STATES OF JERSEY

STATES OF JERSEY COMPLAINTS BOARD: FINDINGS – COMPLAINT AGAINST A DECISION OF THE MINISTER FOR PLANNING AND ENVIRONMENT REGARDING REFUSAL OF RETROSPECTIVE PLANNING PERMISSION FOR THE CONSTRUCTION OF A WALL IN THE COUNTRYSIDE ZONE

Presented to the States on 16th May 2011
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, 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 refusal of retrospective planning permission for the construction of a wall in the Countryside Zone.

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

STATES OF JERSEY COMPLAINTS BOARD

4th April 2011

Findings of the Complaints Board constituted under the Administrative Decisions (Review) (Jersey) Law 1982 to consider a complaint by Mr. and Mrs. B. De La Haye against the Minister for Planning and Environment regarding refusal of retrospective planning permission for the construction of a wall in the Countryside Zone

1. Present –

Board Members

Mr. N. Le Gresley, Chairman
Mrs. C. Vibert
Mr. S. Platt

Complainant

Mr. and Mrs. B. De La Haye
Deputy F.J. Hill of St. Martin

On behalf of the Minister

Mr. J. Gladwin, Senior Planner (Appeals)
Connétable P.F.M. Hanning of St. Saviour

States Greffe

Mrs. L. Hart, Assistant Greffier of the States

The hearing was held in public at 10.30 a.m. on 4th April 2011 in Le Capelain Room, States Building.

2. Summary of the dispute

2.1 The Board was convened to hear a complaint by Mr. and Mrs. B. De La Haye (the complainants) against a decision of the Minister for Planning and Environment to refuse retrospective permission to construct walls in the Countryside Zone.

3. Site Visit to Leighfield, La Grande Route de la Trinité, Trinity

3.1 Prior to the formal opening of the hearing in the States Building, the parties met on site, and viewed the walls constructed on land to the south of the property known as Leighfield, La Grande Route de la Trinité, Trinity. Note was made of the height of the walls and also the distance from the pavement to the pillar of the northern boundary wall in respect of Class D2(b)(i) of the

Planning and Building (General Development) (Jersey) Order 2008, which required that walls abutting on and within 2 metres of a road should be no higher than 90 centimetres above the level of the road. The parties also viewed the new access road created to a former agricultural shed, located in the same rural setting just yards from the De La Haye's land, which was now being used as a warehouse by a food distribution company. The complainants considered that this illustrated no less an urbanisation of the countryside than the walls in question, but the Senior Planner (Appeals) contended that the 2 applications were not comparable and the use of hard standing as opposed to hoggin, which gave the access road a more urban appearance, had been necessary given the heavy nature of the vehicles visiting the site. He also upheld the need to comply with the aforementioned Planning Order, in order to ensure the access visibility splays at Leighfield were acceptable.

4. Summary of the Complainant's case

4.1 Upon convening in the States Building, the Chairman welcomed both parties to the meeting and reiterated the terms of Article 9 of the Administrative Decisions (Review) (Jersey) Law 1982, against which the complaint would be considered. He advised that, having reviewed the summary of the complaint, the Board needed to be fully apprised of the chronology of the events surrounding the construction of the walls.

4.2 Deputy Hill, representing Mr. and Mrs. De La Haye, thanked the Board for agreeing to hear the complaint, as the past 6 to 8 months had been quite stressful for the complainants. The couple had built the property known as Leighfield 50 years ago on land gifted by Mrs. De la Haye's mother and the land to the south of the property had always been utilised as a garden. Historically the boundary with the field behind the property had been marked by a hedge. Deputy Hill advised the Board that until he had received the papers for the hearing, he had been unaware of the planning application to build on the site which the complainants had submitted 10 years earlier.

4.3 Deputy Hill highlighted that informal advice had been sought from the Planning Department on 26th August 2009 from a Planning Officer. She had advised that there would be a presumption against building in the garden area of Leighfield, but that there would be no problem in the area being retained as a garden. Mr. De la Haye interjected that he had wanted to preserve the land and prevent it being built upon. He maintained that guidance had been given regarding the ability to build a wall on the site, although it was noted that this was not documented on the written note contained within the bundle.

4.4 Deputy Hill advised that the construction of the northern wall had been agreed as part of the sale of the property. There had been no concerns raised during the construction of the walls and there had been no objections submitted relating to the retrospective planning application. Indeed, the Chairman of the Planning Applications Panel, Connétable J. Le Sueur Gallichan, Connétable of Trinity, lived adjacent to the site and had made no comment, other than to discuss how the land would now be classified for the parish rates.

4.5 Mr. De La Haye advised the Board that before construction work had commenced, he had contacted the Connétable of Trinity to inform him that the

access entrance to the site would be opened and he had been advised that it would not be necessary to create a hardcore pathway. After the house had been sold, Mr. De La Haye had asked the Connétable to provide Parish signage whilst the wall was being constructed and no mention had been made of planning permission at that time. In response to a question posed by the Chairman, Mr. De La Haye advised that the property had been sold in 2009 and the footings for the walls had been constructed in March/April 2010.

