PLANNING APPEALS PANEL

Planning Appeals Panel
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Appeal Decision Notice

Planning Tribunal Hearing held on 8th November 2012 at Les Cotils Christian Centre, St. Peter Port including a visit to the Appeal site during the course of the Hearing

Members: Mrs. Linda Wride (Presiding), Miss Julia White, Mr. John Weir

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Appeal Site:	**5 Mount Row, St Peter Port**
Property Reference:	**A307290000**
Planning Application Reference:	**FULL/2012/0061**
Planning Application Valid Date:	**13th January 2012**
Appeal Case Reference:	**PAP/028/2012**

- The Appeal is made under the provisions of Part VI and section 68 of The Land Planning and Development (Guernsey) Law, 2005.
- The Appeal is made by Colneway Limited against the decision of the Environment Department made on 10/05/2012 under section 16 of the Law to refuse to rescind condition 8 (closure of existing access) of application FULL/2011/0835 to remove a section of existing roadside wall to create vehicular access and driveway and install pillars and steps to front of property.
- The appellant was represented by Advocate P Ferbrache who was assisted by Mr. J Le Gallez of Mourant Ozannes
- The Environment Department was represented by Mr. J Rowles, Director of Planning Control Services, Ms E M Hare, Principal Planning Officer, Mr. D Perrio Investigations and Enforcement Officer

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Decision

1. The Appeal is allowed and permission is hereby granted for the retention of the development approved under application FULL/2011/0835 without complying with condition 8 of that permission (all other conditions having been complied with).

Planning background and relevant planning history

2. The exterior of the dwelling at 5 Mount Row is on the list of protected buildings because of its special architectural and historic interest. In addition, the appeal site lies in St Peter Port Conservation Area. The Tribunal has statutory duties under the Law to pay special attention to the desirability of preserving the protected building's special characteristics and setting, and preserving and enhancing the character and appearance of the Conservation Area.

3. The protected building is set back from the highway, on rising land. At the time application FULL/2011/0835 was submitted, the only off-street parking on the appeal site was a small garage to the left of the dwelling, positioned forward of the main building line, served by a driveway sloping up from the road to the garage. Historic maps indicate that this garage, driveway and access have existed since 1938, if not longer. This matter of fact is not disputed by the Department.

4. A retaining wall separates the garage drive from the raised front garden of the host dwelling on one side. A wall of similar height on the other side of the driveway forms the boundary between the appeal site and the house to the left/west on Mount Row, which is set at a slightly lower level.

5. Mount Row is designated an urban Traffic Priority Route in the Traffic Engineering Guidelines for Guernsey. The status and guidance set out in this document is considered more fully elsewhere in this decision.

6. In March 2011, a planning application sought permission for alterations to form a new parking area. The submitted plans showed the removal of a section of roadside wall to create a new vehicular access and driveway to serve a parking area excavated from the raised garden at the front of the site, together with the construction of a retaining wall around the parking area, pillars and steps up to the entrance of the building. It is clear from the application form that the purpose of creating the new parking area was to increase the number of parking spaces on site from 2 (in the garage and on the garage driveway) to 4/5, with the additional spaces being provided on the new forecourt.

7. The wall between the garage driveway and the forecourt parking area is shown on the proposed layout plan. A note on the drawing referring to this wall states "*Existing wall to be reconstructed if necessary once existing raised garden area has been removed*".

8. Although no public comments were received, the Conservation Officer opposed the scheme because of its effect on the historic fabric, character and appearance of the protected building and its failure to conserve the character and appearance of the Conservation Area. Concerns were also expressed by the Traffic Services Unit (TSU) about the poor sightlines at both the existing and proposed accesses compared with the visibility recommendations in the Traffic Engineering Guidelines, and the failure

to show how vehicles could turn on site so as to enter and leave the site in forward gear.

9. The TSU consultation response goes on to suggest that "*Some of these concerns could be overcome by serving these parking areas through a single access and ensuring that on-site turning provision is included in the design. However, even with this in place, there would remain road safety concerns due to the sightline issues*".

10. In the event, the planning case officer took the view that given the prevalence of frontage parking on Mount Row, the evident effort to respect the character of the building and the improvement to traffic flows which the scheme could deliver, on balance the proposal was acceptable, subject to the width of the new access being limited to 4m. Revised plans were subsequently submitted in response to this request (albeit with the new access reduced to 4.5 m wide) and on 13 July 2011, planning permission was granted for the amended scheme under application reference **FULL/2011/0835** subject to eight planning conditions, including the following conditions which are dealt with in more detail below.

