STATES OF JERSEY

STATES OF JERSEY COMPLAINTS BOARD: FINDINGS – COMPLAINT AGAINST A DECISION OF THE MINISTER FOR PLANNING AND ENVIRONMENT REGARDING No. 49 ST. MARK'S ROAD/ BYRON LANE, ST. HELIER

Presented to the States on 8th December 2010
by the Privileges and Procedures Committee

STATES GREFFE

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REPORT

Foreword

In accordance with Article 9(9) of the Administrative Decisions (Review) (Jersey) Law 1982 as amended, the Privileges and Procedures Committee presents the findings of the Complaints Board constituted under the above Law to consider a complaint against the Minister for Planning and Environment regarding No. 49 St. Mark's Road/Byron Lane, St. Helier.

Connétable J. Gallichan of St. Mary,
Chairman, Privileges and Procedures Committee.

STATES OF JERSEY COMPLAINTS BOARD

16th November 2010

Findings of the Complaints Board constituted under the Administrative Decisions (Review) (Jersey) Law 1982 to consider a complaint against the Minister for Planning and Environment regarding No. 49 St. Mark's Road/Byron Lane, St. Helier

1. The Review Board was composed as follows –

Mr. N.P.E. Le Gresley (Chairman)

Mr. T.S. Perchard

Mr. C. Beirne

The parties were heard in public in the Le Capelain Room, States Building, Royal Square, St. Helier on 16th November 2010.

The complainants were represented by Mr. E. Hibbs, Mr. P. Grainger and Mr. B. Hibbs.

The Minister for Planning and Environment was represented by Connétable P.F.M. Hanning of St. Saviour, a member of the Planning Applications Panel; and Mr. J. Gladwin, Senior Planner, Planning and Environment Department.

The parties visited the site in question after the opening of the hearing, viewed drawings of the proposals and viewed the site from the gardens of the 2 neighbouring properties to the east.

2. Hearing

2.1 Summary of the complainant's case

2.1.1 Mr. Grainger outlined that by letter dated 16th July 2010, Mr. E. Hibbs had indicated that, as a result of his application being rejected, and in the absence of being able to appeal against the decision other than through the Royal Court or a Complaints Hearing, he had 3 concerns. Firstly, he considered that the Minister for Planning and Environment and the States of Jersey were not acting in conformity with the provisions of the Human Rights (Jersey) Law 2000. Secondly, he considered that the Minister's decision to reject his application was unreasonable, having regard to all the circumstances. Thirdly, he considered that the Minister's refusal to reconsider his application following its rejection by the Planning Applications Panel was contrary to the provisions of the Planning and Building (Jersey) Law 2002 and planning practice.

2.1.2 *Issues on the determination of applications and appeals against that decision*
The planning application submitted on 20th November 2009, together with the planning fee of £747.00, had been to "Convert 1 No. dwelling into 1 No. flat and 1 No. maisonette. Demolish garage and construct store and 1 No. maisonette." The application was subsequently consulted upon and advertised,

both in the "Jersey Gazette" section of the Jersey Evening Post and by means of a site notice displayed on-site, with a report being prepared by planning officers which recommended the refusal of the application on a number of grounds. This had subsequently been determined by the Planning Applications Panel, rather than by the Minister – as specified in Article 19 of the Law: "Grant of planning permission." Mr. Hibbs, having written to the Minister to appeal against the decision, was informed that as the application had been determined by the Planning Applications Panel, the Minister was unable to consider an appeal and that Mr. Hibbs' only recourse was to refer the matter either to a Review Panel or to the Royal Court. Mr. Hibbs did not consider this to be acceptable. Further, he considered that the system of Ministerial delegation of functions by means of Ministerial Decision was unreasonable, given the complexity associated with identifying the extent of such delegations. Nowhere in the Law or under Supplementary Planning Guidance could Mr. Hibbs find any reference to the Minister being unable to determine an appeal, and he was concerned that, his application having been determined by the Planning Applications Panel, he was being denied the opportunity to appeal directly to the Minister which he considered to be unreasonable and possibly *ultra vires*.

