

JERSEY / JUDGMENT

Blackstone -v- Minister for Planning and Environment

[2012] JRC 047A (08 March 2012)

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judgment

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Introduction

1. On 6 th October, 2011, the Planning Applications Panel ("the Panel") under delegated powers on behalf of the Minister for Planning and Environment ("the respondent") granted Antler Property CI Limited ("the applicant") permission under the Planning and Building (Jersey) Law 2002 in respect of the property known as Camellia Cottage, Le Mont de Gouray, St Martin. The permission was to demolish the existing house and ancillary buildings, make remedial repairs to quarry faces and to construct three houses on a basement car park. On 25 th October, 2011, Mr Christopher John Blackstone ("the appellant"), issued a Notice of Appeal against that decision. That appeal was brought under Article 114 of the Planning and Building (Jersey) Law 2002 ("the 2002 Law"). It is, therefore, a third party appeal. 2. The grounds of appeal relied upon by the appellant as set out in his Notice of Appeal are as follows:- "1. Regarding Policy GD2 of the Island Plan 2011, the Application contains two untrue statements and one unsupported statement on which the Minister has relied in stating that "the applicants have demonstrated that the existing building is in a poor state of repair and they have argued that the redevelopment of the site is in the interests of its long-term sustainability". No evidence has been given to support the applicants claim in this respect and the Application is thus in direct conflict with Clause GD2 of the Island Plan 2011. 2. Regarding Policies BE3, GD5 and SP7 of The Island Plan 2011, the proposed development is visually prominent and obtrusive in the landscape setting, involves the removal of existing trees and landscape features, has a seriously detrimental impact on important vistas and does not maintain the character and appearance of the area, thus being in direct conflict with these policies. 3. If indeed, the quarry face is unsafe, it is the responsibility of the owner to make it good. However, this matter is irrelevant to a Planning Application for three large houses. 4. The Minister has failed to demonstrate that there is sufficient justification for granting planning permission that is inconsistent with The Island Plan 2011. 5. The

action taken by or on behalf of the Minister was unreasonable having regard to all the circumstances of the case." The appellant also indicated in the Notice that he did not require an oral hearing of the appeal. The respondent did not object to that proposal. This is therefore an appeal which can be dealt with "on the papers" under Rule 15/3C of the Royal Court Rules 2004 . 3. In accordance with the requirements of the Royal Court Rules 2004 , an affidavit on behalf of the respondent sworn on 15 th December, 2011, by Mr Roy Thomas Webster, Principal Planner of Planning and Building Services, was filed. This addressed in detail the background facts and also responded to the grounds of appeal put forward by the appellant. 4. Having considered the Notice of Appeal and the affidavit filed in response, I indicated to the parties by Act dated 3 rd January, 2012, that I was minded to decide that the appeal be dealt with on the papers and under the modified procedure. I therefore invited the parties to make written representations to me within 14 days on this proposal. The applicant had indicated that it was quite happy for the Minister to respond to the Notice of Appeal and it did not wish to be heard on the appeal. In my Act, I also set out directions for the filing of the necessary documents for the appeal to be adjudicated upon by me on the papers. 5. Camellia Cottage sits within an old quarry on the north side of Le Mont de Gouray in Gorey, St Martin. It fronts onto the roadside on the south-eastern part of the site and is a three-storey building (two-storeys plus dormered roof) which has been split into two flats. Parking provision for one vehicle is accommodated in a garage accessed virtually direct onto the highway. Along the rest of the site frontage is a high roadside granite wall. The surrounding quarry face rises steeply to the rear and is largely covered by trees and vegetation. As such, the existing property is seen against a large green backdrop. 6. When the application was submitted in December 2010, the Island Plan in force was that approved by the States on 11 th July, 2002. At the time the application was determined in 2011 the Island Plan then in force was that approved by the States of Jersey on 29 th June, 2011. On both Island Plans the application site lies within the Built-Up Area boundary and the Green Backdrop Zone. The relevant policies applying to these Zones were essentially the same under both Plans but the affidavit filed on behalf of the Minister stated that the application was determined under the 2011 Island Plan. The Planning Permit 7. Permission was given with reasons in the Planning Permit issued on 6 th October, 2011. The principal reasons in the Planning Permit for granting the application can be summarised as follows:- (i) The site is in the Built-Up Area. Under the provisions of Policy H 6 of the 2011 Island Plan, there is a presumption in favour of the development of new dwellings. The Panel were satisfied that this was a substantial site which could comfortably accommodate the scale of development proposed. (ii) One of the main themes running through the 2011 Island Plan was an emphasis on focusing new development in sustainable locations, ideally being built-up area sites. The Plan also seeks to achieve the highest reasonable density (Policy GD 3) for all developments in the interest of making the best use of the Island's limited land resources. Whilst there was a general policy presumption in favour of retaining existing buildings where possible, in the present case the applicant had demonstrated that the existing building was in a poor state of repair and that redevelopment of the site was in the interests of its long-term sustainability i.e. the provision of greater number of better-designed and better-constructed dwellings than at