11. **Condition 4** requires details of surfacing material to be used on the paved area to be approved before commencement of development. The appellant sought to "resolve" this matter with the submission of a material sample as part of the appeal process. However, evidence submitted by the Department shows that a sample of the surfacing material was submitted on 9 January 2012 and approved by letter dated 10 May 2012. Consequently, the Tribunal has not considered this matter as part of the appeal.

12. **Condition 5(a)** of the permission states

"*The existing flank wall between the existing access and the existing garden (west of the parking area hereby approved) shall be retained as it is.*

Reason – To ensure a satisfactory external appearance in the interest of visual amenity"

13. **Condition 8** of the permission (the condition in dispute in this appeal) states:

"*Within one month from the date of this permission, detailed proposals for the closure of the original access serving the garage to vehicular use (e.g. with permanent bollards or a wall to match the existing adjoining) shall be submitted for the approval in writing of the Environment Department. The approved proposals shall be implemented as an integral part of the development hereby approved and shall be retained as such thereafter.*

Reason – In the interests of traffic safety given the seriously substandard sightlines from the existing access and the lack of a turning facility for vehicles"

14. Condition 8 was not complied with. No appeal was lodged against the grant of permission subject to this condition within the statutory six month period. An application to "rescind" condition 8 on permission FULL/2011/0835 was refused on 10 May 2012. This refusal (**FULL/2012/0061**) is the subject of this planning appeal.

15. On 19 July 2012, Compliance Notice **ENF/2011/00187** was issued by the Department. This requires the closure of the original vehicular access serving the garage by constructing a wall to match the existing roadside wall in terms of height, retaining a pedestrian access no wider than 1m, if required. The Compliance Notice came into effect on 21 August 2012 and the requirements, as described above, were to be taken no later than 21 September 2012. An appeal against this Compliance Notice was lodged on 8 August 2012 on the grounds that the issue of the Notice was *ultra vires* and/or unreasonable. The Compliance Notice appeal was heard following the planning appeal Hearing and site visit.

The Tribunal's approach to determining this appeal

16. The planning appeal relates specifically to the Department's refusal to rescind condition 8 in permission FULL/2011/0835, made under application reference FULL/2012/0061. However, in the Tribunal's view, condition 8 does not stand alone. We, the members of the Tribunal, consider that any appeal against this condition ought to be considered in the context of the development proposed in the original application FULL/2011/0835 and the subsequent grant of permission.

17. The Tribunal therefore advised the parties before the Hearing that it intended to treat the planning appeal as an appeal against the refusal to permit the development granted permission under FULL/2011/0835 without complying with condition 8 of that permission. In considering the development as a whole, the Tribunal would deal with the application as if it were the Department dealing with it in the first instance. When reaching a decision, the Tribunal could therefore allow or dismiss the appeal, reverse or vary any part of the decision (whether the appeal relates to that part of it, or not) in accordance with section 69 of the Law.

18. As part of this process, the Tribunal would consider what conditions should be imposed in the event that it was minded to allow the appeal. This consideration would not be restricted to the condition in dispute. The Tribunal would be able to attach new conditions, remove others, or make existing conditions more onerous. However, in the interest of natural justice the parties would be given the opportunity to comment on any conditions which might otherwise come a surprise.

19. The parties were offered an opportunity to make submissions on the Tribunal's approach at the start of the Hearing proceedings. Advocate Ferbrache for the appellant drew the Tribunal's attention to the Human Rights (Bailiwick of Guernsey) Law 2000, in particular section 6 *Acts of Public Authorities* which includes the Planning Panel, and Part II *The First Protocol* Article 1 *Protection of Property.*

20. Having given careful consideration to Advocate Ferbrache's submission, the Tribunal considers that its approach in determining this planning appeal is consistent with Article 1, bearing in mind that this article does not impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with general interest. However, we take very seriously the requirement to exercise this control in a way that is proportionate.

21. In its submissions, the Department confirmed that it treated applications to "rescind" a planning condition in the same way as the Tribunal intended to treat the planning appeal i.e. by considering the development as a whole, not just the condition in dispute. However, unless this approach is conveyed explicitly to the applicant, it could give rise to confusion if, for example, the condition in dispute is rescinded, but new conditions are added or others made more onerous. In the Tribunal's view, it would be helpful if the Department were to explain clearly to applicants how it assesses an application to "rescind" a planning condition where this is made later than six months from the date of permission (but before the completion of all the works required) and to reflect this approach in the description of the proposed development.

