

JERSEY / JUDGMENT

Webb -v- Minister for Planning and Environment [2012] JRC 107 (30 May 2012)

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judgment

the commissioner: 1. This judgment is concerned with two appeals brought under Article 114 of the Planning and Building (Jersey) Law 2002 ("the Planning Law") by the same appellants in relation to two closely situated properties. Although the issues in respect of the properties are not identical, it is convenient to deal with both appeals within the one judgment. The properties, known as "Les Brisants" and "Greenhaze", are situated at Le Petit Port, which is at the southern end of St Ouen's Bay. They form part of a line of properties situated above the road known as La Rue de Grouet. Behind this line of properties is an escarpment that is partly domesticated to varying degrees. 2. Greenhaze and Les Brisants are single storey dwellings or bungalows (Les Brisants being on a split level) with garaging below accessing the road. Les Brisants is the larger of the two, having been extended considerably in 2000 and therefore (with its long white wall against the road) has the greater visual impact. 3. Looking at a photograph of the line of properties taken from the north and working from right to left (from west to east) the first property is Le Récif, belonging to the appellant Mr Webb, who very helpfully and ably presented the case for the appellants. His property is both higher and larger than any of the other properties and comprises two storeys. The next property moving east is Les Brisants, followed by Les Talus Verts, belonging to the appellant Mr Grimshaw. This is a bungalow, which has not been developed as much as Les Brisants and which has less of a visual impact. The next property is Greenhaze, followed by Les Hironnelles, belonging to the appellant, Mr Stear. This appears to be of a more modern split level construction, but still built on the line of the other properties. Beach House, belonging to the other appellant, Mrs Mayne, is situated below the road and not therefore within the line of these properties. 4. The appeals are against the decision of the Minister permitting the applicants to demolish the existing buildings and to replace them with two story buildings of modern design.

Procedural history

5. Both applications have a similar procedural history. They were due to be heard at the Planning Applications Panel meeting of 27 th January, 2011, but were deferred at the request of Senator B Shenton (who had become involved at the behest as we understand it of the appellants), to enable the then Assistant Minister, Deputy R C Duhamel, to comment on the

schemes, specifically with regard to environmental matters and landscape impact. The Assistant Minister broadly supported the recommendations of the Planning Department that approval be granted. 6. The applications were then considered by the Planning Applications Panel ("the Panel") at a public meeting on 24 th February, 2011, at which it received inter alia a PowerPoint presentation from Mr Webb, representing himself and the appellants Mr Stear and Mr Grimshaw (the latter also addressed the Panel), outlining their concerns and objections. The applications were however approved, subject to certain conditions. 7. Prior to the permit being issued, it came to light that the Panel had not been properly constituted in accordance with Article 9A(2) of the Planning Law and its decision was therefore of no legal effect. The applications therefore came back before a properly appointed but similarly constituted Panel at a public meeting on 26 th May, 2011. At that meeting, Advocate D Steenson, a neighbour living in that area, expressed concerns as to the process by which essentially the same group of people that had previously granted consent to the developments were now being asked to consider the matter afresh. He further expressed the concern that the applications appeared to be being rushed through in advance of the likely establishment, by means of the adoption of the new Island Plan, of a Coastal National Park, which would encompass the Petit Port area. The Panel, having considered this and other representations raised at the meeting, decided in the interest of fairness and transparency of the process that it would be appropriate to refer the applications to the Minister for determination. 8. The new Island Plan establishing the Coastal National Park was approved by the States on 29 th June, 2011. Reports dated 5 th and 19 th August, 2011, respectively from the Planning Department noted that the zoning of the site had changed from the Green Zone to that of the Coastal National Park with the adoption of the Island Plan 2011 . The Minister (now Deputy Duhamel) deferred the decision to enable him to undertake a site visit and having required a number of amendments to the application in respect of Les Brisants he approved both applications on 14 th October, 2011, subject to a number of conditions. 9. The Minister set out his reasons at length. Certain of the opening paragraphs are the same for both applications and are as follows (taken from Les Brisants):- "Planning Permission has been granted following careful consideration of the scheme, its history, the plans and documents submitted, the relevant policies of the Island Plan and the consultation responses and representations received. It is recognised that the site lay within the Green Zone in the 2002 Island Plan, wherein Policy C5 set a general presumption against development. This does not however preclude development, and in all cases the merits of a scheme and all material planning considerations must be taken into account. In the Green Zone the key issue was the impact upon the landscape. Replacement buildings, as proposed here, have historically been allowed where it has been considered that the proposed scheme would have a positive or no detrimental impact upon the landscape. The requirements of policies G2 (General development Considerations), G3 (quality of design) and G15 (Replacement Buildings) have also been considered. Since the application was first submitted and considered to be acceptable by the Planning Applications Panel, the 2011 Island Plan has been adopted and the site now lies within the Coastal National Park, Policy NE6 sets the strongest presumption against development and gives the park the highest level