2.1.3 *Issues on planning appeals contrary to Human Rights legislation*

Mr. Hibbs had confirmed that he did not submit an appeal against the decision of the Planning Applications Panel within the 2 month period set out in the Supplementary Planning Guidance, and was consequently considered to be 'out of time' to appeal to the Royal Court. His only remaining option had then been to request the present Complaints Board hearing. Mr. Hibbs was concerned that the planning appeal procedures were such that he could not afford to appeal to the Royal Court, and that in any event he did not have the expertise to pursue such a course of action. He noted that the disincentive to pursue appeals to the Royal Court which faced prospective appellants, primarily on the basis of costs, had been referred to in the report accompanying the Draft Planning and Building (Amendment) (Jersey) Law 200- (P.210/2004), although this had, nevertheless, been adopted by the States on 15th December 2004.

2.1.4 *Issues on the reasonableness of the decision on Mr. Hibbs' planning application*

Mr. Hibbs had referred to his letter, dated 11th June 2010, which he had sent to the Chairman of the Planning Applications Panel setting out his reasons for wishing to appeal against the Panel's "unreasonable" decision to refuse his application. It was suggested that the planning officer recommendation to reject his application "had been totally unfounded and appears to be based on a desire to appease objectors rather than on taking an impartial view having regard to the standards currently being adopted by the Minister and the Department." Mr. Hibbs had also questioned the reasonableness of using generalised policies to justify a decision which was very important to him, given that "such generalised policies are open to a great degree of individual interpretation." Mr. Hibbs was also concerned as to why the planning officers had felt it appropriate to object to the relationship of the proposed works to his existing property, as he considered that the Planning and Building Law was not intended to apply to the configuration of his own property. After all, if he

wanted to create a specific relationship within his own site, then why should planning officers feel justified in objecting thereto.

2.1.5 In his letter of 11th June 2010, Mr. Hibbs had drawn attention to some of the content of the "Draft Supplementary Planning Guidance: New Development Guidelines for the Town issued on 16 April 2008" which he considered had not been consistently applied to his application or which he contended either met or surpassed the requirements. It appeared to Mr. Hibbs that the Case Officer had either not been aware of or had ignored the 2002 Island Plan policy "that new residential development should be undertaken in the existing urban areas to avoid unnecessary expansion into the countryside." Mr. Hibbs opined that the new accommodation he had proposed facing Byron Lane "is the standard configuration of most of the town area", and he was of the view that the Minister had indeed approved similar schemes, which meant that the refusal of his application represented the adoption of a double-standard and demonstrated inconsistency in the decision-making process.

2.1.6 Mr. Hibbs contended that his intention was to create additional space to meet the needs of his family, and that he had endeavoured to make some provision for amenity space, despite not particularly wanting or needing this for his own purposes. He had, nevertheless, made every effort to minimise the possible effects of the proposed development, but he considered the concerns expressed by the neighbours to be excessive. Furthermore, Mr. Hibbs was of the view that it appeared that no account had been taken of the existing open amenity space to the front of the property. Mr. Hibbs confirmed that, if necessary, he was prepared to remove the balconies proposed for the first floor.

2.1.7 Mr. Grainger indicated that originally, 4 units had been proposed, which requirement had been reduced to 3 units under the present application. His clients were concerned that it had taken some 5 months to obtain initial advice from the Planning Department and that, having suggested the inclusion of balconies, it had then objected to them. Having provided his clients with a draft of proposed new standards, the application had subsequently been determined under the 'old standards' – some of which dated back to 1988. It was apparent that there was some disagreement between officers within the Planning Department as to what might be acceptable, and this inconsistency in approach was to the detriment of applicants. By way of illustrating such inconsistency, photographs of a number of schemes elsewhere in St. Helier and a recent article in the Jersey Evening Post were cited. Further inconsistency in approach was suggested as being apparent in the divergence of views as between the Planning Officers and the Parish of St. Helier as regards achieving pedestrian and vehicle visibility lines and the sufficiency of on-site parking and vehicle turning space. It was considered unfair that, without reference to the applicant, officers had referred the application for determination by the Planning Applications Panel whereas it could have been determined by officers under delegated authority. Such referral to the Planning Applications Panel had precluded appeal to the Minister, limiting Mr. Hibbs' options for appeal to the Royal Court – an expensive venture – or to the Complaints Board, as at present. Overall, Mr. Grainger confirmed that his clients were concerned at the level of negativity demonstrated in the Planning Officers' correspondence regarding the application, rather than any effort –

particularly in the early stages – to discuss the matter with the applicant, possibly with a view to overcoming any perceived deficiencies therein. Also of concern was reference in Planning's correspondence to direct overlooking of the adjacent children's nursery being "very unsatisfactory."

