

Judgment 1/2009

**Wilkes-Green v Environment Department – Royal Court
(Civil Action File 1280) – 9 January 2009**

Island Development (Guernsey) Law, 1966 – appeal from refusal of application to re-surface drive – whether the decision of the Department was reasonable – relevant Policies of the Urban Area Plan - Lieutenant Bailiff retired with the Jurats and delivered the reasoned judgment of the Court – appeal allowed by a majority – the judgment set out the reasons for the majority and minority conclusions of the Jurats respectively

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 1280

The 9th Day of January 2009 before John Russell Finch Esquire., Lieutenant Bailiff.

Between

RONALD WILLIAM WILKES-GREEN

Appellant

v

THE MINISTER OF THE ENVIRONMENT DEPARTMENT

Respondent

In the action of RONALD WILLIAM WILKES-GREEN (“the Appellant”) against THE MINISTER OF THE ENVIRONMENT DEPARTMENT (“the Department”);

THE COURT having allowed the Appeal on the 4th day of December, 2008, this day handed down Judgment in the attached terms,

S M SIMMONDS
Her Majesty’s Deputy Greffier

**Approved Judgment
9 January 2009**

**IN THE ROYAL COURT OF
GUERNSEY**

**APPEAL UNDER SECTION 26 OF THE
ISLAND DEVELOPMENT (GUERNSEY) LAW, 1966**

Between Ronald WILKES-GREEN Appellant

-v-

**THE MINISTER OF THE Respondent
ENVIRONMENT DEPARTMENT**

**Date of hearing: 4th December 2008
Judgment handed down: 9th January 2009**

Before: John Russell Finch Esq., Lieutenant-Bailiff

**Advocate for the Appellant: Advocate P M A Palmer
Advocate for the Respondent: Advocate K E Walder**

Introduction

1. The Jurats allowed the appeal by a majority of 7 (**Jurats Lowe, Le Page, De La Mare, Tanguy, Le Conte, Ferguson and Jones**) to 5 (**Jurats Le Poidevin, Bisson, Lane, Mowbray and Bartie**).
2. We had the benefit of a Vue de Justice, not only of the site, but at Candie Gardens, where we were able to see the type of material that the Appellant proposed to use as surface material, should the appeal be successful. The planning history of the site is shown in the Bundle and we were taken to it. We have noted the applications made and the relevant documentation. In addition, we had copies of the two conveyances relevant to the development of the four houses on the site, at pages 103 – 108 of the Bundle. Photographs showing the existing appearance of the site and an impression of it surfaced were on pages 109 – 111, but we found our Vue more informative, and it is to be noted that the passage of vehicles has caused further wear of the present surface. There was some difficulty regarding the limits of the Conservation Area, which might have been avoided in this case by the provision of a larger, clearer map. At page 112 we saw the red area corresponding to the Conservation Area, but it was made clear by Advocate Palmer that should the Appellant succeed there would not be any surfacing of that red portion. It is also to be noted that the States of Guernsey, in its private capacity as landowner, had no objection to the surfacing work, but our task is to consider the planning aspect from a public law standpoint.
3. In our deliberations we carefully went over, in considerable detail Policies CO4, CO5, DBE1 and DBE7 of the Urban Area Plan and Section 17 of the Island Development (Guernsey) Law, 1966, as amended, especially paragraphs, (a), (b), (c), (e) and (f). We also, where

appropriate, took account of the “Explanations” in the Urban Area Plan attached to the four Policies we had to consider. We looked at the Grounds of Appeal produced by Advocate Palmer and the Department’s decisions, particularly that dated 8th May, 2007 (pages 93 – 95) and the associated Planning Application Report (pages 89 – 92), especially the “Assessment”, which is a summary of the Respondent’s position. Counsels’ submissions were cogent and to the point, developing the principal considerations advanced by both parties in the documentation. When we deliberated, we were in no doubt of the issues and the submissions on both sides. We agree with the “Assessment” (page 91) to the extent that:

“Montville Drive and gardens have been available as an amenity for the people of Guernsey for many years, complementing the long-established woods through which the drive passes to Colborne Road”.

We must however, indicate a degree of concern that different organs of the States of Guernsey seem to be facing in different directions in this case, and would respectfully encourage, where possible, a more “joined-up” approach in future.

4. We were directed that:-

- (i) the burden of proof in this case lay on the Respondent, that is the Minister of the Environment, as it is the decision of the Environment Department which was the subject of the Appeal. The Department had to satisfy us that its decision was reasonable;
- (ii) the standard of proof upon which the Department had to satisfy us was the balance of probabilities; that is to say, weighing everything in the balance, were we more persuaded rather than less persuaded that the Department’s decision was reasonable? Having conducted that mental exercise, it is only if the balance tilted in the Department’s favour that we should support it and dismiss the appeal;
- (iii) It was emphasised to us that there is a band of decisions within which we should not seek to replace the Department’s judgment with our own. If we should think that the Department’s view was mistaken that does not of itself entitle us to substitute our own decision. However, if we reached the conclusion that the Department’s decision was not only mistaken but also not reasonable then we could intervene. There is a margin of appreciation or band of reasonableness to which we must have regard before concluding that a decision which the Court may think is mistaken becomes so wrong that it is not reasonable. Bearing that further direction in mind, if we considered that the Department had not persuaded us on the balance of probabilities that its decision was reasonable, we must allow the appeal;
- (iv) however, if we considered that we would have come to a different decision, but nevertheless that the Department’s decision was within the band of reasonableness, then we must dismiss the appeal.