of protection. The Policy does, however, allow for replacement residential buildings as an exception provided set criteria are met, including achieving environmental gains, restoration of landscape character, a reduction in visual impact and an improvement in design. The requirements of policies GD1, GD2 and GD7 have also been taken into account. Particular attention has been paid to the specific context of this site. This site is part of a distinct built up ribbon of dwellings fronting the road. It is not an isolated coastal site nor does the application propose new development of a vacant or undeveloped site in open countryside; the site already accommodates a residential dwelling within a group of residential dwellings, and the proposal is to replace it with another, single dwelling, facing the road. This proposal does not extend the existing ribbon of development nor does it involve development outside the line of existing buildings or the residential curtilage of the site, and it is considered that the high quality design of this proposal will improve the architectural quality of the group. Within the ribbon of development there is considerable variety with regard to the scale and style of the existing buildings, including single-storey and two-storey properties, and it is not therefore considered that a two storey development of this site is out of keeping within this context." It is necessary to set out the remainder of the reasons for the two properties separately:- Les Brisants "Moreover, the existing property is considered to be outdated with a poor internal configuration, is of little or no architectural merit and detracts from the streetscape. Its replacement, therefore, is not considered to be problematic having regard to the policy context. The majority of buildings in the ribbon sit above road level and, owing to the slope of the land, many have domestic garages, driveways, or retaining walls between them and the road, some of which would not satisfy the Minister's current design standards. Whilst the proposed building has a larger floor area than the existing building, this increase in size is not achieved by building forwards in front of the building line, or upwards so that it is taller than other buildings. Indeed, except for the chimney, the top of the new building is in fact lower than the ridge of the existing building whilst the principal roadside elevation is set slightly further back into the site than at present. The overall footprint of the proposed dwelling at upper ground floor level is broadly equivalent to that which exists at present with the increase in floor area primarily being achieved through an enlargement of the lower ground floor and parking garage. These are increases which, per se, have little or no perceivable effect on the surrounding area or neighbouring uses. This scheme has been designed so as to minimise any potential overlooking of adjoining properties; there are a minimal number of secondary windows which face east and west, whilst the new balcony terrace at first floor (which replaces an existing terrace in this location) has been designed with timber louvre privacy screens at each end. Following a site visit the Minister requested that changes be made to the design of the stair tower to the eastern end of the building, including setting it back further into the site, changing its external finish and creating an additional planter in front. The effect of these changes would be to further reduce the impact of this element of the scheme as well as reducing the level of excavation required at the basement level. These changes have been incorporated into the design. The scheme will provide improved parking, turning and visibility arrangements, reducing the pressure for on-street or verge car parking, thereby

improving highway safety. A condition has also been imposed requiring the rear of the site to be landscaped to achieve a more natural and sympathetic appearance than is the case at present. The front area of the site will be re-landscaped with materials which will reduce the visual intrusion of the development, when compared to the existing situation. Overall, therefore, it is considered that the proposed scheme will achieve architectural, environmental and highway improvements, and that it will enhance the existing built up ribbon of development, the site and its setting, rather than detract from them. It is accepted that the application proposes a degree of excavation (including some rock breaking), which is a cause of concern for some neighbours. In this instance, the scheme has been designed in order to keep this to a minimum and this aspect of the development will be overseen by a professional engineering firm. In addition, a Construction Environmental Management Plan has been required by a condition on the permit. All development, however, has some potential short term impact upon adjoining properties during the process of construction. It is not the purpose of the Planning and Building (Jersey) Law 2002 to prevent development where there is the chance of some impact on adjoining properties during construction. To do so would prohibit nearly all development. It is the responsibility of the applicant to ensure that the works do not cause damage to any other property, whether Planning Permission is granted or not." Greenhaze "Moreover, the proposed building has been improved, and its mass better broken up than the previous refused scheme. The majority of buildings in the ribbon sit above road level and due to the slope of the land many have domestic garages, driveways, or retaining walls between them and the road, some of which would not satisfy the Minister's current design standards. Whilst the building proposed has a larger floor area than that existing, this is mainly achieved not by building forwards in front of the building line, nor upwards so that it is taller than other buildings. Indeed the top of the building is lower than the ridge of the existing building. The increase in floor area is primarily achieved by lowering the level from that of the existing house and creating a second floor of accommodation in place of the mass of the existing pitched roof. This scheme has addressed the overlooking impact on adjoining properties and whilst it will clearly be visible from the west facing window in the side elevation of the house to the east, it is not considered that the impact on that property is so great that it justifies the refusal of Planning Permission. The scheme will provide improved parking, turning and visibility arrangements, reducing the pressure for on-street or verge car parking, and improving highway safety. A condition is also imposed requiring the rear of the site to be landscaped to achieve a more natural and sympathetic appearance than is evident where other gardens have been extended. The front area of the site will be re-landscaped with materials which will reduce the visual impact of the development, when compared to the existing situation. Overall therefore it is considered that the proposed scheme will achieve architectural, environmental and highways improvements, and that it will enhance the existing built up ribbon of development, the site and its setting, rather than detract from them, and achieve a more environmentally efficient building. It is accepted that the application proposes a degree of excavation which is a cause of concern for some neighbours. The application has reduced the extent of excavation from the previous refused application, thereby reducing

the potential impact on adjoining properties. In addition a Construction Environmental Management Plan has been required by a condition on the Permit. All development however has some potential short term impact upon adjoining properties during the process of construction. It is not the purpose of the Planning Law to prevent development where there is the chance of some impact on adjoining properties during construction. To do so would prohibit nearly all developments. It is the responsibility of the applicant to ensure that the works do not cause damage to any other property, whether Planning Permission is granted or not." Procedural Fairness 10. Article 19(2) of the Planning Law is in the following terms:- "In general the Minister shall grant planning permission if the proposed development is in accordance with the Island Plan." When the Minister considered the applications in October 2011, he was required therefore to apply the 2011 Island Plan, which was then in force. However, this raises an issue of procedural fairness, in that both applications had been submitted at a time when the 2002 Island Plan was in force, and both applications had been approved by the Panel under that Plan. As a result of an administrative error within the Planning Department, the Panel turned out not to be properly constituted, requiring the application to be delayed until after the 2011 Island Plan had come into force. 11. Counsel for the Minister and for the applicants did not produce any authority on the issue of procedural fairness, but during the hearing, Mr Mills produced a note of a case prepared by Genevieve Kirkwood BA (Hons) Law of Chelmer Institute, Chelmsford, namely, *Ynys Mon Isle of Anglesey Borough Council-v-The Secretary of State for Wales and Parry Bros. (Builders) Co. Ltd.* (Queen's Bench Division), Woolf J, December 2, 1983. In that case, the appeal site formed the logical conclusion to an estate of houses developed in phases over six years, but fell foul of severe limitations placed on the granting of planning permissions by a new policy. The Secretary of State had allowed an appeal against a refusal for planning permission, taking into account that history. Quoting from the case note:- "The reference to it being inequitable to uphold the refusal of the appeals was clearly referring to the planning and factual history of the area in the vicinity of the site, and in particular, to the fact that it was intended to be and was, in fact, developed in phases. If in fact the application sites had no existing planning permission other than that granted by the Secretary of State in the decision under attack, that was a consequence of the fact that it was always intended that the estate should be so developed. In deciding whether or not to grant planning permission, the Secretary of State, like the planning authority, had to confine himself to planning considerations. He could not properly take into account the fact that a particular decision might be said to be a harsh one on a particular developer if that was otherwise the only proper conclusion to be reached from an appraisal of the relevant planning considerations. However, in his (Woolf J's) view, while not in any way derogating from that general proposition, it was right, in a case where the other planning considerations did not compel a different view, to bear in mind that the proper application of planning policy required that it should be fairly administered. In fairly administering planning policy, there would be situations where it would be proper to take into account the fact that a particular site had a planning history requiring the grant of planning permission to achieve fairness where all other things were equal." 12. Similar considerations apply in our view to the proper

