

Appeal Decision Notice

Planning Tribunal Hearing and Site Visit held on 10th December 2012 at Les Cotils Christian Centre, St Peter Port, followed by a visit to the Appeal site

Members: Mr. Stuart Fell (Presiding), Mr. Patrick Russell, Mr. David Harry

Appeal Site: Land at Bonamy House, North Clifton, St Peter Port

Property Reference: A20108B000-P01

Planning Application Reference: FULL/2011/3038

Planning Application Valid Date: 22nd September 2011

Appeal Case Reference: PAP/010/2012

- The Appeal is made under the provisions of Part VI and Section 70 of The Land Planning and Development (Guernsey) Law, 2005.
 - The Appeal is by Mr. J. D. Collings against the decision of the Environment Department dated 19th December 2011 to refuse planning permission on a retrospective application to create a temporary car parking area for twenty cars.
 - The appeal is directly related to a concurrent appeal against the decision of the Environment Department to issue a Compliance Notice in respect of the land subject to this appeal. A separate Hearing into the appeal against the Compliance Notice was heard on the conclusion of this Hearing.
 - The appellant, Mr. J. D. Collings, presented his own case.
 - The Environment Department was represented by Mr. A. J. Rowles, Director of Planning, Mr. J. Pentland, Planning Officer, and Mr. D. Perrio, Enforcement Officer.
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Decision

1. The appeal is dismissed.

Preliminary Matters

1. Having made a preliminary assessment of the appeal documents following the submission of the appeal, the Planning Tribunal made a determination that certain of the grounds of appeal were unrelated to planning matters and were accordingly beyond its remit and authority. These grounds could not therefore be taken into account in its consideration of the appeal. These conclusions were made known to the parties in a letter from the Tribunal dated 22nd November 2012. Mr. Collings made no written response on this matter prior to the Hearing, and indicated at the Hearing that he had no desire to contest the Panel's determination as to the grounds of appeal.
2. One of the grounds of appeal relating to planning permissions that had been granted in respect of States-owned land in La Rue Marguerite (Ground 5) was expressed by Mr. Collings in terms of a conflict of interest on the part of the Environment Department, being a Department of the States of Guernsey. Having read the submitted documents, the Tribunal interpreted this ground of appeal as one relating to a possible inconsistency on the Department's part in its determination of the applications relating to the States-owned land on the one hand, and the subject application on the other. Neither party raised any objection to the Tribunal's interpretation of this ground of appeal.

The Appeal Site and its Context

3. The appeal site is an area of land known as the Lower Garden which is associated with Bonamy House, a fine historic building dating from around 1820. Bonamy House, whose principal entrance faces west, stands on the pavement edge, commanding the road junction of College Street and North Clifton. These roads fall away respectively to the east and to the south-east, following the natural land contours, so that Bonamy House stands at the highest point of its site. The house and its land occupy the major part of a block of property contained by College Street to the north, La Rue Marguerite to the north-east, North Clifton to the west and south-west, and a block of existing properties to the south-east. The location is on the western edge of the town centre in a densely developed area containing a mixture of residential and commercial properties.
4. The use of Bonamy House has changed over its lifetime, having been built initially as a substantial dwelling. Mr. Collings explained that it is now used as offices at the lower level, while the upper floors have been converted to form four, one-bedroom apartments. One of the apartments is retained for Mr. Collings' own use when in the Island, as he spends much of his time abroad. To the south of the building, with access from North Clifton, lies a walled service yard which is roughly triangular shape. This provides a communal parking area for the residential units and the office space within Bonamy House. During its site visit the Tribunal saw that there is room for a maximum of five parking spaces in this area, though manoeuvring is somewhat difficult because of the restricted land area and its shape. Directly to the east of

Bonamy House is the main garden, identified on some of the submitted plans as the Upper Garden.