Main Issues

22. From all that the Tribunal has read, heard and seen, we consider the main issues in this appeal to be

    (a) Whether allowing the development approved under application FULL/2011/0835 without complying with condition 8 would unacceptably harm highway safety and convenience

    (b) Whether condition 8 is reasonable in the context of other conditions attached to application FULL/2011/0835 in particular condition 5(a), and having regard to the hitherto unrestricted access to the garage and its driveway

23. The Tribunal also has a statutory duty to consider whether the retention of the original access in addition to the access approved under application FULL/2011/0835 would conserve or enhance the character and appearance of the St Peter Port Conservation Area and preserve the setting of the protected building on the site.

The Development Plan

24. Policy DBE7 of the Urban Area Plan (UAP) reflects the statutory requirement to conserve or enhance the character and appearance of a Conservation Area, whilst Policy DBE8 seeks to protect buildings of special interest from development that would detract from their special qualities.

25. Although not referred to specifically in the refusal reason or the reason for imposing condition 8 in the first place, Policy GEN8 requires decision-makers to take into

account the need to ensure safe and convenient access. The Tribunal therefore considers this policy relevant in this case.

26. Policy GEN8 is supported by the Traffic Engineering Guidelines for Guernsey, which have been approved by the States Traffic and Environment Committees and adopted as the standard against which highway-related matters are assessed. The guidelines set out policies and standards for different types of routes within Guernsey's road hierarchy. In reaching its decision, the Tribunal has given this document considerable weight, whilst noting that it provides guidance rather than setting mandatory standards.

27. Mount Row is identified as a Traffic Priority Route on the map included in the guidelines. It is therefore one of the key routes whose primary function is to distribute traffic throughout the Island. Policy TPR02 of the guidelines requires very careful consideration to be given to both the creation and design standard of new accesses on urban Traffic Priority Routes. Minimum design parameters are expected to be achieved and will only be relaxed in exceptional circumstances.

28. Appendix 2 to the guidelines specifies design standards for different types of roads on the Island, including visibility requirements. For Traffic Priority Routes with a design speed of 25 mph, an access serving a private drive as in the appeal scheme, 33m visibility measured 2m back from the edge of the carriageway is recommended in both directions. Visibility splays should be kept clear of obstructions over 900mm high.

Assessment

Highway safety and convenience considerations

29. There is no dispute between the parties that the vehicular access serving the existing garage and driveway at 5 Mount Row is sub-standard when assessed against visibility recommendations in the Traffic Engineering Guidelines. This means that when traffic on Mount Row is traveling at the design speed of 25 mph, there is insufficient time for the driver of an oncoming vehicle to brake within a safe stopping distance to avoid colliding with a vehicle emerging from the garage driveway access. Likewise when leaving this access, drivers have to move forward until the front of the vehicle intrudes onto the highway before they have a clear view of vehicles approaching from the west. The risk of a collision in such circumstances must be acknowledged.

30. It is also agreed that vehicles using this access to park on the drive or in the garage are unable to turn on site because of the walls which line both sides of the driveway, one of which is required to be retained by condition 5(a) on permission FULL/2011/0835. As a result, vehicles either have to enter or leave the access in reverse gear. Unless a second person is available to stop traffic as and when this activity takes place, the highway safety risk inherent in such a manœuvre is self-evident.

31. Furthermore, due to the physical constraints at the appeal site, it is impossible to independently access the garage and driveway parking spaces. Should a vehicle parked in the garage wish to leave the site, any vehicle parked on the driveway must exit first. Inevitably this double manœuvre takes more time than required for one vehicle to leave the site, thereby increasing the likelihood of vehicles on the highway having to wait and, in the process, undermining the aim to minimize congestion on busy Traffic Priority Routes, such as Mount Row.

32. On the other hand, the existing garage, driveway and access have been in use for many years. No evidence was tabled to suggest that the poor visibility or lack of turning area at the existing access has given rise to road traffic accidents or undue congestion.

33. On our visit to the site, the Tribunal observed that most of the dwellings on this section of Mount Row have forecourt parking areas where visibility at the access is obstructed by walls, pillars and posts over 900mm high, either within the site or on neighbouring land. None of the parking areas we saw had turning areas marked out to ensure that vehicles could enter and leave the access in forward gear. In this respect, the appeal site is little different from its neighbours in the street.