administration of planning policy in this jurisdiction. It would be unfair if the applications had complied with the requirements of the 2002 Island Plan (under which a permit, albeit invalid, had been issued) but had fallen foul of stricter policies brought in by the 2011 Island Plan, when it was entirely the fault of the Planning Department that both applications were delayed so as to be dealt with under the stricter regime. It was clear from the reasons given by the Minister that he had taken this procedural history into account, rightly, in our view, and he is entitled to do so pursuant to the provisions of Article 19(3) of the Planning Law which permits a departure from the current Island Plan where there is justification:- "19(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." 13. Our approach, therefore, has been to consider the Minister's decisions applying the 2011 Island Plan, as he was required to do, but if we find that either decision was unreasonable because of its failure to comply with the requirements of the 2011 Island Plan, then we should proceed to consider the application in the light of 2002 Island Plan, which had been applied by the Panel. This approach, it seemed to us, would also be fair to the appellants, who informed us that they would have appealed the decision of the Panel if it had been properly constituted and whose submissions were made to us on the basis that the decisions of the Minister were unreasonable, applying both Island Plans. Policies 14. The principal policies with which we are concerned under the 2011 Island Plan are set out below:- "Policy NE 6 Coastal National Park The Coastal National Park, as designated on the Proposals Map, will be given the highest level of protection from development and this will be given priority over all other planning considerations. In this area there will be the strongest presumption against all forms of new development for whatever purpose. The Minister for Planning and Environment recognises that there are existing buildings and land uses within the Coastal National Park and there will be a strong presumption against their redevelopment for other uses; their extension; and the intensification of their use. Exceptions will only be permitted where it is demonstrated that: 1. extensions to existing residential buildings will not cause serious harm to the landscape character of the area, and where their design is appropriate relative to existing buildings and their context; 2. the redevelopment of existing residential buildings would give rise to demonstrable environmental gains and make a positive contribution to the repair and restoration of the landscape character of the area by a reduction in their visual impact and an improvement in the design of the buildings that is more sensitive to the character of the area and local relevance; 3. proposals for new or extended cultural and tourism attractions are sensitively related to the distinctive landscape character and heritage of the area. 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 HE1 'Protecting Listed buildings and places' and Policy HE4 'Demolition in Conservation Areas' or in protected species and their habitats, in accord with Policy NE2 '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." 15. GD 2 is a general development indicator and as made clear in the preamble, should not be treated in isolation. As Mr Charlton Gladwin, Senior Planner of Planning and Building Services, states in his affidavit of 22 nd December, 2011, it has to be balanced with other ambitions in the 2011 Island Plan to achieve environmentally sensitive buildings, to improve the quality of design and to concentrate development within the existing built-up areas and currently developed sites. 16. Finally we set out a further general development indicator namely GD7:- "Policy GD7 Design quality A high quality of design that respects, conserves and contributes positively to the diversity and distinctiveness of the landscape and the built context will be sought in all developments, in accord with the principles of good urban design, as set out in policy SP7 'Better by design'. Where the design of proposed development does not adequately address and appropriately respond to the following criteria, it will not be permitted. 1. the scale, form, massing, orientation, siting and density of the development, and inward and outward views; 2. the relationship to existing buildings, settlement form and character, topography, landscape features and the wider landscape setting; 3. the degree to which design details, colours, materials and finishes reflect or complement the style and traditions of local buildings; 4. the use and maintenance of landscape to enhance new development and the degree to which this makes use of local features and an appropriate mix of materials and plant species suited to both the landscape and wildlife interests of the locality; 5. the incorporation of existing site features into the development such as boundary walls, banks and trees; 6. the design of safe pedestrian routes, including for those with mobility impairments, vehicle access and parking; and 7. the incorporation of features to design out crime and to facilitate personal safety and security, in accord with the principles of safety by design, by way of a crime impact statement if required, as set out in supplementary planning guidance." Legal test 17. The legal test to be applied is now settled and is that set out Island Development Committee-v-Fairview Farm Limited

[1996] JLR 306 as elaborated in Token Limited-v-Planning and Environment Committee

