

ENVIRONMENT SCRUTINY PANEL

REVIEW OF THE PLANNING AND BUILDING (JERSEY) LAW 2002

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I will confine my submission mainly to the provision of Appeals within the new Law. I will firstly comment under the terms of reference 1.c) on the advantages and disadvantages of the current pre-application process, with particular regard to the degree of neighbour/ public involvement, and under terms of reference 2., 'To assess the effectiveness of the existing planning application process and to consider the implications arising from the forthcoming introduction of the new Planning and Building (Jersey) Law 2002' I will write about the provision for a third party right of appeal.

I believe it has been accepted for some years by politicians and by the Planning Department that the degree of third party involvement in the current pre-application process has been and remains far from satisfactory under the 1964 Law.

Mr. Chris Shepley makes the point in his 'Review of Planning and Building Functions' November 2005 that the introduction of site notices will improve the position and he believes it would be prudent to monitor the effectiveness of this approach, suggesting that this should include surveys of public reaction. He also suggests that a more thorough, alternative approach would be a system of neighbour notification, which he recommends is considered at a future point.

It has not been right that on occasions applicants but not other interested parties have addressed Members. I agree with Chris Shepley that all representations must be dealt with in the same way, and that everyone should have had an equal opportunity to express their views to the decision-making Committee/ Applications Panel. That is, all parties, for or against the application, should have had an equal right and opportunity to present their views to the Committee/ Panel.

I welcome the Application Panel's meetings being held in public. This will ensure openness and transparency in the new process. The provision in the new Law to hold public enquiries will enhance the position of third parties regarding a proposed large or significant development. I support Mr. Shepley's recommendation that full use of the local media be made when the Law comes into force in order to fully inform the public about the new provisions and how the new Law will operate.

Requests for reconsideration by applicants, whilst not technically an "appeal" (Shepley.P.30) have nonetheless afforded the applicant a second chance. There has been an unfair advantage to the applicant under this procedure, with permission for either him or his agent to speak to the full Committee whilst others with an interest in the application have been denied this privilege.

The States has now substantially improved the operating provisions of the former Board of Administrative Appeal, but it still remains the fact that the Board can only

‘request’ the Panel to re-consider a decision, and not instruct the Panel to alter a decision. The decision of the Board is not binding on the Committee/ Panel and this devalues this means of redress in the eyes of the appellant. Whilst it is accessible by a third party, the Board lacks effective clout.

Similarly, when the States Assembly supports a request for the Planning Committee/ Panel to re-consider a decision, it can only ‘request’ this, however large the vote.

An appeal to the Royal Court is available for appellants but expensive, therefore having a deterrent effect and lowering the numbers prepared to go down this route. I was greatly saddened when the provision for a Planning Appeals Commission was scrapped in favour of the current Royal Court process. My preference is still that an independent Planning Appeals Commission/ Tribunal is established. The States has been promised a new system within the Royal Court to hear planning appeals and I believe that in view of the scrapping of the Commission this system should be instigated forthwith. The decision to scrap the Commission was taken by States Members with the expectation that a new Royal Court procedure would be established as quickly as possible.

Chris Shepley advocates the involvement of third parties under the new Law when he states in his Report (p.30): -

“I would add another very important point: that under the existing law the rules do not allow for the involvement of third parties in the way that they should. Under the new law this will change and I believe it is important that this provision is brought into force (I understand it may be delayed) in order to demonstrate the fairness of the process. Where a person has objected to (or commented on) an application, and that view has been supported by the Committee, then that person should have a continued right to express relevant views at the appeal stage. This does of course involve additional administrative work, though in most cases this should not be substantial.”

He also writes:

“The existence of any open, fair, impartial and accessible appeal system is in my view essential to the operation of the planning system. Its value is not just in resolving disputes objectively and efficiently, though of course this is crucial. But its existence also pervades the whole of the system – even when it is not used, the knowledge that it may be used is taken into account by the decision maker. Conversely, applicants will not appeal frivolously to a properly independent body, but will do so only if they believe they have a good case. They will know that the body is not subject to influence, and that all parties with an interest will have equal access to it.”