2.1.8 In summary, Mr. Grainger contended that general considerations, as set out in the relevant policies within the 2002 Island Plan, should not form the basis of planning decisions. It was suggested that the effect of the proposed development would be to reproduce the street scene which existed further along Byron Lane, and would therefore not be detrimental to the character of the area. It was claimed that it was not apparent from the relevant policy that development proposed for the rear of a property registered as a 'Building of Local Interest' property should have any bearing on a designation based on the front of the property. In the case of No. 49 St. Mark's Road, it was of concern that it appeared that no report was available supporting the case for registering the frontage of that property. It was considered unfair that the entire planning system appeared to be geared towards professional persons, rather than lay persons, with the threat of potential costs arising from an appeal taken to the Royal Court clearing acting as a deterrent to such a course of action. As far as Mr. Hibbs was concerned, he believed that he had complied with all the relevant Island Plan policies and that he had acted in accordance with advice received from the Planning Department. Consequently, the refusal of the planning application in respect of No. 49 St. Mark's Road was considered to be unfair.

2.1.9 Messrs. E. and B. Hibbs reaffirmed their agreement regarding the points which had been raised by Mr. Grainger, indicating their belief that planning officers should have provided advice to them regarding the various perceived deficiencies of their application prior to the matter being referred to the Planning Applications Panel. Messrs. Hibbs expressed their appreciation of the presentation of their case by Mr. Grainger, confirming that – as laymen – they would have been unable to do so themselves.

2.2 Summary of the Minister's case

2.2.1 By letter dated 30th July 2010, the Senior Planner, Appeals indicated that the background and details of Mr. Hibbs' application in respect of 49 St. Mark's Road/Byron Lane, St. Helier were set out in the report of the Planning and Environment Department dated 31st March 2010, which had been considered by the Planning Applications Panel at a public meeting held on 15th April 2010. It was noted that the Department had received a 10-signature petition against the application as well as 5 letters of objection. It was confirmed that the decision to refuse the application had been made having taken into account all representations, including those which had been made in person by Mr. Hibbs and his agent. The application had been recommended for refusal by the Case Officer and checked and agreed by the Assistant Director of Planning.

2.2.2 It was recalled that the application had been refused on 7 grounds, as follows –

1. The proposed balconies to both the proposed new 2-bedroom dwelling and the first floor of the main dwelling would result in unacceptable overlooking to the respective residents of these new units and to the neighbouring properties to the north/east; 53 St. Mark's Road and Raldi Lodge to the south/east of the site, contrary to Policies G2(ii) and H8 of the Island Plan 2002.

2. The windows to the first and second floors of the north elevation of the proposed new 2-bedroom unit would result in unacceptable overlooking and loss of privacy to the amenities of the residents of the main dwelling; 49 St. Mark's Road, and to the neighbouring property to the north/east; 53 St. Mark's Road, contrary to Policies G2(ii) and G3(iii) of the Island Plan 2002.

3. The proposed windows to the first and second floors of the south elevation of the new dwelling proposed, at approximately 6 metres from the north facades of the properties opposite the site on Byron Lane, would result in unacceptable overlooking and loss of privacy to the residents' habitable accommodation and general amenities, contrary to Policies G2(iii) and G3(iii) of the Island Plan 2002.

4. The proposed development, by virtue of its size, height, position on the site and its relationship with the surrounding neighbouring properties, results in an unacceptable overbearing impact which is dominant and intrusive and therefore harmful to the amenities of the occupiers of Raldi Lodge to the south/east of the site, to the properties opposite the site on Byron Lane, to the main dwelling of 49 St. Mark's Road, and to 53 St. Mark's Road, contrary to Policies G2(ii) and H8(iii) of the Island Plan 2002.

5. The proposal fails to provide adequate standards of usable on-site amenity space for the new 2 bedroom unit of accommodation (13 square metres) and the new 2 bedroom unit within the main dwelling (12 square metres), contrary to the minimum standards set out in planning Policy Note No. 6 'A Minimum Specification for New Housing Developments, February 1994' of Planning Policies G2 and H8 of the Island Plan 2002.

6. The proposed development provides insufficient car parking of 5 No. car parking spaces for 3 No. new units of accommodation, contrary to the Minister for Planning and Environment's Planning Policy Note No. 3, 'Parking Guidelines 1988' of Policies G2 and G3 of the Island Plan 2002.

