Judgment 52/2009 **C M Enterprises Ltd v Environment Department – Royal Court (Civil Action File 1306) - 9 November 2009 and 14 December 2009**

Island Development (Guernsey) Law, 1966 – appeal from decision by Environment Department refusing permission in principle to erect a dwelling – Urban Area Plan – Policies GEN 12 (Effect on adjoining properties) DBE 5 (Open Space) and HO2 (Opportunity Sites) – appeal allowed

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 1306

The 9th day of November, 2009 before John Russell Finch, Esquire, Judge of the Royal Court; present: Derek Martin Le Page, Stephen Edward Francis Le Poidevin, Alan Cecil Bisson and Michael John Tanguy, Esquire, Susan Mowbray and Barbara Jean Bartie, Peter Sean Trueman Girard, Esquire, Constance Adele Elizabeth Helyar-Wilkinson, Jurats

In the action of C M ENTERPRISES LIMITED ("the Appellant") against THE MINISTER OF THE ENVIRONMENT DEPARTMENT ("the Department") in the terms attached hereto;

THE COURT, having heard Advocate E.A.G. Prentice for the Appellant and Advocate A.M. Merrien for the Department ALLOWED the Appeal, having carried out a Vue de Justice, and having answered the Questions for the Jurats (detailed in the Judgment) as set out below: -

Question 1 -	No – by five votes to three;
Question 2 -	No – unanimous;
Question 3 -	No – by five votes to three;
Question 4 -	No – unanimous;
Question 5 -	No – by five votes to three;

AND THE COURT AWARDED costs in favour of the Appellant.

S M SIMMONDS
Her Majesty's Deputy Greffier

AT THE INSTANCE OF C. M. ENTERPRISES LIMITED whose registered office is at First Floor Harbour Court, Les Amballes, St Peter Port, Guernsey GY1 1WU ("the Appellant") and whose address for service is 1, Le Marchant Street, St Peter Port, Guernsey

S U M M O N S

The Minister of the **ENVIRONMENT DEPARTMENT** ("the Department") **TO APPEAR** before the Bailiff or his Deputy and the Jurats of the Royal Court at 10.15 a.m. on the 5th day of September 2008 **TO SHOW CAUSE** why the decision of the Department refusing consent to erect a dwelling on the Appellant's site ("the Site") situate at La Neuve Rue, St Peter Port the whole as set out in the Appellant's application received by the Department on 28th December 2007 and which was rejected by the Department pursuant to its decision dated 13th June 2008 ("the letter of rejection") should not be set aside or varied on the grounds that such decision was an unreasonable exercise of the powers of the Department the material facts upon which the Appellant relies being as follows:-

1. <u>The Reasons for Rejection</u>

In the letter of rejection the Department stated that the application was rejected for the following reasons 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 HO2, DBE5 and GEN12.

(c) The proposal would be incongruous with its surroundings because of its siting and exterior appearance.

(d) The effect of the proposal on open spaces.

(e) The Site is within the Settlement Area in the Urban Area Plan. Land immediately to the east is designated as an Area of Landscape Value and site of Nature Conservation Importance.

The Site is within the Settlement Area in the Urban Area Plan, land immediately to the east is designated as an area of Landscape Value and site of nature conservation importance.

The proposal is not for infill development in the conventional sense, but is backland development to the rears of existing properties requiring a relatively tortuous access arrangement and unrelated to any established street frontage. The proposal would not in this context result in an appropriate consolidation of the built form but would encroach into a generally open area to the detriment of the character and amenities of the locality and contrary to Policies DBE5 and HO2.

The development of the Site by virtue of its access and position in relation to neighbouring dwellings, would be likely to have an adverse effect on the amenities of adjoining properties.

RELEVANT POLICIES

Urban Area Plan Policies HO2, DBE1, DBE5 and GEN12 are the most relevant.

2. **The Appellant submits** that the reasons given for refusal in the letter of rejection were an unreasonable exercise of the powers of the Department in respect of its interpretation of Policies HO2, DBE1, DBE5 and GEN12.

POLICY HO2 states that :-

"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 areas;

(b) the development is acceptable in terms of design, density and amenity; and

(c) the development does not conflict with other relevant policies of the Plan."

Under Policy HO2, the Site is suitable for the proposed development due to its position in relation to other property and the surrounding area. The Site has an area of approximately 429 square metres including the proposed driveway and an area of approximately 328 square metres excluding the proposed driveway.

The three dwellings immediately adjacent to and adjoining the site have plot areas of

Approximately 368 square metres in total, approximately 369 square metres in total and approximately 362 square metres in total respectively.