[2001] JLR 698 as follows:- "The test to be applied by this court in determining appeals under the Island Planning (Jersey) Law 1964 was settled by the Court of Appeal in Island Dev. Cttee. v. Fairview farm ltd. (2). Le Quesne, JA stated (1996) JLR at 317:- "The Royal Court, as an appellate body, must consider not merely whether the inferior body has followed the correct procedure, but also whether its own view is that the decision was unreasonable. It may allow whatever weight it thinks proper to the experience and knowledge of the inferior body, but it cannot escape the responsibility of forming its own view The duty of the court on an appeal under art. 21 is not merely to consider whether any reasonable body could have reached the decision which the Committee did reach, but to decide

whether the court considers that that decision was, in its view, unreasonable." 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." Appellants' contentions Failure to comply with Policy NE6 18. The appellants' case in respect of both appeal properties was set out in two very similar affidavits sworn by Mr Webb. He exhibited a photograph of Les Brisants, Les Talus Verts, Greenhaze and Les Hirondelles, showing that they comprised a group of four single storey dwellings built on similar sized sloping plots with a variety of walls and garages below, so that the visual impact is far greater in our view than might be expected of single storey buildings built on flat land. 19. Mr Webb informed us that when built, all the properties in this group had an area of approximately 100 - 110 square metres and that Les Brisants was subsequently extended to 210 square metres in or around 2000. He said they all present roughly the same frontage, with a certain degree of linearity. Basically, in his view, they all blended in with none of them sticking out or being out of character. This would no longer be the case if the developments were allowed to proceed. 20. It seems to us that, as observed in the Planning Department's reports, there is a considerable variety of scale and style of buildings comprised within this group and it is difficult to discern any particular character. We noted that the photograph excluded Mr Webb's own property, Le Récif, immediately to the west of Les Brisants which is materially larger and is out of line with and dominates the group of four properties to its east. 21. Mr Webb referred us to two publications which preceded, and, as we understand it, informed the 2011 Island Plan, namely the Jersey Island Plan Review - Countryside Character Appraisal published in December 1999 and the Jersey Countryside Character Appraisal Supplementary Report: Island-wide Policies and Priorities, published in December 1998, whose recommendations he submitted had not been followed by the Minister. 22. We will not set out the extracts to those two reports because in our view, they add nothing to the Policy NE6, which they informed, and in any event, it is to the 2011 Island Plan that the Minister is required by Article 19 to have regard, not to recommendations contained in earlier reports. 23. Turning to Policy NE6, Mr Webb emphasised the high level of protection afforded by it and although it recognised that there are existing buildings within the Coastal National Park, there was a strong presumption against their extension or intensification of use. The Minister, he said, should therefore start with the presumption that any application should be rejected placing the onus on the applicant to prove that there are sufficient extenuating circumstances to justify waiving that strong presumption. We acknowledge that strong

presumption and that any applicant has the burden of demonstrating to the Minister that the application comes within one of the exceptions set out in the Policy. It is the second exception that is most relevant here and in that respect, Mr Webb noted the use of the word "and" which links the conditions and makes it clear that all must be met. We accept that this is the case so that the applicant must demonstrate that:- (i) the redevelopment of existing residential buildings would give rise to demonstrable environmental gains and (ii) make a positive contribution to the repair and restoration of the landscape character of the area by a reduction in their visual impact and (iii) an improvement in the design of the buildings that is more sensitive to the character of the area and of local relevance. 24. In calculations that were accepted by the other parties as accurate, Mr Webb informed us that the floor area of Les Brisants was being increased by 67% from 210 square metres to 350 square metres, while the garage at road level would be 100 square metres, roughly the same size as the original house which occupied the site. The living accommodation was being increased from three/four bedrooms and three bathrooms to five bedrooms and six bathrooms, a significant intensification of their use. 25. The floor area of Greenhaze was being increased by 132% from 111 square metres to 258 square metres, again with the garage at street level of 100 square metres which was roughly the same size as the original house which occupied the site. 26. Mr Webb contended that it was unreasonable for the Minister to suggest that the architectural style and size of the proposed buildings were more sensitive to the character of the area and local relevance; on the contrary, the proposed flat roofed two storey glass fronted buildings (which in the case of Les Brisants contained a stair tower on its north-east corner) were simply too big for the plots and would clash with the neighbouring properties on similar sized plots. Furthermore, it was unreasonable, he said, for the Minister to suggest that the proposed buildings would have less visual impact than the properties they are replacing. Indeed, in the planning report in relation to Greenhaze, the Planning Department had acknowledged that there was no reduction in the visual impact of the new building:- "This scheme would replace a small but unattractive roadside garage, secure landscaping of the site and allow a building which in the Department's assessment is an attractive design. Improved parking and visibility would be achieved. A 2 storey building in this position is not in the Department's view detrimental to the mixed character of this ribbon of houses but it could be argued that it does not achieve a reduction in visual impact. In this most unusual case however, it is considered that it would be unreasonable not to acknowledge the history of this application and the 2002 Island Plan under which it was submitted and originally assessed. This Plan, whilst requiring careful assessment of the impact of the development on the landscape, did not specifically require a reduction in visual impact. Whilst the development may not achieve a reduction in visual impact it is felt to achieve an improvement in design and appearance." 27. The Minister acknowledged in the reasons given for both decisions that the floor area of both properties was being increased but made the point that this increase in size is not achieved by building forwards in front of the building line or upwards so that it is taller than other buildings, but mainly through excavation. 28. We will return to the issue of there being no reduction in the visual impact

