

**Judgment 16/2010**

**Harper v Environment Department – Royal Court (Civil Action File 1452) - 1 March 2010 and 26 March 2010**

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**Island Development (Guernsey) Law, 1966 – appeal from decision by Environment Department refusing permission to demolish dwelling and erect three new dwellings – relevant Policies of the Urban Area Plan – decision held not to have been unreasonable - appeal dismissed by unanimous decision of the Jurats**

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY**

Civil File No. 1452

The 1<sup>st</sup> day of March, 2010 before John Russell Finch, Esquire, Judge of the Royal Court; present: Stephen Edward Francis Le Poidevin and Michael John Tanguy, Esquires, Susan Mowbray, The Reverend Peter Gerald Lane, David Osmond Le Conte and Stephen Murray Jones, Esquires, Claire Helen Le Pelley, Constance Adele Elizabeth Helyar-Wilkinson and Niall David McCathie, Esquire, Jurats.

In the action of GEORGE WAYNE HARPER (by his Guardians, Richard Wayne Harper and Patrick Michael Antony Palmer, appointed by Act of the Royal Court dated the 8<sup>th</sup> day of August, 2006) (“the Appellant”) against THE MINISTER OF THE ENVIRONMENT DEPARTMENT (“the Respondent”) in the terms attached hereto;

THE COURT having heard Advocate P.M.A Palmer for the Appellant and Crown Advocate P. Nicol-Gent for the Department and having carried out a Vue de Justice unanimously DISMISSED the Appeal;

AND THE COURT AWARDED costs in favour of the Department.

S M SIMMONDS  
Her Majesty’s Deputy Greffier

**Collas Day**  
**30/10/09**  
**PMAP**

**GEORGE WAYNE HARPER**, husband of the late Telesfora Harper, of King Edward VII Hospital in the parish of the Castel (by his Guardians, Richard Wayne Harper and Patrick Michael Antony Palmer, appointed by Act of the Royal Court dated the 8<sup>th</sup> day of August 2006) ("the Appellant") whose address for service is Manor Place in the parish of Saint Peter Port, the owner of, inter alia, a bungalow called "Greenways", gardens, yard and land situate at Upper Saint Jacques in the parish of Saint Peter Port ("the Appellant's premises)

### **ACTIONS**

**THE MINISTER** of the **ENVIRONMENT DEPARTMENT** ("the Respondent") whose address for service is care of St James' Chambers in the said parish of Saint Peter Port **TO SEE** the Respondent show cause why the decision of the Respondent whereby the Appellant was refused permission to demolish "Greenways" aforesaid and erect three dwellings and garages in accordance with Drawings Nos. 5424/3/1, 2, 3, 4 ("the Plans") produced by Peter Falla & Associates Limited ("the Application") at the Appellant's premises which said decision was communicated to the Appellant's Advocate, Advocate P M A Palmer, by a letter and Refusal of Consent dated the 26<sup>th</sup> February 2009 ("the Refusal of Consent") should not be set aside or varied on the grounds that the said decision is unreasonable the material facts upon which the Appellant relies being as follows:

1. On the 6<sup>th</sup> day of October 2008, Advocate P M A Palmer wrote to the Respondent asking for a reconsideration of an application for permission to demolish "Greenways" and erect three dwellings and garages in accordance with the Plans at the Appellant's premises to which letter and documents forwarded therewith the Appellant will refer at the trial herein for the full meaning and effect thereof.
2. On the 26<sup>th</sup> day of February 2009 the Respondent rejected the Appellant's said application for reconsideration which Refusal of Consent stated inter alia:

*The Department carefully reconsidered the proposal in the light of the representations which you made, but still decided to reject it for the following reasons(s) under the provisions of Section 17 of the Island Development (Guernsey) Laws, 1966-1990:*

*(a) the Urban Area Plan as approved by the States.*

*In reaching its decision the Department has taken into account all relevant policies in the above Plan. Particular attention is drawn to Policies DBE1, DBE2, DBE5 and H02.*