present. The Panel accepted that view and the principle of redevelopment was considered to be acceptable. (iii) The general area within the immediate vicinity of the application site was characterised by properties in a variety of styles and forms. The proposed design was for three individual and detached dwellings which are tiered and step back into the site at each level. This allowed for the establishment of significant integral planting at each level and also that the development as a whole would not have an overbearing presence. (iv) The site is zoned as Green Backdrop Zone (Policy BE 3) and landscaping must remain the dominant element of the scene. The Panel was mindful of the concerns raised by a number of nearby residents regarding the loss of existing landscaping. However and most importantly, although involving a further extension of development alongside Le Mont de Gouray, the proposed development would still be set against and viewed against a large expanse of "green backdrop". Furthermore, the applicant had stressed that the old face of the quarry was unstable and in a dangerous position. At the public meeting the Panel had heard from a professional geotechnical engineer who had expressed the view that the extensive programme of remedial work to stabilise the quarry face was essential irrespective of any further development on the site. Such work would unavoidably result in the loss of greenery to the site in any event. Following such remedial work, a full programme of planting and landscaping would be implemented which, in time, would result in the re-vegetation of the site. Also, the new dwellings had been designed to allow for integral landscaping throughout the development. The Panel was, in the circumstances, satisfied with this approach. (v) The Panel noted that a number of neighbours had been critical of the proposed design which they regarded as an overdevelopment of the site and out of keeping with the character of Gorey. It had been suggested that a more traditional scheme would be more appropriate and better suited to the site. The Panel did not share that view. The buildings around Gorey Harbour were eclectic in nature reflecting a settlement which had developed and evolved over many centuries. In the Panel's view, this latest scheme represented a well designed and carefully considered 21 st century addition to an evolving townscape. As such, it was considered that the proposed development would not unreasonably harm the character and amenity of the area. Planning Policies 8. The Planning Policies to which the appellant refers in his Notice of Appeal provide as follows:- "Policy GD 2 Demolition and replacement of buildings The demolition of a building or part of a building will not be permitted unless the proposed development:- 1. involves the demolition of a building or part of a building that it is not appropriate in sustainability terms to repair or refurbish.; and 2. makes adequate provision for the management of waste material arising from demolition in accord with policy WM1 'Waste Minimisation and New Development'; and The demolition of a building or part of a building will also not be permitted where the proposed development: 3. would have an unacceptable impact on a Listed building or place in accord with Policy HE 1 'Protecting Listed buildings and places' and Policy HE 4 'Demolition in Conservation Areas' or protected species and their habitats, in accord with Policy NE 2 'Species protection'; 4. would have an unacceptable impact on the character and amenity of the area; The replacement of a building or part of a building will not be permitted unless the proposed development:-

5. enhances the appearance of the site and its surroundings;
6. replaces a building that is not appropriate to repair or refurbish; Policy BE 3 Green Backdrop Zone The Green Backdrop Zone is defined on the Proposals Map. Within the Green Backdrop Zone, development will only be permitted where:- 1. the landscape remains the dominant element in the scene and where the proposed development is not visually prominent or obtrusive in the landscape setting; 2. it retains existing trees and landscape features; 3. it presents satisfactory proposals for new planting which serve to maintain and strengthen the landscape setting and character of the area. Policy SP 7 Better by design All development must be of high design quality that maintains and enhances the character and appearance of the area of Jersey in which it is located. The various components of development, including:- layout and form; elevational treatment and appearance density and mix scale: height and massing external elements, and landscaping; and architectural detail and materials will be assessed to ensure that the development proposed makes a positive contribution to the following urban design objectives:- local character and sense of place continuity and enclosure quality of the public realm ease of movement and permeability legibility adaptability diversity safety by design Applications must, where appropriate, be accompanied by a Design Statement to demonstrate and explain how the principles of good design have been incorporated into the development proposal. Policy GD 5 Skyline, views and vistas The Minister for Planning and Environment will seek to protect or enhance the skyline, strategic views, important vistas, and the setting of landmark and Listed buildings and places. Proposed development that has a seriously detrimental impact, by virtue of its siting, scale, profile or design, in terms of its affect upon or obscuring of the skyline, strategic views, important vistas, and the setting of landmark and Listed buildings and places will not be permitted." The Appellant's Contentions 9. In his written submissions, the appellant addressed in more detail the Planning Policies referred to in the previous paragraph. In relation to Policy GD 2 The appellant referred to the Demolition Waste Management Report of 30 th November, 2010, provided by the applicant. He referred to a number of what he considered to be inaccuracies in that report. (i) The report says that the exiting property dated back to the early 20 th century. This was not true. Plans had been approved for it in December 1968 and so it would have been constructed in around 1969. Furthermore, the property was not "traditionally constructed" but was of a contemporary cavity design. (ii) The report said that the building was unoccupied but it had, in fact, been occupied until July 2011. (iii) The report stated that the building was in a very poor condition and needed substantial restoration the extent of which would be financially unviable. The appellant contended that there was no evidence to support that statement nor had any expert report been commissioned or provided to justify it. In relation to Policy BE 3 The appellant argued that the fact that this proposed development conflicted with Policy BE 3 had been continually sidelined or ignored. In particular:- (i) The Policy provided that development would only be permitted where it was not visually prominent or obtrusive. In this application, as evidenced by the photomontage provided by the applicant, the height of the proposed buildings showed that they were visually prominent and towered over