34. Given the number and proximity of vehicular accesses on this section of Mount Row, it seems likely that most drivers would approach this stretch of highway with caution, aware that a vehicle might emerge from one or more of these accesses at any time.

35. In addition, the appeal site is closer to the Mount Row/The Queens Road/Mount Durand/Prince Albert Road junction than most of the other properties in the street. The "Filter Ahead" road traffic sign is clearly visible to motorists approaching the existing garage access from the west. There is no evidence before the Tribunal to indicate whether traffic on this part of Mount Row regularly reaches the design speeds of 25 mph. However, given the warning traffic sign at the east end of the street close to the appeal site and the number of accesses on the approach to the appeal site, we think it likely that drivers would slow down on the approach to the junction. If actual traffic speeds are generally less than the official design speed, this would help mitigate the highway safety risks identified.

36. Allowing the existing garage access to be retained in addition to the new access serving the forecourt parking area would result in one site being served by two accesses. The Tribunal notes TSU's presumption against the creation of an additional access on a site which already has one serviceable access, which is said to be enshrined in Policy TPR02 of the Traffic Engineering Guidelines. However, there is no reference to any such presumption set out in this policy.

37. While TPR02 refers to "*strict controls of frontage activities…to mitigate congestion*" and "*careful consideration to be given to…the creation of proposed accesses*", this does not amount to a presumption against a site being served by more than one

access, in the Tribunal's view. If that is the intention, then the policy ought to be worded more clearly and explicitly. As Mr. Rowles conceded at the Hearing, applicants coming afresh to the policy as drafted would be unlikely to read it as a "presumption" against multiple accesses on a particular site. This is a matter which the Tribunal considers it would be helpful to clarify (and justify) in any future review of the guidelines and associated public consultation. In the meantime, we give little weight to a presumption which is not set out in the approved guidelines or any UAP policy.

38. Taking all these matters into account, on balance, the Tribunal has concluded that allowing the approved development to be retained without closing off the existing access serving the garage as required by condition 8 on permission FULL/2011/0835 would not exacerbate the existing risk to highway safety to a significant degree, notwithstanding the sub-standard visibility at this access and lack of turning area. Likewise, there is nothing before us to suggest that any traffic congestion arising from the continued use of this access would materially worsen as a result of development which has been granted planning permission.

39. In reaching this view, the Tribunal has considered very carefully the suggestion by the TSU that some of its concerns could be addressed if the parking areas (which we assume refers to both the existing garage and drive and the new forecourt parking area) were to be served by a single access. This is dealt with in more detail below.

Is condition 8 reasonable?

40. As pointed out by the Department, section 17 of the Land Planning and Development (General Provisions) Ordinance, 2007 allows the Department to impose such conditions as it thinks fit. This includes conditions required (i) to reduce any anticipated adverse effect of the development on land under the control of the applicant, whether or not it is land in respect of which the application was made (ii) manage any buildings or land under the control of the applicant, whether or not it is land in respect of which the application was made and (iii) secure works which are reasonably required in connection with the development to be carried out before commencement of development.

41. Having regard to these provisions, bearing in mind that the new access has better visibility than the existing garage access, and taking into account TSU's suggestion that some of its concerns could be overcome if the parking areas were served by a single access, the Tribunal considers that Condition 8 could accord with the requirements of section 17 but ONLY if an alternative access were to be provided to the existing garage in the event that the existing access is closed off. This important caveat goes to the heart of our concern about the reasonableness of the condition in dispute.

42. Although not the only obstacle to movement across the frontage, retaining the wall between the garage drive and the new forecourt parking area as required by

condition 5(a) would physically prevent the new access being used to serve the garage and driveway parking space. At the Hearing, we explored whether this was the Department's intention, or whether the combined effect of conditions 5a and 8 had not been fully appreciated at the time permission had been granted. We were advised that the Department had intended to prevent any use of the garage and driveway for parking in the future, and these two conditions were consciously and deliberately imposed to achieve this end. The Department justified this approach on the basis that the approved development would provide a new access with better sightlines and the potential to turn on site. In its view, these benefits would outweigh the permanent loss of the garage and driveway for parking.