- (b) *the extent to which the proposal would detract from the character of the locality concerned.*
- (c) *the effect of the proposal on open spaces.*

*This site forms part of a larger area of open and undeveloped land to the south of St Jacques. It is part of a larger area that does not contain buildings or other urban features. The site represents part of an attractive valley landscape which makes a valuable contribution to the character and amenity of the surrounding residential neighbourhood. It is also an important landscape setting for the adjacent Conservation Area.*

*The proposed development of this site would result in a significant loss of such open space within the Urban Area and would be detrimental to the open character and visual amenity of the area contrary to Policies DBE1, DBE2, DBE5 and H02 of the Urban Area Plan.*

3. The Appellant submits that the Respondent's decision was unreasonable in that:

- (i) The Appellant's premises in accordance with the terms of the Urban Area Plan (Review No. 1) ("the said Plan") are situate within an area designated as a Settlement Area and the said Plan does not preclude the Respondent from giving the permission sought within an area so designated;

- (ii) **Policy DBE1** of the said Plan provides:

*In general, the Department will require new development to:-*

- (a) *achieve a good standard of architectural design;*
- (b) *respect the scale and massing of existing buildings in the vicinity;*
- (c) *avoid the introduction of elements that would appear obtrusive or discordant in the street scene;*
- (d) *retain existing features that contribute to the character of the area;*
- (e) *incorporate measures, as appropriate, to ensure the safety and security of the public; and*
- (f) *achieve a satisfactory relationship with adjacent properties.*

It is not accepted that the proposed development contravenes any of the requirements set out in sub-paragraphs (a) to (f) above particularly in light of other recent residential developments in the immediate vicinity of the Appellant's premises.

- (iii) **Policy DBE2** of the Plan provides:

*Development proposals, which will result in a significant change to the character of the surrounding townscape, will be required to:-*

- (a) *make a positive contribution to townscape quality, in terms of layout, density, height, massing, architectural, style, materials and landscaping;*
- (b) *facilitate safe and convenient access, including movement by pedestrians and cyclists, both within the development and between the development and the surrounding areas; and*
- (c) *retain, enhance and/or create urban spaces, public views, skyline, landmarks and other townscape features, which make a significant contribution to the*

*character of the area, and take opportunities to reveal such features to public view.*

*A Planning and Design Statement will be required on all sites of more than 0.1 hectare (0.6 vergee) or for developments of more than 4 dwellings or 400 sqm.*

*Development Briefs will be required for sites of more than 0.5 hectare (3 vergees) or for developments of greater than 20 dwellings or 2000 sqm.*

It is not accepted that the development proposals will result in a significant change to the character of the surrounding landscape and even if they did it is the Appellant's contention that in any event the proposals conform to the requirements set out in sub-paragraphs (a), (b) and (c) above.

A Planning and Design Statement has been supplied to the Department and the Applicant will refer to this Statement at the trial hearing for the full meaning and effect thereof.

(iv) **POLICY DBE5** of the Plan provides:

*Development will be resisted where it would lead to the loss of open space, which provides:*

- (a) a valuable contribution to the character and visual amenity of an area;*
- (b) a valuable wildlife habitat, corridor or link;*
- (c) an important opportunity for public access and enjoyment; or*
- (d) a buffer between incompatible uses or a link between other open spaces.*

It is not accepted that the proposed Development would lead to the loss of an open space which provides any of the attributes referred to in sub-paragraphs (a), (b), (c) and (d) above.

(v) **Policy H02** of the Plan provides:

*Proposals for housing development within the Settlement Areas and on previously developed land will generally be permitted provided that:-*

- (a) the site is suitable having regard to the existing characteristics of the site and its relationship with the surrounding area;*
- (b) the development is acceptable in terms of design, density and amenity; and*
- (c) the development does not conflict with the other relevant policies of the Plan.*

There is nothing in the Application which contravenes the requirements of this policy.