neighbouring cottages. The planning officer's report also acknowledged that the buildings would be highly visible with new terraces designed to enjoy distant views across the Royal Bay of Grouville. (ii) The Policy also states that a development will only be permitted where it retains existing trees and landscape features. The appellant argued that this development involved the removal of virtually all vegetation on the entire site including a number of mature trees. In his view, this was inconsistent with the Policy. He pointed out that the immediate roadside area (which was not in danger from rock falls) contained several mature trees. (iii) The Policy also required new planting to maintain and strengthen the landscape setting and the character of the proposed area. He argued that what had been approved here did not achieve this objective. There was no planting at the top level which was the most visible. Furthermore, the type of planting proposed was not realistic for the Jersey climate and unlikely to be successful. In relation to Policy GD 5 The appellant pointed out that this Policy was not referred to in either the planning officer's report or in the Panel minutes of 6th October, 2011. The Policy requires the Minister to seek to protect or enhance the skyline, strategic views and important vistas. The appellant said that the proposed development had a seriously detrimental impact by virtue of the siting, scale, profile or design in terms of its effect upon the skyline and strategic views and important vistas and was totally contrary to Policy GD 5. The proposed buildings were highly visible and they were incongruous and intrusive in a sensitive area. It was most surprising that in giving its decision no reference had been made this Policy. In relation to Policy SP 7 This Policy required that all development must be of high design quality that maintains and enhances the character and appearance of the area of Jersey in which it is located. The appellant argued that the permission granted in the present case was in direct conflict with the expressly stated requirements of Policy SP 7. 10. In summary, the grounds of appeal as set out in the Appellant's written submissions are as follows:- "(a) The development was in direct conflict with Policy BE 3 of the Island Plan which imposes restrictions on developments within the Green Backdrop Zone. (b) The development involved the demolition of an existing building. The Minister relied on untrue statements in the application and in the planning officer's report in deciding that the building was unsustainable and therefore might be demolished (Policies GD 1 and GD 2). (c) The development was in direct conflict with Policy GD 5. (d) Article 19 of the 2002 Law required the Minister to show justification for departing from the Policies of the Island Plan. This he had failed to do. (e) The Minister acted unreasonably in approving a development which was inconsistent with the Island Plan and he provided no justification for doing so." The Respondent's Contentions 11. The affidavit of Mr Webster filed in response to the Notice of Appeal sets out in detail the background to the application under appeal. It also exhibits all relevant documentation. These include details of the normal consultation process and the written representations (largely against the application) which were received. It also provides copies of the planning officer's report and the decision of the Panel. 12. The affidavit also sets out a detailed response to the grounds set out in the Notice of Appeal on which the appellant relied (these are set out in full in paragraph 2 above). That response is summarised in the next paragraphs. 13. In response to ground 1 (see paragraphs 54 to 56 of the affidavit):- (i) the respondent accepted the