of Greenhaze in a moment, but we are in the realms here of Planning judgment. We agree with Mr Gladwin when he says that the fundamental issue in assessing the visual impact of a development in the landscape does not concern floor space "figures" and "percentages" per se, but rather the issue of apparent scale and mass. 29. The position of the Minister was that it was demonstrated to him that the proposed developments would achieve architectural, environmental and highways improvements and have a positive impact on the character of the area as set out in his reasons. He took into account the following inter alia:- (i) The sites were within a clearly defined ribbon of development and the scale and mass of the proposals were not out of keeping with neighbouring properties. Les Brisants would be lower (except for the chimney) than the existing building and its principal roadside elevation was being set back into the site further than the existing building. Greenhaze would also be lower than the existing building and the adjacent buildings, Les Hirondelles and Les Talus Verts. (ii) Both sites were already developed and included dwellings and garages that, in the judgement of the Minister, did not contribute positively in terms of design to the character or landscape of the area. (iii) New landscaping proposals to the north and south of the site would significantly contribute to the repair and restoration of the landscape. 30. In relation to Les Brisants, the increase to the floor area did not increase the apparent scale of the development in the Minister's view. Indeed, in his view, because most of this resulted from floor space created by excavation and not an increase in the visual mass of the dwelling, the apparent scale would be reduced as a result of the form design and materials approved. 31. The Court has first to form its own view and judging from the information before us and with the aid of the helpful computer enhanced photograph produced to us, which showed how the new building at Les Brisants would look when constructed, this Court agreed with the judgement of the Minister that notwithstanding the proposed building having two floors there will be a reduction in the visual impact consistent with the second exception to the Policy. 32. The position in relation to the visual impact of Greenhaze is different. Again, the percentage increase to the floor space is achieved in the main by excavation rather than increasing the height of the building and whilst that increase in floor space does not necessarily increase the apparent scale of the building, it is acknowledged by the Planning Department that it does not achieve a reduction in its visual impact as required by the second exception to the policy. 33. The Policy is clear, and in our view, the decision in relation to Greenhaze would have been both mistaken and unreasonable under the 2011 Island Plan, because no reduction in its visual impact had been demonstrated as required by the Policy. However as a matter of fairness the Minister took into account the procedural history and in our view and as discussed above, he was justified in doing so. It is clear that under the 2002 Island Plan, whilst the property came within the Countryside Zone and therefore under the protection of Policy C5, there was no requirement for a reduction in the visual impact. In our view, it was therefore not unreasonable for the Minister to have approved this application, notwithstanding that there was no reduction in the visual impact of the proposed building. 34. There was some discussion as to whether, in increasing the floor area and the number of bedrooms and bathrooms, there was

intensification in use contrary to the presumption set out in the Policy. The short point is that the presumption applies unless the application comes within the exceptions and provided it does so, intensification of use, if such there be, is acceptable. 35. It is clear to us that the Minister gave very careful consideration to the Policy in relation to both applications including a site visit. Following that site visit, changes were requested to the application in respect of Les Brisants which would further reduce the impact of that scheme, including setting it further back into the site and changing its external finish. In our view the Minister has complied with the Policy in respect of both applications and where he departed from it, he was justified in doing so. Reference to non-existent lower ground floor at Les Brisants 36. In his reasons for accepting the proposed development, the Minister states that the increase in floor area is primarily achieved "through the enlargement of the lower ground floor". Mr Webb contended that this is unreasonable, as it implies that the present building already has at least two stories, when this is not the case. There is a small windowless store-room below the balcony of the front of the building, but it is misleading in their view to call this a lower ground floor. 37. We see no merit in this contention. We were shown the plans of the existing building which accompanied the application, which described the space as "existing store", so there can be no question that the applicants have misled the Planning Department or the public as to the current position and we do not regard the phraseology used by the Minister in giving his reasons as in any way misleading. Furthermore from a visual perspective, the existing building and walls do present as if they could comprise two floors. Failure to take into account the history of development at Les Brisants 38. Mr Webb argued that the Minister failed to give due consideration to the fact that Les Brisants had already been significantly extended in 2000. When it was built in the 1960s, Les Brisants was a single storey 100 square metre bungalow identical, apparently, to its neighbour, Les Talus Verts. Despite the fact that it was in the Green Zone and the protests of neighbours, the previous owner was allowed to double the size of the property. There was no evidence that this history had been considered by the Minister, even though, in the appellants' view, it was a relevant circumstance. 39. The planning history in relation to Les Brisants was set out in the Planning Department's report and so it was before the Minister. Whilst the history is relevant, the fact is that, like it or not, consent was given under an earlier planning regime to extend the property and the Minister has to consider the application in the light of what is there today. In his opinion the application will bring about an improvement on what is there today, a view with which we concur. We do not see any failure in this regard on the part of the Minister. Failures to comply with Policies GD1 and GD2 concerning the replacement of buildings 40. Unlike Greenhaze, which the appellants accept had reached the end of its useful life, there was no evidence, they say, that it was not appropriate to repair or refurbish Les Brisants, one of the requirements of Policy GD2 (and of GD 1 which we have not set out above). The statement in the design statement that it was almost at the end of its useful life was questionable, as the property had doubled in size in 2000, and therefore half the property was only twelve years old. They further questioned the statement that the property was difficult and expensive to heat, producing a copy of a

Jersey heat loss map which shows Les Brisants being green, meaning that it has low heat losses. There is no evidence that this map was before the Minister and as Mr Benest reasonably pointed out, we do not know its methodology or when it was made; the property could have been empty, for example, or the heating off at the time. 41. It is the case that there was no survey of the current condition of the property before the Minister, but, in our view, there was sufficient evidence before him to enable him reasonably to reach the conclusion that its replacement was justified in sustainability terms. He had the advice of the professional advisers to the applicants that the building had reached the end of its useful life. In support of that contention, they observed that it was constructed from un-insulated cavity block work, had un-insulated timber floors, had a poorly insulated timber roof, had an antiquated oil-fired central heating system (whose storage tank does not meet modern health and safety requirements), has an electrical system largely dating from 1965 which requires complete replacement and had inadequate parking, which is contributing to land erosion along the public road. 42. Furthermore as mentioned above, Policy GD2 is a general development indicator which should not be treated in isolation and the Minister was entitled to take into the balance issues of sustainability and design quality. We do not think it was unreasonable of the Minister to reach this conclusion. Failure to meet the design criteria of Policy GD2(5) and GD7(1, 2 and 3) 43. Mr Webb contended that the Minister had not adequately taken into account the requirements of these policies which relate to design in respect of both applications. The present buildings are in a group of four single storey buildings on similar size plots which are all set at approximately the same height above the road level. In view of the size (particularly the change from single storey to two storey), mass and ultra-modern architectural design of the proposed buildings, it was clear to him that they will clash with, not complement, the other buildings in the area and will destroy the linearity which currently exists when viewed from the other side of the bay. These policy requirements were not therefore adequately taken into account. 44. There can be no question that these policies were taken into account by the Minister, but he has simply reached a different conclusion from those of the appellants. His reasons are set out above and we will not repeat them here. Whilst respecting the views of the appellants, this Court agrees with the views expressed by the Minister. Loss of amenity to neighbouring property of Greenhaze 45. Policy GD1 which we have not set out above, states:- "Development proposals will not be permitted unless the following criteria are met such that the proposed development:- ... (3) does not seriously harm the amenities of neighbouring uses and should, in particular: ... (b) not unreasonably affect the level of light to buildings and land that owners and occupiers might expect to enjoy." 46. Mr Webb contended that as a consequence of the proposed new building at Greenhaze, there will be a significant loss of light to and views from the west facing windows of Les Hirondelles, belonging to the appellant Mr Stear. From the photographs, we can see that there are three windows involved, the first giving light to a stairwell, the second to a bathroom and the third to a bedroom towards the rear of the property. Bushes had been established, substantially blocking any view out of the bedroom, which Mr Stear informed us had been done to protect the privacy of the