5. These introductory points are common to both the majority and minority decisions in this appeal. We will now turn to these. The majority and minority Jurats agree in all aspects of their respective decisions.

Majority Decision

6. In relation to Policy CO4, we consider that only paragraphs a) and b) are engaged in the present appeal. We took note of the “*Explanation*” and came to the conclusion that a need to

provide appropriate access had been shown and that the proposed surfacing would not be obtrusive. The “*visual quality*” of the area would not be affected. Here, we were able to look at the surfacing in Candie, which has been down for some time. There is not a great deal of difference in the colouring between such a surface and the present drive or track. We found nothing “*jarring*” or “*insensitive*” about the use of such material.

7. Policy CO5 seems on the facts to be only marginally engaged. We were not given to understand that there was any particular ecological interest under threat on the site or in its vicinity. The Appellant’s contention in his Cause (page 3) that “*The Appellant’s proposals would not have any or any material (our underlining) impact on the nature conservation value of the site*” is justified, in our judgment. We consider that the “Explanation” annexed to the Policy (page 24 of the Bundle), is relevant where it says:

“The benefits to the community that will accrue from the development will need to be commensurate with the identified harm to a finite nature conservation resource”.

We consider the Department has applied Policy CO5 too rigidly here. We are sympathetic to the aims set out in this Policy, but unable to see a great deal of engagement of it.

8. Policy DBE 1 sets out what new development should conform to. For the avoidance of doubt, we would indicate that, upon considering the “Explanation” of the Policy (at page 19 of the Bundle), we would not find the proposed development “*poor or obtrusive*”. We deem this Policy to be more relevant to building development, rather than the works contemplated here. Policy DBE1 (e) alludes to the safety of the public. The development would enhance this due to the state of the present unprotected surface, which presents a risk to pedestrians, particularly during inclement weather.
9. Policy DBE 7. This is only relevant to a Conservation Area. Even if it were to be considered that the subject matter of this appeal is “*within the setting of a Conservation Area*” and thus DBE 7 was relevant, then we would also take note of the “Explanation” (page 20 of the Bundle). Whilst ground surfaces are indeed important to the character of a Conservation Area, it is our opinion that due regard is being paid to the “*sensitive adaptation*” of this existing feature. Our reading of this Policy however, leads us to conclude that it only applies to Conservation Areas or their setting. It is therefore on the facts only engaged marginally.
10. Section 17 of the Law. The submissions advanced on behalf of the Appellant are really aspects of the same proposition – which is that this surfacing will not adversely affect the appearance of the area or its character and amenity, nor will it have any discernable effect on the locality. Having inspected the surface at Candie Gardens and considered it in the light of the proposed surfacing, we find ourselves in agreement. We noted that like Candie Gardens, the neighbouring area of public land was being managed by the States as park land. The Respondent’s Planning Application Report overstates the case by contending that this would “*introduce a relatively formal, urban type of appearance ... which would contrast with the informal, more natural character of the remaining drive*” (page 91 of the bundle). Far from over-formalizing the area it will enable local people to enjoy the amenity with more safety than before in a way that is relatively unobtrusive. We concluded that the interpretation of Section 17 set out by the Department was unreasonable and therefore were in favour of allowing the appeal.

Minority Decision

11. The substance of our opinion is that whilst some of us may have arrived at a different decision from the Department, we would go back to the legal direction with which we have to comply, namely that it is not sufficient to say we would disagree, but also we need to conclude the

decision is unreasonable. If the decision was within the band of reasonableness, then we should dismiss the appeal.

12. We are well aware from our local knowledge that the area is one of the few “green lungs” within the Parish of St Peter Port and very much valued by the Guernsey public. Accordingly, its character and amenity have to be safeguarded. To this end we are in sympathy with the Assessment in the Planning Development Report (page 91 of the Bundle):

“The continuity afforded by the relatively informal gravel surface of the drive is an important element in the garden landscape. The resurfacing of a section of the drive as proposed would remove that continuity and introduce a relatively formal, urban type of appearance to the section of Montville Drive involve, which would contrast with the informal, more natural character of the remaining drive”.

And also:

“Although the proposed resin-bonded surfacing could be superficially compatible with the original brown gravel Montville Drive surface, it would nevertheless formalise the existing “natural” character of the public walk to the detriment of the character, amenity and natural beauty of the locality”.

13. However, the main reason for our opinion that the decision of the Department should be upheld is simply that, in our judgment, it lies within the range of reasonable decisions that it could come to. In other words, it falls within the “margin of appreciation”, on which we were directed. It is, as we were also directed, not a question of whether we would necessarily have come to the same decision as the Department.