applicant's submission (contained in the November 2011 Demolition and Waste Management Plan) that the building was in a poor state of repair. The majority of demolition material could be recycled. (ii) The affidavit also referred to Planning Policy GD 2 which provides that demolition of a building will not be permitted unless the proposed development involves the demolition of a building which is not appropriate in sustainability terms to repair or refurbish. Sustainability terms concern not only the physical condition of a building but involved a more balanced consideration of a number of factors as outlined in the preamble to Policies GD 2, SP 1 and SP 2. (iii) The respondent also took the view that the proposed redevelopment of the site (which lies within the Built-Up Area) was acceptable in wider sustainability terms than could be achieved by retaining the existing building. This accorded with the aim of the Island Plan to direct new housing development to the Built-Up Area and to achieve higher densities for residential development (see Policies GD 3 and SP 2). The proposed buildings would also be more energy efficient and the existing property had little architectural merit. 14. Ground 2 (see paragraphs 57 to 62 of the affidavit):- (i) The removal of planting would happen irrespective of the proposed development because of the work needed to the rockface. The removal of planting was not a direct consequence of the proposal for the new development of three houses but the application did provide the respondent with an opportunity to ensure that appropriate replanting was part of this scheme. (ii) The scale and design of the proposed redevelopment and its effect on Gorey and the terms of the Green Backdrop Zone were carefully considered. The Panel was of the opinion that the development would not unreasonably harm the character and amenity of the area. (iii) A green backdrop would remain dominant therefore the proposal was not in contravention of Policy BE 3. (iv) The stepped height, design and integral planting together with replacement planting to the quarry face provided a scheme entirely appropriate to the site which would not be obtrusive in the landscape setting. This satisfied the requirements of Policy GD 7. (v) There was a wide variety of architectural styles in the area. The proposal would not obscure the skyline, block any strategic views or detrimentally affect the setting of any potential listed buildings. It was, therefore, compliant with Policy GD 5. 15. Ground 3 (see paragraph 63 of the affidavit). The applicant had demonstrated awareness of its responsibility to make the rockface safe and had provided a detailed geotechnical assessment. The application gave the respondent an opportunity to ensure a high quality planting scheme was part of the redevelopment. 16. Ground 4 (see paragraph 64 of the affidavit). For the reasons set out in the Planning Permission dated 6 th October, 2011, the respondent considered the design approved to be consistent with the 2011 Island Plan. 17. Ground 5 (see paragraph 65 of the affidavit). The respondent refuted the suggestion that granting approval to the application was unreasonable having regard to all the circumstances of the case. 18. The Planning Permit was issued to the applicant on 6 th October, 2011, and sets out in detail the reasons for the approval (see paragraph 7 above). It says that permission was granted having taken into account the relevant policies of the Island Plan, together with other relevant policies and all other material considerations including the consultations and representations received. It also points out that the Panel, which approved the application at the second of two public meetings, visited the site as part

of its determination process and noted a number of representations which were made in person to it. 19. I also received detailed written submissions from Mr Duncan Mills of the Law Officers Department on behalf of the respondent. These covered a number of areas including responses to submissions of the appellant and the law to be applied. I summarise them briefly in the following paragraphs. Legal Test on Appeal 20. The respondent addressed firstly the applicable legal test for an appeal and said this. A planning appeal is not a hearing de novo nor is it an opportunity for an appellant to present information or ventilate representations he could have put before the Panel in this case. The Royal Court is not the planning authority. The role of the Court is to decide whether the decision of the Minister was unreasonable having regard to all the circumstances of the case. Thus, the question is not whether the Court would have made the same decision as the respondent but, whether, allowing the respondent a margin of appreciation, it reached a decision which the Court thinks is so wrong as to become unreasonable. 21. The legal test is set out in the judgment of the Royal Court in the case of *Token-v-Planning and Environment Committee*

- [2001] JLR 698 . At paragraph 9 of that judgment the test is put this way:- " The Court might think that a Committee's decision is mistaken, but that does not of itself entitle the Court to substitute its own decision. The Court must form its own view of the merits, but it must reach the conclusion that the Committee's decision is not only mistaken but also unreasonable before it can intervene. There is an element of semantics here but there is, nonetheless, a qualitative difference between finding that a decision is unreasonable, rather than simply mistaken. To put it another way, there is a margin of appreciation before a decision which the Court thinks to be mistaken becomes so wrong that it is, in the view of the Court, unreasonable." 22. The test means that a Court can substitute its own decision on a planning appeal if, and only if, it considers the decision of the respondent was not just wrong but also unreasonable. The Court is not entitled to say that the respondent's decision was reasonable but the Court will quash it because it has itself reached a different, equally reasonable decision. (see *Minister for Planning and the Environment-v-Dorey*
- [2009] JCA 219). Date of Decision 23. The reasonableness of the decision to grant planning permission should be judged according to the material before the decision maker (in this case the Panel). See *Arbaugh-v-Island Development Committee*
- [1966] JJ 593 at 595 as referred to in *Trump Holdings Limited-v-Planning and Environment Committee* (C. A.)
- [2004] JLR 232 . 24. In this case, the relevant date is 6 th October, 2011, the date of the decision of the Panel. The appellant, in his affidavit, has adduced evidence not before the Panel namely a report on the condition of Camellia Cottage commissioned after the decision to grant permission. I accept this point and in coming to my decision I have disregarded any evidence which was not before the Panel. 2011 Island Plan 25. The Island Plan is a key factor in the decision-making process. The respondent must grant planning permission if a proposed development is in accordance with the Island Plan. The unwritten corollary is