- (vi) the Appellant's proposals would not detract from the character of the locality concerned;
- (vii) the Appellant's proposals would not have any/any material adverse effect on open spaces;

4. There is and was no valid reason for not granting permission on the basis of the Policies and



**Approved Judgment  
26 March 2010**

**IN THE ROYAL COURT OF GUERNSEY**

**APPEAL**

**Between**

**GEORGE WAYNE HARPER**

**The Appellant**

**-v-**

**THE MINISTER OF THE  
ENVIRONMENT DEPARTMENT**

**The Respondent**

**Date of hearing: 1<sup>st</sup> March 2010**

**Decision handed down: 26<sup>th</sup> March 2010**

**Before: John Russell Finch Esq., Judge of the Royal Court and Jurats:  
S E F Le Poidevin, M J Tanguy, E I J S M Mowbray, The Reverend P G Lane,  
D O Le Conte, S M Jones, C Le Pelley, C Helyar-Wilkinson and N D McCathie**

**Counsel for the Appellant: Advocate P M A Palmer  
Counsel for the Respondent: Advocate W P T Nicol-Gent**

**Materials referred to:**

The Island Development (Guernsey) Law, 1966, as amended, Section 17  
The Urban Area Plan, Review No. 1  
*Token Ltd v Island Planning and Env. Committee* [2001] JLR at 703-4

**Background**

1. This appeal was heard on 1<sup>st</sup> March 2010 and included a Vue de Justice. It was dismissed on the same day and it was indicated that the Jurats' reasons would follow, which they do now. An agreed bundle plus plans and other documentation was placed before the Jurats and references are to page numbers therein. The Appellant is referred to as "A", the Respondent as "R".
2. The appeal is set out in detail in A's Cause at Tab 1 of the bundle. The Court had to decide whether R's decision, dated 26<sup>th</sup> February 2009 (pages 74-77), should be set aside as unreasonable. The decision related to a refusal by R to allow the demolition of a dwelling and the erection of three dwellings and a garage at Upper St Jacques in St Peter Port. The site is depicted in a plan at page 78 and in photographs at pages 82-86.
3. The contentions in support of the appeal are set out in the Cause and in some detail in Advocate Palmer's letter dated 6 October 2008 (pages 56-61). The application in question was for reconsideration of an earlier application refused on 5<sup>th</sup> March 2008 (Tab 3 of the bundle). It is helpful when considering the submissions made on behalf of the parties to look at in particular, the photo montage of the proposed three dwellings (pages 58-61). Also

worthy of consideration were two detailed letters from the objectors, Mr and Mrs Paine, the original one at pages 51-52 and the one relating to the reconsideration at pages 71-72. The Vue de Justice not only extended to the site, but took into account the immediate vicinity and the neighbourhood.

4. As the burden is on R to establish that it was not acting unreasonably, submissions made on their behalf were heard first. The principal submissions of Counsel will be concisely set out, followed by the legal directions given and then the decision of the Jurats.

#### **Submissions on behalf of the Respondent**

5. The question for the Jurats to decide was reasonableness. R was required to have regard to the Plan and Section 17 of the Law. Section 17(a) relates to the Plan; Section 17(e) to character and amenity of the locality, and Section 17(f) to open spaces. The Policies in the Urban Area Plan to have regard to were DBE 1, DBE 2, DBE 5 and HO2. It was submitted that should the application succeed, it would be detrimental to the open area and the visual amenity of the locality. There was no particular issue on the design which was acceptable in a different area. The case concerns an oasis of land, which whilst in the settlement area, is an important area of open space. The Planning Inspector's Report did not make the site one of high landscape quality, but it was an important area of open space. The application would be too much of an incursion. Reference was made to the general policies set out in the Urban Area Plan, particularly GEN 6 (page 9) and GEN 12 (page 11). It is not simply a question of building houses, but the effect this would have on open spaces, which are an amenity in the area. This is an area of urban ribbon development and bit by bit the protection of the open areas could easily break down.
6. Reference was made to the Plans DBE (Design and the Built Environment) Policies, Policy DBE 1, (d) and (f) was cited and DBE 2 (c), but the most important element was DBE 5 (page 15) on Open Space. The guidance to that Policy includes the important phrase: "*It is essential that open spaces should not be seen just as sites for development*". Support for R's stance is also to be found in Policy HO2 (page 17). The second letter from the objectors (pages 71-72) was also mentioned and the comments made therein on the site representing an undeveloped buffer zone that should be retained were agreed with. In conclusion it was suggested that the area had been looked at by the Inspector and there was no presumption that development would be permitted, "*any specific proposals for the development of this land would be assessed against a number of policies of the Plan*".