The Site is in the Settlement Area and adjacent to a site of Nature Conservation Importance ("the nature site") which is also owned by the Appellant. The nature site is accessed by the Appellant's driveway ("the Driveway") which serves the two dwellings adjacent to the Site and the only persons who are permitted to use the Driveway are the owners of the two adjacent dwellings, the Appellant for access to the Site and the nature site for the Appellant and its tenant farmer.

The proposed development is for a one and a half storey "Breton" design dwelling, a design which is prevalent in Guernsey and is similar in design and appearance to the houses adjacent to the Site and other houses in the area, it therefore complies with the built form; and as a consequence cannot be incongruous with its surroundings because of its siting and exterior appearance.

POLICY DBE1 states that:-

"In general the IDC 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."

THE APPELLANT SUBMITS

That all of the requirements of the Department (IDC) under Policy DBE1 would be achieved by its proposals.

POLICY DBE5 states that:-

"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."

THE APPELLANT SUBMITS

The Site does not provide any contribution to the character and visual amenity of the area, it is in size and shape an average size building plot. It is not a valuable wildlife habitat corridor or link. It is accessed by the Driveway which belongs to the Appellant, there is no public access to the adjoining nature site.

The three dwellings adjoining the Site, two of which have rights over the Driveway owned by the Appellant were built on an area of land directly to the north east of the Site on what was then an open area of land which previously allowed visual amenity from La Ramee to the nature site. Planning permission was given for the 3 adjacent cottages, notwithstanding the fact that the previous visual amenity from La Ramee would be obstructed. The current proposal in respect of DBE5 does not contravene DBE5 although it could be argued that the construction of the three dwellings adjacent to the site did contravene the provisions of DBE5 when permission was granted for their construction.

Adjoining the Site is the nature site which belongs to the Appellant. The Site was deliberately not included in the nature site by the Department when it was zoned when it might arguably have been included had it been considered by the Department to be of any value in relation to DBE5. The fact that it was zoned in the Settlement Area demonstrates that it was not considered to be of any value for nature conservation and thus development is not precluded on it.

POLICY GEN12 states that:- "In considering proposals for development the Committee will take into account any significant impact on "the reasonable enjoyment of adjoining properties, particularly in relation to overshadowing, overlooking, emissions, noise and disturbance.

The siting and design of the proposed dwelling on the Site has been carefully considered and the dwelling will not overlook any of the adjacent dwellings. The Site will be landscaped and trees and shrubs planted to give the best possible privacy to all adjoining owners. The front of the proposed dwelling is designed to look out over the nature site. Three neighbours have made representations to the Department. One states that the existing drive should be upgraded and is concerned that his right of way would be blocked. He also raises concerns about feasibility of achieving connection to the main drain system and the potential inconvenience lorries would cause in emptying a cesspit. Two others raised privacy issues and also expressed concern that the lane (driveway) is very busy and congested and feel the building is completely unnecessary and that the land is of natural beauty and home to wildlife and birds. The objections do not stand up to scrutiny for the following reasons:-

(i) Two neighbours have rights of way over the Driveway – parking is not permitted on the Driveway, therefore, in law there can be no issue of the Driveway being blocked unless the objecting neighbours park on it themselves.

(ii) The Driveway is approximately 25 feet in width which gives more than adequate room for two way traffic. Those who have rights over it are required to pay a fair share of the costs of upkeep of the Driveway. Therefore upgrading if required can be carried out at common expense.

(iii) There is a mains sewer in the Driveway and the Appellant would be able to connect any dwelling to such sewer as the sewer is in the Appellant's land.

The Department in its assessment state that the Site is within the Settlement Area of the Urban Area Plan (UAP). Land to the east is designated as an area of landscape value and site of nature conservation importance. They argue the Site effectively forms part of the larger open area. This is incorrect; the Site is within the Settlement Area of the UAP which policies as set out in 5.1 of the Written Statement to the UAP seek to ensure that as much new housing as practicable is provided within the existing urban areas and on previously developed land and that housing development

should achieve as high a density as is compatible with achieving good standards of design, accommodation and residential amenity.

Having regard to the Strategic and Corporate Plan the housing principles are:-

The UAP should allow for 90% of the island's housing requirements to be accommodated in the Plan area [5.2.1].

As much new housing as is practicable should be accommodated within the Settlement Areas [5.2.2]

Housing Development should achieve as high a density as is compatible with achieving good standards of design, accommodation and residential amenity [5.2.6].