that applications inconsistent with that Plan will be refused unless the respondent is satisfied there is a sufficient justification for doing so (see *McCarthy-v-Minister for Planning and Environment*

[2007] JRC 063). 26. The 2002 Law addresses the matter of the grant of planning permission in Article 19 which provides:- "Grant of planning permission

- (1) The Minister in determining an application for planning permission shall take into account all material considerations.
- (2) In general the Minister shall grant planning permission if the proposed development is in accordance with the Island Plan. (3 The Minister may grant planning permission that is inconsistent with the Island Plan but shall not do so unless the Minister is satisfied that there is sufficient justification for doing so.
- (4) The Minister may grant planning permission in detail or in outline only, reserving specified matters to be subsequently approved by the Minister.
- (5) The Minister may grant planning permission unconditionally or subject to conditions.
- (6) The Minister may also refuse to grant planning permission.
- (7) Action taken by the Minister under this Article does not give any person the right to claim compensation in respect of any loss or damage the person may suffer as a result of that action." Consistency and the Island Plan 27. The respondent said that it was important to note that the 2002 Law did not refer to an application being "in accordance with" (Article 19(2)) or "inconsistent with" (Article 19(3)) a particular individual Island Plan Policy. The respondent referred to the case of *R-v-Rochdale MBC ex parte Milne*

[2002] 81 P. & C. R. 27 and the judgment of Sullivan J. at paragraphs 48 and 49 of that case. He relied on this case in support of the contention that the question was whether the proposed development was consistent with the Island Plan taken as a whole. This was a judgment of fact and degree to be considered in each case depending on the nature of the application and the Island Plan policies that fell to be considered in determining that application. 28. The respondent then referred to the Green Backdrop Zone Policy BE 3 and Policy H 6 (Housing Development within the Built-Up area). The respondent argued that these two policies operated comfortably together. The underlying purpose of the Green Backdrop Zone Policy was not to prevent development from taking place but to ensure that the landscaping of the zone remained the dominant feature of a site as opposed to buildings. The main policy in respect of an application to develop a site for housing within the built-up area was Policy H 6. This was clear from the text of that Policy itself. 29. Policy BE 3 had not been disregarded nor its importance undervalued by the respondent. The scale and design of the proposal and its effect on the character of Gorey and the Green Backdrop Zone had been carefully assessed. This was evidenced by the fact that the Panel had visited the site and requested more information before it could reach a decision. Furthermore, the planning officer's report (exhibited at RW1/24 of Mr. Webster's affidavit)

and the minutes of 28 th July, 2011, of the Panel (exhibited at RW1/2) made it clear that the Green Backdrop Zone was at the forefront of the decision-making process. A main issue of concern was related to the finished appearance of the quarry face after stabilisation works. The intention was that the green backdrop to the quarry would remain dominant. The respondent therefore considered that the proposal was not in contravention of Policy BE 3. 30. The Panel considered that the scheme put forward was entirely appropriate for the site and would not be obtrusive (as argued by the appellant) in the landscape setting. The development would also be set against a large green backdrop and was therefore entirely consistent with Policy BE3. Furthermore, the decision to grant planning permission was consistent with the Island Plan as a whole. Demolition 31. The question of the existing house being demolished was also addressed. Policy GD 2 applied where one perfectly good house was going to be replaced by another. The Island Plan was focused on the development and re-use of existing urban areas and previously developed land. It was inevitable, therefore, that this would result in the more efficient use of sites that have a house or houses standing in large plots. The respondent referred to paragraph 4.10 in the Built Environment section of the 2011 Island Plan. This made clear that unless land in the Built-Up Area was developed at higher and more land-efficient densities it would not be possible to meet the entire Island's identified needs for housing without reviewing the need to release greenfield sites for development. The respondent argued that it would be wrong to apply Policy GD 2 in a manner which would completely undermine this strategy. The proposed development at Camellia Cottage would result in a more efficient use of the site for three family homes instead of one. Differences in Opinion 32. The submissions for the respondent also addressed the role of differences in opinion when considering planning applications. The respondent argued that the appellant in his contentions did no more than emphasise his deep-felt opposition to the scheme rather than demonstrate that the decision could be said to be unreasonable having regard to the circumstances of the case. The appellant's objections had been taken into account by the respondent who was obliged to consider all representations made. It was inevitable that in planning applications the respondent would be confronted with different views and opinions which he had to consider in coming to a decision. The fact that a decision is made with which a person disagrees does not mean that the decision is unreasonable. Nor does it mean that a person's views or observations had not been taken into account. The amount of weight given to those representations was a matter for the respondent to consider on their merits subject to him reaching a conclusion that was not unreasonable. In this case the decision to grant permission by the Panel was a reasonable one well within the margin of appreciation referred to in the Token case. Financial Considerations 33. The contention of the appellant that financial considerations were irrelevant in considering the planning application was reviewed. The respondent argued that this contention was wrong in law. Material considerations were those which served a planning purpose. Financial considerations could serve that purpose (see Westminster City Council-v-Great Portland Estates Plc