5. Yet further to the east, and at a slightly lower level, is the land referred to in documents as the Lower Garden, which Mr Collings explained was bought by his family in around 1850 so as to buffer Bonamy House from encroaching development and to safeguard the views across the town to the east. To his knowledge the land had never been formally used as a garden and in recent years had become a wilderness. The land shares its north-eastern boundary and part of its north-western boundary with States-owned land in La Rue Marguerite, and extends southwards to North Clifton, where the frontage to that road was originally enclosed by a wall and a gate. The ownership of this land has been transferred in recent years to Lower Garden Holdings Limited (LGH Ltd.), a company of which Mr. Collings is a director.
6. Directly to the east of the parking area next to Bonamy House was a coach-house extending along the road frontage on North Clifton. Though originally part of the Bonamy House holding, this land was sold some years ago for development. Whilst there were proposals initially to convert and refurbish the building, it was eventually demolished. It has recently been replaced with a row of four terraced houses, the building work having been substantially completed in late 2012 by New Coach House Limited. These new houses are three storeys high and are served by an open service area set further to the east. This area is accessed by means of a vehicular entrance onto North Clifton, formed in around 2000. This service area, the ownership of which is retained by LGH Ltd., accommodates the parking and turning facilities for the four new houses. It also provides the vehicular access to the appeal site which represents the surviving part of the Lower Garden and lies on the adjacent land to the north.
7. La Rue Marguerite is a relatively new roadway, having been created as part of the court redevelopment initiated by the States of Guernsey and completed in 2006. This road is sited on land formerly occupied by old prison buildings. The appeal site follows an approximately trapezoidal shape, with its north-eastern corner almost touching La Rue Marguerite, when seen on plan. The construction of La Rue Marguerite resulted in the creation of two left-over parcels of land, both owned by the States of Guernsey. The easternmost of these is triangular in shape and is currently unused. The other site, to the west, is more rectangular in shape and is currently used as a car park under the terms of a planning permission granted initially in 2009 for a period of four years, and later extended.
8. The dramatic land contours in this part of St Peter Port are such that the north-eastern corner of the appeal site is elevated approximately 8m above the States-owned car park in La Rue Marguerite, the site being supported by granite retaining walls. The road here falls sharply to the west away from its junction with St James Street. Whilst the appeal site and the States owned land appear to be separated merely by a boundary wall when seen on a plan, the reality is quite different, as these

adjoining land parcels are physically separated by the very substantial change in ground levels.

The Subject Application

9. In making the retrospective planning application, Mr Collings made it clear in his covering letter of 19th September 2011 that the application was for temporary car parking. When asked by the Tribunal why he had not specified the duration of the permission that he was seeking, or provided any details of the nature and programme of the intended development, his response was that he had taken a lead from the information supplied in the planning applications for temporary parking that had been made by the States Property Department in respect of the adjoining States-owned land. It was Mr. Collings' view that if the Department had wanted any clarification or further information, then they would surely have asked him.
10. In the event, the Department refused the application on 19th December 2011 without seeking further information or clarification from Mr. Collings, resulting in this appeal. The reason for refusal was expressed in the following terms:

“The proposal for temporary car parking on this site would not meet the criteria set out in adopted Urban Area Plan Policy CEN7, which only allows for temporary car parking on vacant sites in specific circumstances. In particular, there is no programme for the early and appropriate development of this site.”
11. In setting out his grounds of appeal, Mr. Collings claimed that no material change in the use of the land had occurred and there had accordingly been no breach of planning control. The principal basis of this assertion was the constant use of the site for purposes other than as a garden, namely its use as a commercial car park from April 2007 to January 2011. Mr. Collings asserted that the Department would have had knowledge of this use, and the lack of action by the Department could reasonably be taken as an implied consent for the continuation of that use.
12. A further substantive ground of appeal, as interpreted by the Tribunal, was the seeming inconsistency in the Department's handling of the subject application, when compared with their handling of applications for temporary car parking on the adjoining States-owned site in La Rue Marguerite.

Main Issues

13. From its assessment of the papers submitted by the appellant and the Department, and from what was seen and noted during the site visit, the Tribunal considers that there are two main issues in this case. The first is whether development on the land has occurred of a kind that requires permission under the provisions of Sections 13 and 14 of the Law, and whether the absence of any intervention by the Department in respect of that use could be taken as an implied consent for its continuation or as an indication that the use had become established. The second issue, should it be

determined that development has occurred which is unauthorised, is whether the continued use of the appeal land as a temporary car park would be in conflict with the objectives of Policy CEN7 of the adopted Urban Area Plan.