The plan is intended to satisfy 90% of the island's housing requirement for five years. In preparing the UAP that requirement has been based on the 2000 strategic and Corporate Plan figure of 250 additional new homes each year.

The Site is an ideal building plot in the Urban Area with its own access drive 25 feet in width in which there is a mains sewer connection and other services.

The Department state that whilst the Site does not, for example, form an important open space along the main road it is nevertheless important in providing an undeveloped buffer to the rears of the buildings to the North West and South and in terms of its relationship to the larger open areas.

The area surrounding the nature site is bounded on all compass points by houses and other buildings many of them of recent construction, which demonstrates that the Department's decision is unreasonable in respect of the Site otherwise they would not have permitted development on the other land adjacent the nature site.

The Department argue that the proposal is not for infill development in the conventional sense, but it is "backland development" to the rears of existing properties requiring a relatively tortuous access arrangement and unrelated to any established street frontage.

The term "Backland" is planning jargon for unbuilt on land behind existing development frontages. The Site is in a settlement area and has its own access driveway 25 ft in width which is wider than many public roads in Guernsey and adjacent to the public road and cannot be described as tortuous, a word which means "full of twists, turns or bends; winding, crooked, sinuous." The driveway is straight and thus the complete opposite of "tortuous" and the Site is at right angles to the Driveway. Access would involve straight line driving from La Neuve Rue with one left turn from the Driveway into the driveway of the proposed dwelling.

The proposed dwelling would be sited in a similar position to several hundred houses which have been built in Guernsey on estates or clos and the size of the Site and the siting of the proposed dwelling will no more affect the privacy of existing dwellings than those dwellings currently affect each other.

Access to the site is not reliant on the "extension of the currently un-metalled field track" as stated by the Department. This statement is erroneous because the drive described as a track by the Department currently extends from La Neuve Rue to the entrance to the nature site and thus extends right up to the Site.

The drive is not presently tarmaced but gravelled. The public have no rights of access over the drive, access is only available to the Appellant, its tenant farmer who uses part of the nature site from time to time and the two houses adjoining the drive.

The Appellants proposal would mean that three houses would be accessed over the driveway as opposed to two at present together with the Appellant who uses it to access the site when required

with vehicles. In simple terms there would still only be three owners gaining access to their properties using the driveway and the tenant farmer.

There will be no overlooking of the adjoining houses by the proposed dwelling which has been designed so that it faces the nature site. The southern boundary will face the parking area on the Site and there will be a garage which will act as a buffer between the Site and the house to the south. The neighbour to the west will not be overlooked, his dwelling is a considerable distance away. The Site will be landscaped and hedging and shrubs will give more privacy to the adjacent dwellings than they currently have.

And the Appellant claims costs

This 29th day of August 2008.

Advocate E A G Prentice

Approved Judgment
14 December 2009

IN THE ROYAL COURT OF GUERNSEY

APPEAL

Between

C M ENTERPRISES LIMITED

Appellant

-v-

THE MINISTER OF THE ENVIRONMENT DEPARTMENT

Respondent

Date of hearing: 9th November 2009

Decision handed down: 14th December 2009

Before: John Russell Finch Esq., Judge of the Royal Court and Jurats: D M Le Page, S E F Le Poidevin, A C Bisson, M J Tanguy, B J Bartie, E I J S M Mowbray, P S T Girard and C Helyar-Wilkinson

Counsel for the Appellant: **Advocate E A G Prentice**
Counsel for the Respondent: **Advocate A M Merrien**

Text
Island Development (Guernsey) Law, 1966

Reasons for Decision

1. On the 9th November 2009 this appeal was heard by the Royal Court and allowed with costs. It is now necessary to set out the reasons of the Jurats and the legal directions they were given. References to pages are from the agreed joint bundle, submitted on behalf of both parties. The decision was announced in accordance with the five agreed questions submitted by the parties to the Jurats for determination.