bedroom against the occupiers of Greenhaze. Mr Webb had taken photographs from the bedroom of Les Hirondelles, in which he had attempted to show the profile of the new building, although he accepted it was a very rough and ready exercise. We found it difficult to relate that to the approved plans, which show a building which is no wider than that which currently exists and which is materially lower than the existing roof, although we accept that being rectangular in shape, the corner of the new building would extend beyond what is currently there. 47. The Minister specifically addresses this issue, so there can be no question that he did not take it into account. He concluded that its impact was not so great as to justify refusal. 48. The appellants recognise that Les Hirondelles had no right to a view, and relied on the following passage from the judgment of Bailhache, Deputy Bailiff in *Steenson-v-Minister of Planning and Environment*

[2009] JLR 427 :- "While the appellant has no right to a view, he does have a right to expect planning policies in the Green Zone to be applied sensibly and sensitively. In this case, the Applicant's property is in the sensitive area of St Ouen's Bay, albeit at its southern extremity, and on a reading of the Island Plan and Policies contained in it the appellant would be entitled to think that significant development of an adjoining property was unlikely." 49. Invitations to look at the facts of other planning appeals need to be considered with care, because apart from the judgment, you do not have the full information (and often the benefit of a site visit) that was before or available to the other Court. However, it is clear from the judgment in *Steenson* that the impact upon the privacy of the appellant in that case was to a quite different order. "50. The court was also of the view that there was no doubt at all that there would be a very substantial impact on the appellant were this development to go forward. As is presently noted in the case officer's notes, the appellant's property currently overlooks the applicants' property to the greater extent, by nature of the appellant's property being built further up the escarpment. The appellant currently has a private back garden and, perhaps to a lesser extent, some privacy from his front balcony. The effect of the proposed development would be to remove any privacy from the back garden and also to affect adversely the privacy on the front balcony. Finally, the site visit confirmed that the effect on the views which the appellant enjoyed not only from his front balcony but also from his back garden would be very significant. Indeed, the view to the north would be very restricted indeed. The appellant produced photographs to the court which confirmed this potential impact of the development." 50. There was no evidence before the Minister of loss of light, if any, to the west facing windows of Les Hirondelles. Mr Webb's submissions on this were concerned substantially with the loss of a view. We assume that a loss of view might also give rise to some loss of light and we take the two together in terms of amenity. 51. In this case, we have a line of properties built closely together, whose main view is to the north overlooking St Ouen's Bay. By definition, windows in the sides of these buildings would have a more restricted view and access to light. Yes, the view from the west facing windows of Les Hirondelles will be reduced, but this would not unreasonably harm the amenities of Les Hirondelles, which will continue to enjoy, along with its neighbours, an

unrestricted view to the north and reasonable access to light to the side. Failure to consider the case of Steenson 52. One of the reasons for the Court overturning the decision of the Minister in Steenson, apart from the significant impact on privacy, was that the mass and scale of the proposed development was out of all proportion to the existing building and to the character of the area. The property in that case, "Eventide", was proposed be increased from 450 square metres to 560 square metres, i.e. some 24%, substantially less than the increases in respect of both Greenhaze and Les Brisants. We make the observation that whilst it is a smaller percentage, it is a smaller percentage of a much larger building. 53. The Court in Steenson undertook a site visit so that it could establish the character of the area. It is clear from the judgment that it was not dealing with a ribbon of dwellings fronting the road:- "49. The site visit conducted by the court revealed that the property "Eventide" is constructed some 15 yds. from and only very slightly elevated above the main coastal road. Other properties in the neighbourhood, including the property belonging to the appellant, have been constructed further up the escarpment. The site visit revealed clearly to the Jurats that the proposed development not only did not retain the character or mass of the original building, and was therefore out of scale and proportion and would make the property a wholly different type of property, but that it was also quite out of scale with the buildings in the near vicinity, other perhaps than the former Seacrest Hotel." 54. At paragraph 56, the Court concluded that the new building, if approved, would dominate the area in an overbearing way. 55. We agree with Mr Mills and Mr Benest that mathematical comparisons of floor areas of the type relied upon are of little assistance, as what matters is the apparent scale and mass. The apparent scale and mass of these proposed developments were carefully considered by the Minister. Although it is already set out above, it is worth setting out the Minister's reasons in this respect again, which was the same for both properties:- "Particular attention has been paid to the specific context of this site. This site is part of a distinct built up ribbon of dwellings fronting the road. It is not an isolated coastal site nor does the application propose new development of a vacant or undeveloped site in open countryside; the site already accommodates a residential dwelling within a group of residential dwellings, and the proposal is to replace it with another, single dwelling, facing the road. This proposal does not extend the existing ribbon of development nor does it involve development outside the line of existing buildings or the residential curtilage of the site, and it is considered that the high quality design of this proposal will improve the architectural quality of the group. Within the ribbon of development there is considerable variety with regard to the scale and style of the existing buildings, including single-storey and two-storey properties, and it is not therefore considered that a two storey development of this site is out of keeping within this context." For our part, we agree with the Minister's reasoning. Previous decision to reject application for Greenhaze 56. This contention was raised in respect of both applications. On 17 th June, 2010, the Planning Applications Panel rejected an application for the development of Greenhaze. The reasons for rejecting the application were given as follows:- "The site lay within the green Zone, wherein there was a presumption against development. Whilst it was accepted that replacement