First issue

14. It is clear to the Tribunal that the original function of the appeal land was as an extension to the rear garden of Bonamy House, and that it continued to fulfil its function as a buffer between the house and surrounding development until the late 1990s, thereby contributing to the residential amenity of the house. The fact that the land may not have been actively used as a garden in recent decades, and may have become overgrown, as evidenced in an aerial photograph of 1996, does nothing to alter this fundamental position. The fact that the appeal land has remained contiguous with the upper garden and accessible from it, and was incapable of independent use until the new vehicular entrance was formed in around 2000, further supports the above interpretation.
15. This position began to alter during the 1990s, when a series of planning permissions was granted for the redevelopment of the former coach house site. These necessitated the formation of a new vehicular entrance onto North Clifton and the setting aside of an area of land for access, parking and servicing of the proposed houses, as described in paragraph 6 above. This interim position can be seen in an aerial photograph of 2001. This also shows that the substantial part of the Lower Garden, which now forms the appeal site, was at that time largely unaffected by these changes arising from proposed development in the southern part of the Bonamy House land.
16. In 2004, the ownership of the appeal land, together with the shared access and parking area just described, was transferred to NGH Ltd. In the same year an arrangement was entered into between NCH Ltd and R. G. Falla, the contractors building the new court in La Rue Marguerite, to enable the appeal land to be used as a store for building materials and equipment, thereby facilitating the construction of that project. Materials were moved between the appeal land and the building site by means of a tower crane, overcoming the substantial difference in ground levels. This use of the land continued until the latter part of the building contract, when it was utilised as a car park by the contractors who were completing the internal fitting-out works of the Royal Court court building.
17. In response to questions from the Tribunal, the Department confirmed that it had no record of planning permission having been given for this temporary use of the land between 2004 and 2006, a situation explained by the fact that development undertaken by the States of Guernsey at that time was exempt from planning control. Mr. Rowles explained that the exemption from the need for planning permission had presumably been extended to the temporary use of the appeal site for purposes considered ancillary to the implementation of the States development. This tacit approval, he said, would have ceased on the completion of the project in

2006. It is the Tribunal's opinion that once the temporary use of the land described above had ceased, the planning status of the land would have returned to its established use as a garden/amenity area associated with Bonamy House.

18. By the time the 2006 aerial photograph was taken, it is evident that all the temporary construction activity had ceased, and the appeal land had reverted to its previous overgrown state. The adjoining triangular area of land to the south, which would serve as a common service and access area for the coach house development and the remaining Bonamy House land, was by this time formally laid out and surfaced.
19. In April 2007, Mr. Collings arranged to rent out his land at the appeal site and within the adjoining service and access area to law firm Collas Day for use as a car park for approximately ten vehicles. The number soon increased to sixteen vehicles. This arrangement was on a monthly basis and came to an end in January 2011. No application for planning permission was sought for this use, and the possibility that the Environment Department might determine this use to be unlawful is anticipated in one of the written terms of the agreement with Collas Day, which requires the parking activity to cease immediately should this eventuality occur.
20. The Tribunal has considered the question of whether the use of the land by Collas Day for commercial parking represented a change of use of the appeal land. The Tribunal has already concluded that the established use of the land was associated with the primary residential function of Bonamy House, which, under the terms of the Island Development (Use Classes) Ordinance, 1991 was categorised within Residential Use Class. With the occupation of the appeal land by Collas Day, the predominant use changed to the parking or storage of motor vehicles unrelated to the use of Bonamy House, and was categorised as Storage/Distribution Use Class 44. In terms of the current Land Planning and Development (Use Classes) Ordinance, 2007, this equates to a change from a Residential Use Class to Storage/Distribution Use Class 33. The Tribunal's conclusion is that the parking activity did indeed involve a material change of use amounting to development that could only be regularised by a grant of planning permission.
21. Part of Mr. Collings' case is that the Department would have been well aware of the commercial parking that was taking place from 2007, and he had interpreted the lack of any intervention on its part as a tacit approval for this use to continue. In order to assess how the use of the appeal site might have been perceived by the Department at that time, the available photographic records of the land have been carefully examined by the Tribunal.
22. A key factor in making this assessment is whether the legitimate use of the appeal land and the adjoining service and access area might include car parking in association with the authorised uses and activities within Bonamy House. Mr. Rowles confirmed that this was the case, and that overspill parking arising directly from such uses and activities could reasonably be accommodated on the appeal site. On the basis that the Bonamy House uses might generate a need for a total of up to parking