- (1985) AC 661). The respondent said that in a particular case it was for him to decide whether financial considerations were a relevant planning consideration and, if so, the weight to be attached. Where a planning advantage could be secured those particular circumstances were capable of being a relevant consideration (see *Ferrara & Ferrara-v-Minister for Planning and Environment*)
- [2010] JLR N 32. 34. A comprehensive reason for approval was given for the grant of permission in this case. Financial considerations were not listed because they were not a reason for approval. The development met with approval on the merits of a three house scheme and not because of some exception to policy driven by need for the development to be viable in order for the stabilisation works to be executed. The development did, nevertheless, achieve a planning purpose in the context of Policy BE 3. The remedial work to the rock face was essential and this work would unavoidably result in the loss of greenery to the site in any event. The consequence of the approval given by the respondent is that the remedial work can be carried out in an orderly and controlled way to ensure that appropriate landscaping is put in place. The outcome of the development will have the benefit of bringing unstable land back into beneficial use in planning terms. Respondent's Conclusions 35. The respondent argued that the appellant was effectively asking the Court to prefer his view on the planning aspects of the matter. This was the wrong approach for the Court. The appellant must convince the Court that the respondent's decision was not only mistaken but also positively wrong. Unless that could be shown the Court could not simply substitute its own or the appellant's views for those of the respondent. The Court must come to its own view of the merits in order to determine whether the decision appealed against is not only mistaken but also unreasonable. This is the margin of appreciation referred to in the *Token* case. It was the respondent's position that the decision taken was entirely reasonable and, therefore, the appeal should be dismissed. The Applicable law 36. The law which I must apply in deciding this appeal is well established. It is set out in the *Token* case cited in paragraph 21 above. That test was applied by the Royal Court in the case of *Burgess -v- Minister for Planning and Environment*
- [2010] JRC 038 . In paragraph 12 of that case the learned Bailiff said as follows:- "As the Court emphasised to the appellants during the hearing, the Court is not the planning authority for the Island. That responsibility rests with the Minister. Whether to grant planning permission in a particular case is very much a matter of judgment and requires many competing factors to be taken into account. There is room for reasonable disagreement as to the right result. The Court may not intervene simply because the individual members of the Court might have reached a different decision from that of the Minister. This is clear from Article 109(1) of the Law which provides that an appeal may only be allowed where the decision of the Minister "... was unreasonable having regard to all the circumstances of the case." Guidance on what is meant by "unreasonable" is to be obtained from the well known decision in *Token Limited-v-Planning and Environment Committee*

[2001] JLR 698 where Bailhache, Bailiff said this at para 9:- "The Solicitor General submitted that the decision in Fairview Farm did not entitle the court to find that the Committee's decision was reasonable but quash it because the court had reached an equally reasonable but different decision. We agree. The court might think that a Committee's decision is mistaken, but that does not of itself entitle the court to substitute its own decision. The court must form its own view of the merits, but it must reach the conclusion that the Committee's decision is not only mistaken but also unreasonable before it can intervene. There is an element of semantics here but there is, nonetheless, a qualitative difference between finding that a decision is unreasonable, rather than simply mistaken. To put it another way, there is a margin of appreciation before a decision which the court thinks to be mistaken becomes so wrong that it is, in the view of the court, unreasonable."" 37. Article 114 of the 2002 Law sets out provisions in relation to third party appeals and is in the following terms:- "114 Persons who may appeal against grant of planning permission