Directions

2. The Jurats were directed as follows:-

   (i) they must accept the legal directions given;

   (ii) the burden of proof lay on the Respondent, that is the Minister of the Environment. The Environment Department must satisfy the Jurats that the decision was reasonable;

   (iii) the standard of proof upon which the Jurats have to be satisfied is the balance of probabilities. That is to say weighing everything in the balance, were they 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 the Jurats should support it and dismiss the appeal;

(iv) the Jurats were the sole judges of fact. They therefore are the sole judges as to whether the decision of the Department was reasonable. To determine that question they had to bear in mind the requirements of the IDC Law, which includes the relevant parts of the Urban Area Plan. The Jurats also had to bear in mind the legal directions given, the submissions of the parties and the individual facts and circumstances of the case. Bearing all those matters in mind, the Jurats must then decide whether the decision which the Department reached was reasonable;

(v) there is a band of decisions within which the Jurats should not seek to replace the Department's decision with their own. If the Jurats considered that the Department's view was mistaken, that did not of itself entitle them to substitute their own decision. However, if they reached the conclusion that the Department'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 they may think was mistaken became so wrong that it was not reasonable. Bearing that further direction in mind, if the Jurats considered that the Department had not persuaded them on the balance of probabilities that its decision was reasonable, they must allow the appeal;

(vi) however, if the Jurats considered that they would have come to a different decision, but nevertheless the Department's decision was within the band of reasonableness, then they must dismiss the appeal;

(vii) the Department was required by virtue of Section 17 of the Island Development (Guernsey) Law 1966, as amended, to take certain matters into account when deciding whether to grant or refuse a development application. Those relevant to the appeal were:

(a) the Urban Area Plan, as approved by the States; in reaching its decision the Department took into account all relevant Policies in that Plan, particular attention being paid to Policies HO2, DBE5 and GEN12;
(c) the proposal would be incongruous with its surroundings because of its siting and exterior appearance;
(f) the effect of the proposal on adjoining properties and also the effect of the proposal on open spaces;

(viii) the Urban Area Plan laid 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;

(ix) however, interpretation of the written contents of the Urban Area Plan was a matter for the Jurats, including whether the Department had reasonably applied the requirements and terms of the relevant parts cited and to the particular circumstances of the case;

(x) the attention of the Jurats was drawn specifically to Policies HO2, DBE5 and GEN12 and the full terms of the letter of refusal, the subject of the appeal (pages 98 – 100):

(xi) whilst there is some overlap in the questions submitted, it was necessary to concentrate on each one so as to see the issues in a clearer light;

(xii) it was not enough for the Jurats to hold a different view from the Department, they had to go further than that and conclude that, in respect of a particular question, the Department's decision was not within the band of reasonable responses open to the Department.

3. Decision on the Questions for the Jurats

1) Has the Department satisfied you that it acted reasonably in applying Policy GEN12 to support rejection of this application?

The Policy and explanation are (page 15):

"GEN 12 3.3.12 Effect on adjoining properties

In a small and densely developed Island it is perhaps inevitable that development will affect someone, somewhere. In assessing the effect on adjoining property, the Committee will consider whether an individual's reasonable expectation to develop property can be justifiably denied in order to protect a neighbour's reasonable enjoyment of amenity.

Policy GEN 12

In considering proposals for development the Committee will take into account any significant impact on the reasonable enjoyment of adjoining properties, particularly in relation to overshadowing, overlooking, emissions, noise and disturbance."

Jurats Le Page, Le Poidevin, Tanguy, Girard and Helyer answered this question in the negative. The explanation annexed to the Policy GEN12 needs to be considered. "*In a small and densely populated Island it is perhaps inevitable that development will affect someone somewhere*". A balancing act needs to be conducted between the interests of the developer and the neighbours. There will be no overlooking as the plans show that the proposed dwelling faces the nature site. The majority appreciate that permission in principle is only the first stage in development and that there can be many alterations prior to final permission being given. The proposed building can be reconfigured. Matters such as landscaping can be addressed in the course of this process; shrubs can be enhanced or even omitted. It is noted that the glass window looking out towards an existing dwelling is planned to be opaque and could be omitted. The majority would point out that the configuration of the building should be dealt with sensitively and that consideration could be given to a smaller unit. It is appreciated that this view is not binding, but it is drawn to the attention of the parties. The majority consider that the projected access is adequate and can be kept under review. As a general point, the majority accept that there is a substantial demand for new housing in Guernsey and a proposed three bedroom unit bridges the gap between apartments and four plus bedroom houses.

Jurats Bisson, Mowbray and Bartie dissent. In particular the letters from Mrs and Miss Leadbeater (pages 109 – 110) were worthy of consideration, although the actual site is not nearly so significant for wildlife as is the adjoining nature area (which is not the subject of any application).

In considering the impact of Policy GEN12 in the circumstances of the case, the Department's response was one reasonably open to it, whether or not the Jurats

individually would have come to the same conclusion. The Department has to act in accordance with the wording enshrined in the Urban Area Plan. Whilst a balancing exercise is necessary this response of the Department cannot be deemed unreasonable and was open to it on the facts of this application.