ten spaces, he thought it reasonable that up to five or six vehicles might overspill onto the adjoining areas of land. Mr. Collings explained that the appeal site had indeed been used by him and by his tenants in this way since 2006, and continued to be used in this manner at the time of the Hearing.

23. No photographs of the appeal site and the adjoining land could be found for 2007 or 2008. However, at around the mid point of the Collas Day usage in June 2009, an aerial photograph is available which was reviewed in detail during the Hearing. Much of the land in the north-eastern part of the appeal site remained overgrown at this time, and only the central parts of the site were surfaced, enabling some parking to take place. Parking spaces are not marked out. Within the appeal site there are six cars apparent on the photograph, five of which were Collas Day vehicles, the other one belonging to Mr Collings. There is space for a further four or five additional vehicles. A steel container is also visible which Mr. Collings explained is used as a store for items that were originally in the house. Within the common service area to the south of the appeal land a further eight vehicles are visible, two of which belonged to Mr. Collings.
24. The above-described condition of the land is confirmed in another contemporary photograph, which is an elevated view of Bonamy House and its rear land shown on the cover of the local publication "Under One Roof", published in May 2009.
25. The Department argued during the Hearing that they had no reason to believe that the vehicles parked on the appeal site and the common area at this time were anything other than cars related to the authorised activities within Bonamy House, combined with the sort of casual parking that is often associated with sites awaiting development. The Department said that although planning officers had visited the site at this time, there was nothing to suggest that formalised commercial parking activity was occurring. Having carefully reviewed all the submitted evidence that might throw light on this matter, including correspondence of that period submitted by the parties, the Tribunal considers that the Department's assessment at that time was reasonable.
26. Between June and October 2009 the condition of the appeal land changed, as can be seen in photographs of the site taken by the Department on 27th October 2009. By this time most of the remaining vegetation on the appeal site had been cleared and the ground area surfaced, substantially increasing the parking capacity of the site. This work was presumably carried out because by this time the development of the four new houses on the former coach house site, which had been granted planning permission in July 2008, had commenced. This construction would have displacing any parking activity from the common service area that immediately adjoins the development site. Mr. Collings explained that as far as he was aware, any work of surfacing and clearing had been carried out by New Coach House Limited, the developer of the new houses.

27. In the Tribunal's view this phase of clearing out and surfacing of the appeal site in late 2009 substantially changed the character of the land. Little trace of the former vegetation remained and the photographic evidence shows that parking was being undertaken in a much more orderly fashion than before.
28. When questioned about the lack of intervention by the Department at this stage, given the information revealed in its record photographs taken in October 2009, Mr. Rowles said that officers had assumed that the parking represented a continuation of the use of the land for overspill parking from Bonamy House, coupled with the parking of contractors' vehicles related to the building of the new houses. As the spaces were not marked out or numbered, he said that there was no reason to believe that the use of the land had changed to that of a commercial car park.
29. The Tribunal finds the Department's position at this time untenable, as there was clearly capacity within the appeal site for around twenty parking spaces, a number far in excess of that needed for overspill parking from Bonamy House and for contractors vehicles. The Tribunal would have expected the Department to make enquiries about the nature of this use, and regards the lack of action as questionable judgment on the Department's part, rather than as an indication of its tacit approval of the use. The Tribunal has taken into account that the Department were in discussion throughout 2009 with New Coach House Limited regarding a proposal to undertake residential development on the appeal site, and may therefore have adopted the view that the use of the land for parking would be short-lived. Nevertheless, this does not alter the Tribunal's conclusion that October 2009 could reasonably be taken as the date when a potential breach of planning control was first known to the Department.
30. Collas Day terminated their use of the site in January 2011 as works of surfacing and landscaping were being undertaken in the common service and access area. By July 2011 the parking activity on the appeal site had recommenced, and twenty-one spaces were identified with numbered markers. It is at this stage that the Department were formally notified of a potential breach of planning control by New Coach House Limited, on the basis that the unauthorised parking would harm the amenity of the new houses then nearing completion. It is at this stage that the Department initiated enquiries about the nature of the use of the land.
31. In relation to the question of whether the parking use had become established, which is the basis of one of the grounds of appeal, Mr. Rowles explained that there was no explicit provision within the Law for uses to become established with the passage of time. He said that authorised uses are regarded as those that were extant at the time when the 1966 Planning Law came into force, or had subsequently benefitted from the grant of planning permission. He reminded the Tribunal that an unauthorised use would fall beyond the scope of enforcement action when it had endured for a period of more than ten years, or for a period of more than four years after the Department had become aware of it.