dwelling had been permitted in the Green Zone, it had been noted that it was proposed to excavate a significant amount of the site and remodel the landscape. Moreover, the scheme involved a material increase in the scale and massing of the buildings on the site. It was considered that the scale of the development was excessive and failed to adequately respect the character and designation of the site and the area, contrary to Policies G2, G3 and G15. It had been concluded that there was no justification for making an exception to Policy C5." 57. The scale of the development currently proposed for Greenhaze is only slightly smaller than that which was rejected in 2010. The proposed area in 2010 was 266 square metres as against the area of the proposed application which is 258 square metres, a reduction of only 3%. If the earlier application was considered to be excessive, then how argued Mr Webb can the Minister justify, as a matter of consistency, approving these applications? The appellants contend that the Minister has made no attempt to justify why the precedent set by his previous rejection had not been taken into account. 58. We accept that consistency is an important factor in planning decisions, but as made clear in *Caesar Investments Limited-v-P. E. C.*

[2003] JLR 566, the need for consistency cannot transform a previous decision into a binding authority, as the Minister's discretion cannot be fettered in this way. 59. According to the Planning Department's report, the floor area has been reduced by 19%, and although this is a relatively small reduction, we accept that the current application is materially different in terms of the extent of excavation, the height and width of the building and the resulting impact from that which was refused. Accordingly, we do not accept that the decisions in respect of the current applications are inconsistent with the earlier refusal. Protected species 60. Policy NE2 of the 2011 Island Plan provides as follows:- "Species Protection Planning permission will only be granted for development that would not cause significant harm to animal or plant species protected by law, or their habitats. Where a proposal may have an adverse effect on protected species or habitats, Applicants will be expected to undertake an appropriate assessment demonstrating proposed mitigation measures." 61. We were informed by the appellants that the area is the home of red squirrels, green lizards and common toads, all of which are protected species. We were shown a photograph of a lizard Deputy Tadier had sent the former Minister, Senator Cohen, with the text:- "FYI, a photo that was sent to me of one of the "beautiful creatures" that lives in the back gardens at Les Grouets. I am glad that this area has been designated a national park status." The former Minister had responded on 4th June, 2011:- "This is quite important. Can you find out more as it could affect things." (his emphasis) Mr Webb contended that the current Minister does not appear to share the former Minister's concerns for the wild life at Petit Port (where we presume Les Grouets is situated), because no conditions had been specified on the permit "to undertake an appropriate assessment demonstrating proposed mitigating measures" with regard to the protected species which inhabit the area. 62. Mr Webb did not pursue this contention with any great vigour. It is clear that during the consultation process advice had been received from the Environment Department to the effect that the area surrounding the properties supported

green lizards but the Minister was not advised that either development would cause significant harm to any protected species. It is correct that a number of conditions were suggested to be placed on any permit to prevent conflicts arising under the Conservation of Wildlife (Jersey) Law 2000, which were not incorporated into the permits, but as Mr Benest pointed out, that Law makes disturbing lizards while using their dens without licence (inter alia) an offence in any event. 63. As Mr Gladwin pointed out in his affidavit in relation to Greenhaze, it was a requirement that the c  til to the rear (south) of the building be actively improved and should not form part of the residential curtilage. The exclusion of this area, plus a requirement for sensitive non-domestic landscaping will enhance the area of the National Park and wildlife habitats. 64. There being no evidence that the development of these properties would have an adverse effect on protected species, the Minister cannot be criticized for declining to impose the suggested condition. Excavation 65. Mr Webb submitted that the Minister failed to give due consideration to the dangers to the neighbouring properties associated with the excavation that would be undertaken at both sites. The proposed developments require excavation across the full width, or near full width, of the sites close to and several metres below the foundations of the neighbouring properties. Risks and dangers to the neighbouring properties resulting from this excavation have not, in his view, been given adequate consideration. 66. In March 2010, the appellants had commissioned a report from Mr Dan Hartigan C. Eng. MICE, a well-known and respected civil engineer, regarding the proposed development of Greenhaze, which was refused. They drew our attention to the following extracts from his report:- "A superficial inspection of the immediately surrounding area coupled with discussions with the inhabitants and with personal experience gleaned during recent alteration works to a nearby site indicates that the ground conditions comprise of underlying sloping granite bedrock overlaid with varying thicknesses of sand and sandy topsoil. The profile of this bedrock is highly irregular, with sporadic and very evident outcrops. The creation of the subterranean element of the new structure would necessitate the excavation of what would in effect be a quarry, with sheer faces immediately abutting the boundaries of the properties in question to the east and west. We are strongly of the opinion that considerable difficulties would be expected in attempting such an excavation in such a tight space, and that there are attendant grave risks to the integrity of the adjoining properties ... and to the safety of the occupants, as a result both of disturbance of the ground on these sites and of vibration." And the report closed with the following conclusion:- "In conclusion, our underlying opinion is that the proposal to carry out such invasive works within such a narrow site between two immediately abutting dwellings to be inappropriate, and that the Planning Committee should consider the consequent implications in terms of perils to the safety and peace of mind of the inhabitants of the neighbouring sites, before considering the granting of consent based purely on a planning aesthetic." 67. In early 2011, a second report was commissioned by the appellants, this time from Dr W K Elson, PhD, C. Eng. MICE, a consultant geotechnical engineer from the United Kingdom, who gave advice about the surveys that should be undertaken and the design of the excavation work itself. He