7. The proposed development does not provide enough space to enable vehicles to turn on the site and exit onto the highway in a forward direction and fails to show how pedestrian and vehicle visibility lines can be achieved onto Byron Lane and would therefore be prejudicial to highway safety contrary to Policy G2(vii) and (viii) of the Island Plan 2002.

2.2.3 In response to Mr. Hibbs' letter of 16th July 2010, the Planning Department considered that Mr. Hibbs had been made aware of the different appeal options available to him by means of an explanatory "An Applicant's Right of Appeal" sheet which had been sent to him with the Refusal Notice. As the application had been determined by the Planning Applications Panel, Mr. Hibbs had been afforded, and had taken up, the opportunity to be heard at the public meeting, and it was considered that this had ensured that a fair and impartial hearing of the application had been held.

2.2.4 The Senior Planner, Appeals confirmed that the proposed development had been deficient in a number of respects, and that this had been illustrated by the number of objections to the application which had been received from near neighbours. It was emphasized that it was open to the applicant to submit a new planning application which took into account the "Reasons for Refusal" set out in the Refusal Notice, and it was confirmed that the Planning Department was more than happy to provide planning advice as to how to achieve a satisfactory application.

2.2.5 Mr. Gladwin explained that the initial delay in responding to Mr. Hibbs regarding his submitted application had been due to the backlog of applications being dealt with at the time by the Planning Department. The Planning Officer had in due course written to Mr. Hibbs on 16th February 2009 in some detail, and it was emphasized that such advice as might be proffered by officers was always 'without prejudice' to any further advice which might be forthcoming from higher authority, whether senior officers, the Planning Applications Panel, or indeed the Minister himself. Mr. Grainger commented that whilst such a situation might be acceptable with regard to approvals, but certainly not for refusals – in respect of which it was maintained that there should be an easily accessible and inexpensive appeals system. Mr. Gladwin confirmed that, although negative, the Senior Planners' letter had been based on an application depicting an unsuitable scheme. In situations where a scheme was almost, but not quite, acceptable, some negotiation of detail with applicants might be possible, but officers did not pursue such a route where it was clear to them from the outset that little improvement could be made. Indeed, with regard to the present application, part of the initial advice had been to produce a design whereby the gable of the proposed building would front on to Byron Lane, but that advice had not been followed.

2.2.6 As regards requests for the reconsideration of applications, Mr. Gladwin confirmed that such reconsiderations were undertaken by the Planning Applications Panel, for which there was no charge. Whilst proposals had been in train to establish an Applications Commission or similar body, which would have resulted in requests for reconsideration being other than to the Planning Applications Panel or to the Minister, this had not come to fruition. It was explained that, for the reconsideration of an application by the Planning Applications Panel, applicants had the same rights for such an oral hearing as they did in respect of the initial consideration of the application by the Panel. Mr. Gladwin restated the willingness of the Planning Department to discuss the possibility of a revised application being submitted which could overcome the objections raised with the present proposal. Indeed, it was confirmed that it might well be possible to agree some sort of development for the rear of

No. 49 St. Mark's Road, but not the present proposals, which were considered to be fundamentally flawed, being too large, significantly overbearing and overly intrusive.

2.2.7 Mr. Gladwin outlined the different forms of appeal which were notified to an applicant upon refusal of an application. These were considered to be in conformity with the Island's Human Rights legislation and included both "ordinary" and "modified" Court processes. It was suggested that reassurance could be drawn from the unlikelihood of costs being awarded against either party as a result of following the "modified" procedure, as although it was theoretically possible for such costs to be awarded, no circumstances were envisaged as to when this might occur and it had not occurred hitherto. It was further explained that an applicant had the option whereby an appeal could be determined on the basis of the paperwork alone, without an oral hearing before the Court. Costs of self-representation to the Court were estimated at approximately £500, which was considered to be within the reach of most applicants, and an explanatory booklet was available from the Judicial Greffe.

2.2.8 The 7 reasons on which the refusal of the application was based were outlined, and it was emphasized that it was clear that the fundamental reasons therefore had been indicated as far back as in the pre-application advice, some of which advice had not been followed. It was explained that decisions regarding pre-application advice and/or the initial approach adopted towards an application were not solely the responsibility of an individual officer, as each of the Department's 2 teams of planners were led by a Principal Planner, to whom reference would be made in the early stages, and that there was also some involvement by the Assistant Director – Development Control, who would raise with the Case Officer any perceived problems. Consequently, it could be seen that there was consistency in approach towards applications. In the case of No. 49 St. Mark's Road, the application could not have been determined by officers under delegated authority in view of the scale of the scheme proposed and its involvement with a Building of Local Interest (BLI).