32. With the above matters in mind, the Tribunal's conclusion on the first issue is that the use of the appeal site for parking activity beyond the needs directly associated with Bonamy House represents a material change of use of the land which amounts to development under the provisions of Section 13 of the Law, and that the said use of the land remains unauthorised and cannot in any sense be regarded as established or condoned by the Department.

Second Issue - Policy Considerations

33. The Department's refusal of the application for change of use was set out in the following terms:

"The proposal for temporary car parking on this site would not meet the criteria set out in adopted Urban Area Plan CEN7, which only allows for temporary car parking on vacant sites in specific circumstances. In particular, there is no programme for the early and appropriate development of the site."

34. The wording of Policy CEN7 is as follows:

"In the central area of St Peter Port, temporary car parking on vacant sites proposed for development will only be permitted where:

- a) the use is limited to a short period in accordance with a programme for the early and appropriate development of the site;*
- b) the operation of the car park will not impair road safety; and*
- c) the total amount of parking provided in any centre does not exceed the amount identified by the States as necessary."*

35. The Department made no claims that the proposed use would conflict in any way with parts b) or c) of Policy CEN7, and the Tribunal has reached the same view on this matter. The main justification for the refusal was expressed simply as the absence of a programme for the early and appropriate development of the site.
36. The basis of Mr. Collings' ground of appeal on this matter is twofold. First, that the Department could readily have established the expected timescales and nature of development by asking him, which it had not done. Second, that the Department had acted inconsistently in twice having granted permission for temporary parking on a neighbouring parcel of land in States ownership, where the programme of development had not been given.
37. In response to questions from the Tribunal, Mr. Collings said that he was seeking permission for a period of four years, the same period that had initially been granted in respect of temporary parking on the States-owned land in La Rue Marguerite. He said that the nature of the intended proposal was a commercial development of the same kind as that envisaged by the States on its sites in La Rue Marguerite. The Tribunal is aware from the submitted documentation of discussions between Mr.

Collings and representatives of the States commencing at the end of 2011. These had been held so as to discuss the possibility of a joint venture between Mr. Collings and the States whereby these neighbouring parcels of land in separate ownership might be combined.