I will now write about the provision in the new Law for third party appeals, in Article 114. Under the 1964 Law, a third party does not have ‘locus standi’ to appeal to the Royal Court. At the time of the original debate, the States supported several amendments to the draft Law, in order to include a provision for third parties who had written to the Committee prior to a decision being taken, and who believed that they would be adversely affected by a consent, to have a full-scale right of appeal within a specific timescale.

Following the inclusion of this provision in the new Law, I accompanied the Director of Planning and a member of his Department to Dublin, in order to visit An Bord Pleanála and the Dublin Corporation, to investigate the operation of third party appeals in Eire. It subsequently became clear to me that the substantial resources necessary to implement a full-scale third party right of appeal in Jersey would act as an effective barrier and prevent this provision from ever being enacted.

Subsequent discussions were held to seek to find a way forward for the provision of a third party right of appeal. The Director of Planning, although I believe philosophically opposed to this provision, did concede that a limited third party right of appeal would be more workable in terms of resources.

In P.47/2005 a differently comprised States Assembly from that which voted for a full scale third party right of appeal, endorsed an Amendment which limited the right of appeal against the grant of planning permission to those people who have objected at the time of the application for the permission, but who also have an interest in property any part of which is within 50 metres of any part of the site to which the planning permission relates.

Two States Assemblies have endorsed a third party right of appeal in the new Law, and I no longer believe that the issue of resources can be seen as a valid reason to defer implementation.

Chris Shepley, whilst supporting the involvement of third parties throughout the application stage, argues against the need for an early introduction of third party appeals in his Report (p.35).

He writes:

“It is my view that by opening up the process in the ways which are intended and which have been discussed in this report, and by demonstrating the transparency and objectivity of the decision making process, the need for third party appeals will be reduced. To put it another way, it is only if the decision-making process is, or is thought to be, unsatisfactory that there is a need for third party appeals”.

It is true that the new Planning Law will open up the application process to third parties prior to a decision being reached. However, we do not live in an ideal world, and there have certainly been examples in Jersey in recent years of bad planning decisions having been made without due regard to all the facts. The availability of a third party right of appeal would have been beneficial to local residents in these instances.

In the event that every decision is carefully considered and correctly judged by the Applications Panel, it may be that the number of requests made by third parties who feel aggrieved and believe that their property/ quality of life will be adversely affected would be extremely low indeed. If this were to be the case, the provision for third party appeals would be little needed and hardly ever used. On the other hand, if there are a significant number of third parties who wish to appeal when the new Law has come into effect, this is surely sufficient reason for the enactment of this provision.

I believe that one reason for delaying the implementation of a limited third party right of appeal is the time factor, although here I would argue that a balance needs to be struck between the speed at which a development can proceed and ensuring the proposed structure will not cause unforeseen adverse effects upon neighbouring properties.

Why do we take decisions in the States Assembly, in this case by two separate Assemblies on separate occasions, only to delay their implementation? I suggest that the answer is not one of resources, but that the applicant is still afforded more consideration than the third party. This is wrong in my opinion.

I would therefore argue that all the provisions in the Law should be enacted at the same time, and that if the improved Law provides only a small number of requests by third parties for an appeal, the scant usage will thus require insignificant additional resources.

The Draft Planning and Building (Jersey) Law 2002 (Appointed Day) Act 200-P.46/2006 refers to the provisions relating to third party appeals and the powers to remedy dangerous structures in the Report, and states:

“It is intended that these provisions will be introduced as resources permit, but this is unlikely to be in the foreseeable future.”

Whilst not wishing to comment on the delay regarding powers to remedy dangerous structures, I believe that the limited third party right of appeal is affordable, unlike the full-scale provision, which I concede would never have been enacted. I would go so far as to say that I do not believe that resources are the reason for the delay in enacting this provision.

We live in the 21st Century and the Human Rights (Jersey) Law 2000 is soon to be brought into force. It cannot be considered fair that under the current Planning Law the rules do not provide for the involvement of third parties when an applicant decides to appeal. When a planning consent is given it cannot be right that third parties will continue to be denied access to an effective appeals provision within the new Law.