2.2.9 It was emphasized that the ability for all interested persons to be heard in public at an oral hearing before the Planning Applications Panel was considered to be an important part of the planning process. All determinations of planning applications were based on the provisions of the 2002 Island Plan, which contained a list of criteria within each detailed policy. However, it was clear that an element of planning judgement was required in the assessment of each application which, in this case, had advocated its refusal. It was apparent that the main problems surrounding the application centred on the dwelling proposed for the rear of the site which was considered to be too high and too large-scale for the relatively narrow site. Also of concern was that the space between the 2 building elements of the proposal would only be 6 metres.

2.2.10 Mr. Gladwin indicated that the examples of other sites which had been cited were not considered to be directly comparable with No. 49 St. Mark's Road. It was clear that the current application would result in a building which significantly overlooked Mr. Bouchard's property next door (No. 53 St. Mark's Road). However, it was evident that an alternative proposal which might envisage a smaller development could well provide adequate space for parking and turning vehicles. The view of the Historic Environment Team –

which was recognised as having the necessary expertise – was that the proposals for development at the rear of the property would not result in a building that was subservient to No. 49 St. Mark's Road. Similarly, it was considered that the whole of a site on which a BLI-designated building was situated was indeed subject to planning constraints. The view of the Historic Buildings Team was normally adopted by the Case Officer involved with an application. As regards the guidelines under which applications were determined, it remained unclear whether the draft guidelines would ultimately be adopted, and Planning Officers were required to apply only currently approved guidelines. It was emphasized that every site was different and that each application was dealt with on its relative merits.

2.2.11 The Connétable of St. Saviour confirmed his understanding that Human Rights compliance was met by the existing appeals procedures. Whereas Mr. Hibbs had made reference to his desire to secure the development of his property for the benefit of his family, it was to be noted that legal advice received from H.M. Attorney General was that the Planning Applications Panel was required to take a long-term view, given that the lifespan of an applicant was generally somewhat shorter than that of buildings. As regards the proximity of the children's nursery next door, the Connétable confirmed that this was indeed a factor that he – and possibly other members of the Planning Applications Panel – would take into account in determining such an application. It was suggested that, whereas such overlooking as presently existed was some distance away, developing the site would inevitably create more direct overlooking. From the perspective of the Planning Applications Panel, the application failed on a number of levels, and it was evident that it would clearly have resulted in a substantial reduction in standards. It was emphasized that the commonsense decision of the Planning Applications Panel to refuse the application had been a unanimous one.

3. The Board's findings

3.1 The Board wishes to emphasize that its consideration of such appeals is constrained by the provisions of Article 9(2) of the Administrative Decisions (Review) (Jersey) Law 1982. As in the present case, it would not be for the Board to supplant its view for the decision arrived at by the Minister, or his delegate, under established procedures. It is regrettable that the applicant chose to ignore much of the pre-application advice offered – albeit after some delay – by the Planning Department. Had he not done so, and from the statement of the planning representative, it is possible that a satisfactory application could have been produced, although probably on a somewhat smaller scale than originally envisaged by the applicant.

3.2 The Board was of the view that the refusal of the subject application was –

(a) not contrary to law;

(b) not unjust, oppressive or improperly discriminatory, nor was it in accordance with a provision of any enactment or practice which is or might be unjust, oppressive or improperly discriminatory;

(c) not based wholly or partly on a mistake of law or fact;

(d) made by a reasonable body of persons after proper consideration of all the facts; and

(e) not contrary to the generally accepted principles of natural justice.

Consequently, in respect of this particular application, the Board was in support of the decision of the Minister for Planning and Environment.

3.3 The Board has particularly noted the repeated willingness of officers of the Planning Department to work with the applicant on a revised application with a view to overcoming the perceived shortcomings of the present application. Although this may incur further costs for the applicant, it is clear that the Planning Department, within the constraints of the resources available to it, does endeavour to assist applicants in achieving their aspirations. While the Board does not recommend that the application be reconsidered, it welcomes the Department's preparedness to come to a resolution of the situation to the satisfaction of all those concerned.

Signed and dated by: .....
Mr. N.P.E. Le Gresley, Chairman

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Mr. T.S. Perchard

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Mr. C. Beirne