#### **Submissions on behalf of the Appellant**

7. The site plan of the proposed development at page 19 was mentioned as an overview of the application. The access road would improve access to the site. It was obvious from the Vue de Justice that the site had very strong boundaries and that there was a clear separation from the adjoining open space (see the map at page 31). Other developments in the area were of a similar style and there were precedents for development in the immediate vicinity, e.g. over the road, a modern group of houses. The Urban Area Plan made provision for the development of "*opportunity sites*". There was ample space for the well-designed houses on the plot and the objectors recognize that the nondescript bungalow there should be replaced. The site, as is clearly shown at page 36, slopes away from the road, which would reduce the visual impact and it is a very private site. It should be noted that there was no opposition from the immediate neighbours; the objectors were a few houses away. Some fourteen houses have been built in the immediate area, which has reduced space. It was imperative in the urban area that all available pockets are used for additional housing. It is not a significant open space and the strong boundaries were re-emphasized.
8. A's submissions were in accordance with the Cause. It is a settlement area and the development would not result in a significant change in the character of the surrounding landscape and would not occasion the loss of a valuable or important open space, indeed it

will be an improvement, especially if the bungalow is demolished. Reference was made to Policies DBE 2(c) and DBE 5(a). The development would improve the view from any public place and would be a valuable contribution to the character and visual amenity of the area. The design, which is good, blends in with the other properties nearby and it is a very private site.

### Directions to the Jurats

9. The first direction was that, as far as the law is concerned, the Jurats must accept what they are told.
10. The burden of proof in this case lay on R, that is the Minister of the Environment, and as it is the decision of the Environment Department which is the subject of the Appeal. R must satisfy the Jurats that its decision was reasonable.
11. The standard of proof upon which R must satisfy the Jurats is the balance of probabilities; that is to say, weighing everything in the balance, are they more persuaded rather than less persuaded that R's decision was reasonable? Having conducted that mental exercise, it is only if the balance tilts in R's favour that the Jurats should support it and dismiss the appeal.
12. In dealing with respective functions and responsibilities: the Judge is the sole judge of law; the Jurats are the sole judges of fact. The Jurats are, therefore, the sole judges as to whether the decision of R was reasonable. To determine that question, they should bear in mind the requirements of the IDC Law, which includes the relevant parts of the Urban Area Plan; the Jurats should also bear in mind the legal directions, the submissions of the parties and all the facts and circumstances of this case. Bearing all those matters in mind, the Jurats have to then decide, whether the decision which R reached was reasonable.
13. It was emphasised to the Jurats that there is a band of decisions within which they should not seek to replace R's judgment with their own. If they should think that R's view was mistaken that does not of itself entitle them to substitute their own decision. However, if they reached the conclusion that R's decision was not only mistaken but also not reasonable then they could intervene. There is a margin of appreciation or band of reasonableness to which the Jurats 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 the Jurats considered that R had not persuaded them on the balance of probabilities that its decision was reasonable then they must allow the appeal.
14. However, if the Jurats considered that they would have come to a different decision, but nevertheless that R's decision was within the band of reasonableness, then they must dismiss the appeal.
15. In discharging their duty, the Jurats might well be assisted by a set of observations from the then Bailiff of Jersey in the case of *Token Ltd v Island Planning and Env. Committee* [2001] JLR at 703-4:

*“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 nevertheless 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.”*
16. The Department is required, by virtue of section 17 of the Law to take into account certain matters when deciding whether to grant or refuse a development application. These are the

matters cited by R in their Refusal of Consent, which are to be found principally at pages 76 and 77 of the bundle, namely – paragraphs (a), (e) and (f).