- (1) This Article applies to a decision by the Minister to grant planning permission on an application made to the Minister in accordance with Article 9(1) if a submission was made to the Minister in respect of the application prior to the Minister's making the decision by a person (other than the applicant) who -
 - (a) has an interest in land; or
 - (b) is resident on land, any part of which is within 50 metres of any part of the site to which the planning permission relates.
- (2) For the purposes of paragraph (1), a person who has made a submission to the Minister includes a body or person created by statute (other than a Minister) that has commented on the application as a result of the Minister's compliance with Article 17.
- (3) A decision to which this Article applies shall not have effect during the period of 28 days immediately after the decision is made.
- (4) If during that period a person appeals in accordance with this Article the period shall be extended until either the appeal is withdrawn or is determined.
- (5) When the appeal is determined the decision shall have effect, if at all, in accordance with the determination.
- (6) The Minister shall serve a copy of the notice informing the applicant of the decision on each other person who made a submission to which paragraph(1) refers.
- (7) The copy of the notice must -
 - (a) be served within 7 days of the decision being made; and

- (b) be accompanied by a notice informing the person that the person may appeal against the decision or any part of it (including any condition of the planning permission) within 14 days of the service of the notice, and that person, if aggrieved by the decision, may appeal to the Royal Court accordingly.
- (8) On the appeal the Royal Court may -
 - (a) confirm the decision of the Minister; or
 - (b) order the Minister to vary his or her decision or any part of it (including any condition of the planning permission) as the Royal Court may specify; or
 - (c) order the Minister to cancel his or her decision to grant the planning permission.
- (9) The Minister shall comply with an order made under paragraph(8)(b) or (c)." 38. In applying the law in this appeal I must take full notice of the fact that the right of appeal does not replace the Minister by me. It is not sufficient for me to conclude that the decision of the Minister is wrong in the sense that I would not have reached the same decision. That does not entitle me to allow the appeal. It is only if I consider that the decision is wrong to such an extent that it can be categorised as unreasonable that I, as the Court, am entitled to intervene. (In addition to the authorities mentioned above see also the recent judgment of the learned Bailiff in *Fern-v-Minister for Planning and Environment*

[2012] JRC 034 especially at paragraphs 29 to 31). 39. In addressing the applicable law, I also mention two other cases which are relevant to this appeal. In *Dunn-v-Minister for Planning and Environment*

[2009] JRC 237 the Royal Court (Commissioner Sir Philip Bailhache presiding) the Royal Court allowed a third party appeal. In so doing it quashed the planning permission which had been granted and remitted the matter back to the Minister for further consideration. The powers of the Royal Court to remit a case back to the Minister have also recently been considered in the case of *Ruette Pinel Farm Limited-v-Minister for Planning and Environment*

[2012] JRC 008 . In that case the Royal Court considered in some detail the powers that existed under the 2002 Law to remit a case to the Minister. The appeal in that case was brought under Article 113 of the 2002 Law (see particularly paragraphs 54 to 72 of the learned Deputy Bailiff's judgment). 40. Having regard to the cases mentioned in the previous paragraph, I consider that in dealing with an appeal on the papers as in this case I have the power to remit the matter back to the Minister. That power would, of course, only be exercisable by me in appropriate circumstances. Decision 41. In deciding this appeal I have considered very carefully all relevant material which was put before me. In particular I have reviewed the Notice of Appeal, affidavit and submissions of the appellant and the affidavit and submissions made on behalf of the respondent. As stated in paragraph 24 above, I have considered only such material as was before the Panel at the date of its decision namely 6 th October, 2011. 42. In coming to my decision, I have applied

