bearing in mind the elevation of the deck, and this is borne out by representations from the occupiers. There is greater potential for activities in the garden to be overlooked and, while the lawn is located to the front of the property, it is the only open green area directly adjoining the house. It is therefore more likely to be used for children's play or for adult informal relaxation than would commonly be the case with front gardens. Some degree of overlooking of private domestic space is commonplace and largely unavoidable in many housing layouts. But we feel that the relationship of the deck to the private space of *Camarest* is not comparable. Having regard to the requirements of Article 13 (1) of the General Provisions Ordinance 2007 and RAP Policy RGEN11, we consider that the

reasonable enjoyment of the property is likely to be adversely and unacceptably affected.

Other Matters

29. We appreciate that the Department has no in principle objection to the alterations to the ground levels, other than the mound on which the deck sits. Subject to the comments below about the specific concerns of neighbours, we also see no harm in that aspect of the development. Therefore, the Tribunal has considered whether it may be appropriate to issue a "split decision", that is, to allow the appeal insofar as it relates to the alteration to the levels, notwithstanding our conclusion about the decking.

30. However, we take the view that this would not be a prudent course of action in the absence of a properly surveyed plan showing with certainty the levels that would be permitted. As indicated earlier in this decision, the submitted plans do not provide sufficient clarity or accuracy; and we have become acutely aware of the shortcomings of photographs to provide a proper record. It would be very unfortunate if an inadequately-defined permission were to be granted that might lead to further dispute at a later date - dispute that could be avoided if the levels were properly recorded. For this reason, we conclude that a split decision should not be issued. This is of course without prejudice to the submission of a subsequent application for the revised ground levels, appropriately supported by a survey to an appropriate standard.

31. The Tribunal has had regard to the representations made by a number of local residents with respect to the possible implications of the development on their interests. We recognise that there are genuine and strongly-held concerns about the likelihood of increased flooding by reason of obstruction of the douit; about encroachment on to land said not to be in the ownership or control of the appellants, with consequences for the maintenance of the douit and the boundary hedge; and about the impact of land raising on the damp-proof course of *Margion*. None of these matters figured in the Department's reason for refusal on the grounds that they did not raise significant planning issues or were not considered to be material planning considerations. Unfortunately, the Tribunal has little technical information before it on which to base any conclusions concerning these matters, and so they were not addressed during the Hearing. It may be that they relate principally to neighbour disputes, in which case they are beyond our remit. But, notwithstanding the Department's stated position, it is possible that they raise more substantial planning issues. If so, these should be addressed either in the context of any future application for the alteration of the ground levels or of enforcement action, should an application not be forthcoming.

Overall Conclusions

32. For the reasons given above, the Tribunal concludes in relation to the main issues that permission is required for the development and that it gives rise to unacceptable harm to the amenity of the occupiers of the adjoining property. We agree with the Department that the latter outweighs the presumption in favour of domestic development under RAP Policy RH6.

33. The Tribunal has considered all other matters raised in the written submissions and during the Hearing. It has also considered all matters pointed out at the site visit and its own observations. However these do not affect its conclusion under the provisions of Part VI Section 69 of the Land Planning and Development (Guernsey) Law, 2005 that the Appeal is dismissed.

Jonathan G King BA (Hons) DipTP MR. TPI
Presiding Member

1st October 2012