2) Has the Department satisfied you that it acted reasonably in applying Policy DBE5 to support rejection of this application?

The Policy and explanation are (page 16):

"Open Space

Open spaces make an important contribution to the quality of the urban environment. The impact of new development upon such spaces will need to be carefully considered. New development should respect the character of any adjoining open spaces. It is essential that open spaces should not be seen just as sites for development.

Policy DBE5

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."

The Jurats unanimously answered the question in the negative. The site cannot be seen from a public road. It is important also to note that the site which was the subject of the application does not include the nature site when zoned, but is in the Settlement Area. It is not easy to see what open spaces can be referred to. On the individual facts of this case, the Jurats find it very difficult to see, looking carefully at the wording of the Policy and explanation, how DBE5 can be applied. It has to be noted once more that the nature site is not affected and the proposed site is an undistinguished parcel of land with very little potential for agricultural or recreational use as an amenity.

3) Has the Department satisfied you that it acted reasonably in applying Policy HO2 to support rejection of this application?

The Policy and explanation are (page 18):

"Opportunity sites

The development of underused sites within the Settlement Areas and on previously developed land, both within and outside the Settlement Areas, could make a major contribution to satisfying the housing requirement. Well designed housing on these sites will also enhance the urban environment.

The IDC will ensure that sites are suitable for housing development having regard to the characteristics of the site and its relationship with the surrounding area. Where such sites could also be suitable for implementing

other objectives of the Plan, for instance if he site is an important open space, then housing may not be acceptable.

Depending upon the scale of the development, Planning and Design Statements or Development Briefs will be required in accordance with Annex 1.

Policy HO2

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 other relevant policies of the Plan."

Jurats Le Page, Tanguy, Bartie, Girard and Helyar-Wilkinson answered this question in the negative. Some of the relevant points over lap with other considerations, but in essence, this space is not of itself so important as to overcome other interests. It has to be accepted from the zoning of the site that it was not of such importance that it should have been zoned in the same category as the nature site. It follows that it is of less importance and could support the proposed dwelling. A proposed dwelling is likely to be potentially attractive to purchasers as it overlooks a nature site and not other dwellings. On the facts it cannot be accepted that the site is somehow an adjunct to the nature area. A sensitively-planned and built dwelling would not be incongruous with the surroundings because of its siting and external appearance. It cannot be concluded that the site is "*an important open space"*. The majority also draw attention to the phrase "*well designed housing"* in the explanation.

Jurats Le Poidevin, Bisson and Mowbray dissent. HO2 requires the Department to consider the relationship between the site and the surrounding areas, and design, density and amenity of the proposed development. The density of the buildings in the vicinity is such that it was reasonably open to the Department to apply this Policy. It was also reasonably open to the Department to consider the effect on open spaces, taking into account that the site is adjacent to the Nature Area. The dissenting Jurats generally concluded that in the light of the wording of Policy HO2 and the explanation, the Department's response was reasonable. The development would not nearly be so attractive were it not for the amenity of the view over the nature area and its wildlife inhabitants.

4) Has the Department satisfied you that it has acted reasonably in taking into account as a factor justifying refusal, the extent to which the development would detract from the character and amenity of the locality concerned?

The Jurats unanimously answered this question in the negative. Again, there is some over-lap between this general question and in particular, Policies DBE5 and HO2. Similar, if not identical considerations apply. The Jurats concluded that the area is banded by houses and other buildings, many of recent origin and also in the vicinity of the nature site. In addition, it is not considered that the land in question is "*Backland"* which was taken to mean unbuilt land behind existing development frontages. There is nothing out of the ordinary in the proposed positioning of the dwelling when considering the lay-out of numerous clos and recent estates in the Island. The access driveway is straight.

5) Has the Department satisfied you that it has acted reasonably in taking into account as a factor justifying refusal the effect of the development on adjoining properties?

Jurats Le Page, Le Poidevin, Tangy, Girard and Helyar-Wilkinson answered the question in the negative.

Jurats Bisson, Mowbray and Bartie dissented.

All the Jurats, both in the majority and the dissentients considered this question amounted to very much the same issue as posed in Question 1 and accordingly gave the same response. It was not possible to differentiate between the questions in any meaningful or significant way. Repetition of the same conclusions would therefore serve no useful purpose.

4. Accordingly, as the answers to each of the five questions were in the negative, the appeal succeeded. The Jurats, however, would emphasize the need to keep the configuration of the building under review during the process that will follow; they are very much aware of the fact this amounts to a permission in principle only in effect.

5. APPEAL ALLOWED

Judge J R Finch