### **Section 17, paragraph (a)**

17. Reference was made firstly to paragraph (a) of section 17. It provides that R must take into account:

*“(a) the Strategic and Corporate Plan when approved by the States and any relevant Detailed Development Plans when so approved”.*

It followed that this paragraph was definitely engaged in this case.

18. The Detailed Plan in this case is the Urban Area Plan.

19. The Written Statement lays down both general and specific guidance as to how planning applications are to be dealt with. The Jurats must follow that guidance and do so whether they approve of it or not.

20. However, interpretation of the contents of the Written Statement could be a matter for the Jurats, subject to any directions that may be given. It was certainly a matter for the Jurats to decide whether R had reasonably applied the requirements of the terms of the relevant parts of the Written Statement and to the particular circumstances of this case.

21. R in this case had relied on Policies DBE 1, DBE 2, DBE 5 and HO2. The Jurats were reminded of them. The Policies are stated succinctly. Having noted that R should take account of these Policies, the question was whether the conclusions drawn by R were reasonable in his case. Put another way, the Jurats had to determine if R acted reasonably in the exercise of its judgment.

### **Section 17, Paragraphs (e) and (f)**

22. The material provisions for the purposes of this case of these sections read as follows:

*“(e) the extent to which the development or other work would detract from the character and the amenity of the locality concerned.*

*(f) the effect of the proposal on open spaces.”*

23. The Jurats might have thought, but it was wholly and entirely a matter for them, that R cannot in this case be criticised for taking them into account as relevant factors. But the crucial question for the Jurats was whether R had reasonably applied paragraphs (e) and (f) to the facts of this case.

24. The Jurats were told to consider the facts, the Policies and sections 17(a), (e) and (f) of the Law. They had to assess what they saw on site, the contents of the bundle and other documentation as well as the submissions of counsel.

25. The Jurats had to come to a view about the character of the locality and what the site looks like in order to consider the arguments about incongruity and detraction.

26. They had to consider whether R had acted reasonably when it refused the proposed development on each of paragraphs (a), (e) and (f) of Section 17, because if it was found that R had acted reasonably when relying on any one of those grounds then the Jurats must answer the question in the affirmative and dismiss the appeal.

27. The Jurats were directed that they must remember that if they held a different view from R then that is not enough for them to decide to uphold the appeal on any of the paragraphs.

They must go further than that and conclude that R's decision is not within the band of reasonable responses open to R.

### **Decision of the Jurats**

28. The Jurats unanimously dismissed the appeal. This was a case where, despite the helpful plans and photographs, the Vue de Justice was of primary importance. Whilst the site is not a Conservation Area, it is, as R put it in the refusal letter (page 75), part of a larger area of open and undeveloped land to the south of St Jacques. The Jurats accepted that the site indeed made a valuable contribution to the character and amenity of the surrounding residential neighbourhood. It was not disputed by anyone connected with the case that the houses were well-designed, but this was the wrong space on which to put them. This is indeed, as R put it (page 76), "*an environmentally important buffer zone*". The Jurats found themselves in agreement with the proposition in the second letter of objection (at page 72) that: "*The current proposals aimed to maximise the development potential rather than optimize the overall future development of the area ...*".
29. It was not necessary to go beyond Policy DBE 5, which was clear, as indeed was the accompanying explanation. The explanation stated "*It is essential that open spaces should not be seen just as sites for development*". The Policy provides that development will be resisted where it would lead to a loss of open space which (a) provides "*a valuable contribution to the character and visual amenity of an area*". Aided by the evidence of their own eyes, the Jurats found themselves in agreement with this Policy's application in the present case. The site is a pleasant green field or meadow, with a good deal of wild life in the vicinity and with a pleasant aspect. It is a rather unexpected bonus in the midst of urban St Peter Port.
30. The Jurats were firmly of the view that the Policies in the Plan cited by the refusal were correctly and reasonably applied in all the circumstances. It could not be suggested that R was unreasonable and their decision was entirely consistent with the Urban Area Plan.
31. Appeal Dismissed.