the principles urged upon me on behalf of the respondent namely that, having regard to Article 19 of 2002 Law and the authorities put forward, the question to consider is whether the proposed development was consistent with the 2011 Island Plan taking as whole (see paragraphs 26 to 30 above). 43. The application which is the subject of this appeal was quite complex and required consideration of a number of Planning Policies which are referred to and set out in detail above. 44. From my review of the material which I had to consider, it would seem to me that much of the reasoning applied by the Panel in coming to the decision might be expressed in the following way:- (i) Camellia Cottage needed to be demolished to provide adequate access to the rockface to make it safe. (ii) Remedial work required to the rockface meant planting on the green backdrop would need to be removed in any event. (iii) This was a Built-Up Area site and, under the provisions of Policy H 6 of the Island Plan, there was a presumption in favour of the development of new dwellings and this was a substantial site which could accommodate the scale of development proposed. (iv) The development proposals enabled the Minister to require new planting having regard to Policy BE 3 as the site was within the Green Backdrop Zone. 45. I appreciate that in considering the decision the Policies in the Island Plan must be looked at as a whole. There are a number of areas of concern which I have in reviewing the decision-making process. 46. It would appear that the suggestion that Camellia Cottage would need to be demolished was accepted on the basis of a statement from or on behalf of the applicant without further enquiry. No consideration seems to have been given to whether it could be retained. No enquiries or reports seem to have been provided or required as to the state of the Cottage or the possibilities of its refurbishment. Furthermore, incorrect information had been provided in suggesting that the Cottage was built in the early 20th Century when it was, apparently, constructed in about 1969. 47. It does not appear, from the material which I have seen, that consideration was given as to whether it would be more appropriate for Camellia Cottage to be replaced by one building having regard to the planning Policy GD 2. This seems largely to have been ignored on the basis of the importance applied by the decision makers to Policy GD 3 (regarding the Built-Up Zone). 48. Again, it is not clear as to how much detailed consideration was given to the requirements and express terms of Policy BE 3 relating to the Green Backdrop Zone. For ease of reference I set out again the terms of that Policy which are as follows:- "The Green Backdrop Zone is designated on the Island and Town Proposals Maps. Within this zone, development will only be permitted where:- (i) the natural landscape remains the dominant element in the scene; (ii) it pays particular regard to the retention of existing vegetation; (iii) it presents satisfactory proposals for new planting; and (iv) it accords with all other principles and policies of the Plan." There are a number of matters which I do not consider have been properly addressed. These are:- (i) It is not clear that natural landscape will remain the dominant element in the scene on the basis of the approved plans; (ii) no regard or consideration seems to have been given as to the possibility of retaining any established trees on the roadside of the site; (iii) the proposals for replanting seem to be requirements on the new houses themselves. Given this fact, does what is proposed constitute retaining the natural landscape as the dominant element or

protecting the green backdrop? The preamble to Policy BE 3 in the Island Plan 2011 at paragraph 6.66 says as follows:- "The Green Backdrop Zone policy is still considered a useful tool in achieving an appropriate lower intensity of building and a higher degree of open space and planting than elsewhere. But it is acknowledged that greater resolve in its application is needed than has been applied in the past. Accordingly, the new Island Plan retains the Green Backdrop Zone, but it has been refined to more accurately define this significant environment." It is not clear to me if, and if so to what extent, regard has been made to this clear statement in considering the present application. 49. In the reasons provided for the decision as set out in the Planning Permit dated 6 th October, 2011, there is no reference to Policy GD 5. This is, on the face of it, somewhat surprising given the sensitive nature of the site. It is not apparent, therefore, what consideration was given to this particular Policy in coming to a decision. 50. Because of this I am not satisfied that the proposal is consistent with the Island Plan as a whole. If I had made the decision on the basis of all the material which was before the Panel, it would have been to refuse the application. 51. As indicated in paragraphs 39 and 40 above, I consider that in determining this appeal I have power to remit the matter to the Minister if I consider it appropriate to do so. In this appeal I think this course of action should be adopted by me. 52. My decision is accordingly as follows:- (i) Having reviewed and considered all this material which was put before me, I would not have made the same decision as the Panel. I am not convinced that the matters which I have addressed in paragraphs 46 to 49 above were dealt with appropriately. In my view, those matters required very careful consideration and I do not believe that such consideration was given. In those circumstances, I consider that the decision by the Panel was unreasonable applying the Token case test. (ii) I am therefore going to allow this appeal and quash the grant of the planning permission. I will remit the application to the Minister for him to consider the application afresh in its entirety. This will give him an opportunity to consider all relevant matters including those which I have mentioned. Ultimately, of course, the decision is for the Minister himself to make on the application. Authorities Planning and Building (Jersey) Law 2002. Royal Court Rules 2004. Token-v-Planning and Environment Committee

[2001] JLR 698 . Minister for Planning and the Environment-v-Dorey

[2009] JCA 219 . Arbaugh-v-Island Development Committee

[1966] JJ 593 . Trump Holdings Limited-v-Planning and Environment Committee (C. A.)

[2004] JLR 232 . McCarthy-v-Minister for Planning and Environment

[2007] JRC 063 . R-v-Rochdale MBC ex parte Milne

[2002] 81 P. & C. R. 27. Westminster City Council-v-Great Portland Estates Plc

(1985) AC 661 . Ferrara & Ferrara-v-Minister for Planning and Environment

[2010] JLR N 32. Burgess-v-Minister for Planning and Environment

[2010] JRC 038 . Fern-v-Minister for Planning and Environment

[2012] JRC 034 . Ruette Pinel Farm Limited-v-Minister for Planning and Environment

[2012] JRC 008 . Page Last Updated: 13 Sep 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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Prepared on 28 October 2026 · Esheria