43. The Tribunal does not share the Department's view. In our judgment, it would be unreasonable to require the existing garage access to be closed off unless there is another way for vehicles to get into the garage and park on the garage driveway. Failure to allow for an alternative access to serve these facilities would effectively sterilize the use of the garage and driveway for parking and result in the permanent loss of two parking spaces which the appellant has enjoyed for many years without restriction. The Tribunal believes this outcome would be unreasonable in planning terms, as well as a disproportionate interference with the peaceful enjoyment of property embodied in Article 1 of the First Protocol of the Human Rights Law legislation.

44. Had concerns about highway safety and convenience been considered so significant that it could only be mitigated by such a condition then, in the Tribunal's view, the appropriate course of action would have been to refuse planning permission. The Department's approach to grant permission on the one hand then use conditions to take away the benefit of securing additional off-street parking undermines the very reason why the development was proposed in the first place i.e. to secure additional parking on the appeal site. The combination of conditions 5(a) and 8 would mean that only 2/3 parking spaces could be provided on the appeal site, rather than the 4/5 spaces for which permission was being sought.

45. At the Hearing, the Tribunal explored with both parties whether it would be physically possible to serve the original garage and driveway as well as the forecourt parking area via the new access and retain an area for turning on site, in line with the general thrust of TSU's suggestion. Whilst this could be achieved, the existing forecourt parking area would have to be re-graded to compensate for the difference in levels and gradients between the garage driveway and the forecourt parking area.

46. If this work were carried out, vehicles parked on the forecourt which are currently well screened by the retaining walls around the parking area, would be far more prominent in views along the street and in the foreground of the protected building. The visual effect of the protected building being raised above street level on a plinth would be severely diminished. The loss of the intervening wall would destroy the symmetry of the forecourt design which mirrors the façade of the protected building. The cumulative impact of these changes would harm the Conservation Area's

character and appearance as well as the setting of the protected building.

47. The alternative approach – to re-grade the garage driveway so that it is level with the excavated forecourt parking area - would make the garage inaccessible because of the difference in level between the excavated parking area and the garage threshold.

48. These considerations aside, it is still not clear whether it would be possible to design a parking layout in the space available which could accommodate 4/5 vehicles on site in total (including in the garage) and provide a turning area served by a single new access.

49. Having explored these different approaches, the Tribunal has reached the view that the grant of planning permission and implementation of the approved works (other than in respect of condition 8) has severely limited the scope to secure a practical and realistic design solution which would address the appellant's parking requirements, Conservation Area and protected building considerations and matters relating to highway safety and convenience. As a result, the Tribunal considered but ruled out a planning condition along the lines set out in paragraphs 45 and 46, even though such a condition had been seen by the parties in advance of the Hearing and tabled at the Hearing for discussion.

Conclusion

50. The Tribunal is not entirely convinced that making a planning application to "rescind" a planning condition imposed on a permission which has already been granted, once the six month period for making an appeal against the condition has elapsed, and after the approved works have already been completed (other than those required by the condition in dispute) falls within the scope of the Law. "Rescinding" a planning condition is not in itself development and therefore on the face of it does not require planning permission. We acknowledge that this course of action was one of the options suggested by the Department when it became aware of the breach of condition 8, and we know that refusals to rescind planning conditions have given rise to a number of appeals in the past. A review by the Department of the guidance it gives to applicants in such circumstances might be helpful.

51. For the reasons stated, the Tribunal does not consider that retaining the approved development without complying with condition 8 on permission FULL/2011/0835 would prejudice highway safety and convenience to an unacceptable degree. As a result, we find no material conflict with the requirements of Policy GEN8. Retaining the existing garage access as it is now and has been for many years would preserve the character and appearance of the Conservation Area and the setting of the protected building in accordance with Policies DBE7 and DBE8.

52. The Tribunal therefore concludes that the appeal should be allowed and permission granted to retain the development as approved under permission FULL/2011/0835, but without compliance with condition 8. In view of this conclusion, there is no

breach of the 2005 Law and therefore no need to address the Compliance Notice appeal which, following normal procedure in cases like this, should be withdrawn.

53. As all other conditions on this permission FULL/2011/0835 have been complied with or discharged, no other conditions are necessary.

54. The Tribunal has considered all other matters raised in written submissions, discussed at the Hearing and seen during its site visit. 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 Department's decision to withhold planning permission in this case was unreasonable, and that the Appeal must therefore be upheld.

Linda Wride Dip TP MRTPI
Presiding Member

Date: 22nd November 2012