38. Mr. Collings argued that the duration of any grant of permission for the temporary car park could readily have been controlled by the imposition of a planning condition, and that Mr. Rowles was aware of the nature of the discussions on a potential joint venture as he had been present at the aforementioned meeting with Mr. Collings and representatives of the States, prior to the refusal of the subject application.
39. Mr. Rowles responded by saying that discussions between Mr. Collings and representatives of the States were at an early stage when the subject application was being assessed and that there was no certainty that agreement would be reached regarding the prospects of development.
40. In relation to the charge of inconsistency on the Department's part, the Tribunal reviewed the permissions that had been granted in respect of the site in La Rue Marguerite. The Environment Board had objected to a proposal made by the Treasury and Resources Department in February 2007 to create a car park on this land on the basis that such a use would be inappropriate on such a prominent site. The Board's view was that the site should be landscaped pending redevelopment.
41. The matter rested there until June 2009, when a further application was made on behalf of the Treasury and Resources Department. No development programme was submitted and the letter accompanying the application made it clear that as there was no development funding there would be little prospect of work commencing for at least four years. It was argued that the income arising from the proposed parking would enable the costs of site landscaping to be met, resulting in a balanced solution for this unsightly area.
42. The planning officer's written assessment of the application acknowledged that no programme for the development of the site has been submitted and the requirements of part a) of Policy CEN7 had not been met. It went on to say that given the particular circumstances and background, the proposal would result in an enhancement of the site and approval in this case would be unlikely to set a compelling precedent for such a use of private land. The proposal could therefore be considered as a minor departure to Policy CEN7. Planning permission was accordingly granted by the Environment Board in October 2009.
43. The Tribunal has found some difficulty in understanding the rationale that underpinned this decision. If the submission of a programme for development is a fundamental requirement of part a) of Policy CEN7, and this requirement has not been satisfactorily fulfilled by an application, then, in the Tribunal's judgment, the application must automatically fail. The issues of precedent and the benefits that might arise from landscaping should have been irrelevant in the reaching of such a

decision, as these relate to the potential consequences of the proposal and can in no way overcome significant omissions in the submitted application. In the Tribunal's opinion the reference in the officer's report to the 'particular circumstances and background' of the case, which are not specified, further undermines the probity of this decision.

44. The Department had the opportunity to review its approach to this development when an application was made in February 2012 to renew the permission up to October 2015. No submissions were made by the applicant in respect of the requirements of part a) of Policy CEN7. It is the Tribunal's view that the Department should at this stage have enquired as to the progress that had been made regarding the funding of the development, and the likely timescales involved in its implementation, but no such enquiries had been made. Permission was granted for this application in April 2012, under delegated arrangements, on the same basis as before.
45. In comparing the handling of the appeal application and the applications relating to Rue Marguerite, the Tribunal sees a striking inconsistency in the varying interpretation of part a) of Policy CEN7. The Tribunal can understand why Mr. Collings might feel that he had been treated unfairly, and agrees that more latitude appears to have been allowed in respect of the applications for States-owned land than had been shown in the assessment of Mr. Collings' application. On the above evidence, the Tribunal is satisfied that there has been inconsistency in the handling of these applications.
46. However, this inconsistency of approach has proven not to be a determining factor in this case, as it emerged during the Hearing that little attention had previously been given by either of the parties to the explanatory text to Policy CEN7, which is set out at paragraph 7.2.3.2 of the Urban Area Plan.
47. This supporting text explains that there is a shortage of open and accessible sites for additional car parking in the short term, and indicates how suitable sites might be found. A critical phrase was drawn to the Tribunal's attention by the Department, and this states:

"From time to time, however, sites are cleared for redevelopment and could be used for temporary car parking'.

It continues,

"...applications to use clearance sites on a temporary basis for parking may be regarded favourably."

48. The Department argued that the term "*cleared for redevelopment*" is significant, as it shows that the intention of the Urban Area Plan is that Policy CEN7 can only be applied to sites that have previously been built on and have subsequently been

cleared to enable redevelopment to take place. This interpretation would apply to the site on La Rue Marguerite, which had previously been occupied by prison buildings, but would not apply to the appeal site, which had never been developed.

49. The Tribunal has carefully considered the Department's submissions on this matter, and can find no alternative interpretation of the explanatory text. On the basis that Policies must be read and interpreted in their entirety, including any related text, the Tribunal concludes that the appeal proposal falls outside the scope of Policy CEN7, and there is accordingly no policy gateway which would enable the proposed development to be approved. The Tribunal is therefore unable to support the appeal.

Conclusion

50. The Tribunal has considered all other matters raised in the comprehensive written submissions, during the Hearing, and at its site visit, but none of these matters affect its conclusion under the provisions of Part V1 Section 69 of The Land Planning and Development (Guernsey) Law, 2005, that the Appeal is not upheld.

**Stuart Fell DipArch RIBA IHBC
Presiding Member**

Date: 24th February 2013