anticipated that the Planning and Environment Department would require a detailed submission giving details of the design and construction of the temporary works, as well as the permanent works, together with all necessary measures to ensure a safe working environment for neighbours and measures to minimise nuisance. Mr Webb drew our attention to this extract from the report:- "Any failure of the proposed deep excavation in the rock is likely to be sudden and catastrophic, hence I suggest it would be reasonable to ask the Planning and Environment Department to insist on conditions that would protect your property from all eventualities." 68. Mr Webb felt that the Minister did not appear to appreciate the practical difficulties and inherent danger in performing an excavation on a mixture of sand and solid granite in such a confined site. He found it difficult to imagine how in practice the walls of the excavation would be supported while the sand was removed and the rock cut away. He felt that the concerns of the appellants had been trivialised by the Minister; concerns which went beyond mere disturbance by dust and noise to a fear of major structural damage to their homes or even collapse. 69. Although Mr Webb acknowledged that conditions had been imposed upon the permit, to which we will come in a moment, he did not consider these to be sufficient. In his view, the Minister should have required that they, as neighbours, and their experts should be involved in reviewing and approving the methods to be used. Mr Webb drew our attention to the Party Wall Act (1996) which sets out a binding procedure for the resolution of disputes between neighbours in respect of work of this kind, through the appointment of surveyors with power to settle the matter. Acknowledging that this Act has no application in Jersey, he argued that similar procedures should have been imposed upon the applicants by way of condition. 70. As is clear from the reasons given by the Minister for his decisions (as above) these concerns were considered by him. Not surprisingly, this aspect of the developments will be undertaken by professional engineering firms; as Mr Benest pointed out, it would be unwise in the extreme for either applicant to proceed otherwise and as can be seen from the conditions, they could not do so. The conditions imposed are as follows (taken from the permit in respect of Les Brisants):- "4. Prior to the commencement of any development on the site (including demolition or site clearance), a comprehensive Construction Environmental Management Plan shall be submitted to, and agreed in writing by, the Minister for Planning and Environment. Such a plan will set out how the development shall be constructed with particular attention paid to the control of any disturbance which may be caused to adjoining properties through noise, dust and vibration; the plan shall also establish how communication with neighbours will be maintained. The approved plan shall be adhered to at all times unless specific written authority is given for a deviation from the plan. 5. Construction operations on site shall not be undertaken outside the following hours:- 08.00 - 17.30 Monday to Friday There shall be no construction work undertaken on weekends or public holidays. Prior to the commencement of the development hereby approved, a full method statement in respect of the excavation and engineering work to be undertaken, shall be submitted, and approved in writing by, the Minister or other authorised officer. Such a statement shall indicate what measures are to be taken to ensure that no damage (through vibration or

impact) will occur to the structures of any nearby neighbouring residences. Such a method statement, as may be approved, shall thereafter be adhered to as part of the ongoing development works." 71. The reasons for the imposition of those conditions were set out as follows (taken again from the permit in respect of Les Brisants):- "4. The development is in close proximity to adjoining dwellings in an area with little background noise and vibration, and, in these circumstances, it is required that special attention be paid to how the development can be implemented in a way which minimises the impact on adjoining properties. The applicant is recommended to consult with the Environmental Health Officer in producing the Construction Environmental Management Plan prior to its submission to the Minister. 5. In the interests of the amenity of neighbouring properties. 6. To ensure that the works do not damage any nearby neighbouring residences." 72. We appreciate the concerns of the appellants in relation to this aspect of the developments, in particular the concerns of Mr Grimshaw, the owner of Les Talus Verts, which sits between the two properties and therefore faces excavation on both sides. There is no suggestion from either Mr Hartigan (whose report, we note, has been taken into account by the architects engaged by the owner of Greenhaze) and Mr Elson, that this work cannot be carried out safely. That being the case, the Minister is correct to observe that it is not the purpose of the Planning Law to prevent development where there is the chance of some impact on adjoining properties during construction. If the possibility of damage to neighbouring properties by excavation work properly undertaken within the perimeters of an applicant's property were to be a ground for refusing consent, then a great deal of development in built-up areas of the Island would be prevented and that cannot be in the public interest. 73. We were not given any authority on the issue of whether the Minister could properly impose conditions giving the neighbours some element of control over the process of work undertaken by the applicants within the perimeter of their own properties, but we accept that such conditions would in all probability be unworkable in practice and therefore in themselves unreasonable. The maintenance of communications with the neighbours forms part of the Construction Environmental Management Plan and the applicants would be unwise not to keep their neighbours fully apprised of what is proposed and wise to ensure that the neighbours' comments and concerns are taken into account by their professional advisers. 74. In our view the Minister has given proper consideration to the implications to the neighbours of the proposed excavations and has imposed appropriate conditions to protect their interests.

Conclusion

75. The appellants have through Mr Webb presented their case with great clarity and thoroughness and with paper work that was meticulous. It will be disappointing, therefore, to them that their appeals fail. We agree, as stated in Steenson, that they have the right to expect the planning policies to be applied sensibly and sensitively and in our view, the Minister has done just that. 76. Much comes down to a matter of planning judgement and in

the judgement of the Minister, the proposed applications will overall achieve architectural, environmental and highway improvements, and will enhance the existing built-up ribbon of development and the site in its setting, rather than detract from them. 77. Unlike the case of Steenson , the Minister has set out his reasons fully and in our view, persuasively. Being persuaded, it must follow that there can be no question of our finding his decisions mistaken, let alone unreasonable. 78. We would wish to reiterate finally that we would have found the decision of the Minister in respect of Greenhaze both mistaken and unreasonable because it failed to comply with the requirements of the second exemption to Policy NE6, that the applicant should demonstrate a reduction in the visual impact. It is only because of the issue of procedural fairness that we agree that the Minister was justified in departing from the requirements of that Policy, and this for the reasons stated above. Authorities Planning and Building (Jersey) Law 2002. Ynys Mon Isle of Anglesey Borough Council-v-The Secretary of State for Wales and Parry Bros. (Builders) Co. Ltd. (Queen's Bench Division), Woolf J, December 2, 1983. Island Development Committee-v-Fairview Farm Limited

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