4.6 The Board noted that the Director of Planning had noticed the new walls in late April 2010 and there had been 3 letters consequently sent from the Planning Enforcement Officer outlining the options available to Mr. and Mrs. De La Haye in relation to the construction of the boundary wall adjacent to Leighfield. It was only in the final letter of the trilogy that the correct information had been imparted regarding the requirement for planning permission in relation to the construction of the walls.

4.7 Deputy Hill highlighted that Transport and Technical Services officers had confirmed that the visibility splays from Leighfield were acceptable. He contended that the visibility was impaired more by the existing high hedge on the left, than by the new pillar at the end of the new wall on the right hand side.

4.8 Deputy Hill advised the Board that the application had been refused on a number of grounds and he sought to address each of these individually. It had been stated that the walls were not considered to be in keeping with the character of the rural countryside. Deputy Hill refuted this assertion and reminded the Board that the area had always been part of the garden of the property and, whilst it did look bleak at the moment, it was intended to plant fruit trees and bushes and create an orchard. He emphasised that in the 'rural countryside' vicinity there was a garage, holiday homes and a wholesaler food outlet and he therefore considered that the notion of a 'rural setting' had been somewhat overplayed.

4.9 In response to the Department's assertion that the border between the field and Leighfield could have been marked by a simple hedge and that the wall had no reason to be built, Deputy Hill reminded the Board that the wall had been agreed as part of the contract of sale between Mr. and Mrs. De la Haye and the new owner of Leighfield. It was further noted that at the Planning Applications Panel meeting on 24th November 2010, it had come to light that the new owner of the property actually owned the land upon which the northern wall had been built and consequently was within the curtilege of a private dwelling house and therefore enjoyed Permitted Development Rights. Mr. De La Haye advised that he had tried to negotiate with the new owner for it to be a party owned wall, but it had been built at his own expense. It was confirmed that the boundary line had been agreed at the time when the land had been purchased, with the contract for the sale being written in such a way as to provide for the wall to be built to the north of the boundary and for it subsequently to delineate the boundary. The Chairman therefore questioned whether the Enforcement notice in respect of the non compliance with Class D2(b)(i) of the Planning and Building (General Development) (Jersey) Order 2008 should have been served on the owner of the wall and not Mr. De La Haye!

4.10 Deputy Hill emphasised that the revelation that the north wall was exempt from planning permission had created an anomaly. Whilst the wall was still considered by the Planning Department to 'cause harm to the character of the Countryside Zone and be contrary to Policy C6 of the Jersey Island Plan 2002' it was allowed to remain, albeit with an alteration to the end abutting the road, whereas the southern wall, built in an identical style, was to be demolished. Deputy Hill reiterated that the southern wall was considered by Transport and Technical Services officers to pose no visual impairment and he was of the opinion that the Planning Department were being unreasonable pursuing this point. He suggested that if Mr. De La Haye was to plant a hedge along the eastern side of the plot, as he was perfectly entitled to do without requiring planning permission, then this would create a greater visual impediment than the existing pillar.

4.11 Deputy Hill contended that the Department's determination that the 'rural setting' be protected was somewhat misplaced as the houses in the vicinity were mostly brick-built with a cement render and of fairly modern design. He reiterated that it was unfair to judge the appearance of the wall at this moment in time as it would be transformed once the proposed fruit trees and bushes were planted against it. He reminded the Board that the nearby wholesale food outlet was placed in a rural setting within the Countryside Zone yet the access had been created in an urban style. If the bleak style hard standing was considered acceptable then he opined that the walls should also be so considered. Mrs. De La Haye interjected that had she and her husband been given the leaflet outlining the supplementary planning guidance in respect of Domestic Permitted Development when they attended upon the Planning Department on 26th August 2009, then they would not have built the wall and could have avoided both the stress and expenses incurred. It was confirmed that advice previously provided to the complainants by the Department had been at a time when Mr. de la Haye had still owned the land.

4.12 The Board asked whether Mr. De La Haye had been intending to sell Leighfield when he sought informal planning advice on 26th August 2009, and whether this intention had been conveyed to the Planning Officer concerned. Mr. De La Haye responded that at that point in time he had been unsure of his intentions, but he had wanted to control the future use of the land and ensure it was not built upon by future owners. It was noted that the property had been sold just 2 months later. Mrs. De La Haye advised that at the time of the visit to the Planning Department, the couple had been undecided as to whether to retain the property and rent it out, or seek to rebuild on the plot for their grandchildren. Mr. and Mrs. De La Haye confirmed that they had not advised the Planning Department that the house had been sold and, indeed the Enforcement Officer's initial letter dated 30th April 2010, established that the Department had encountered difficulties in contacting Mr. and Mrs. De La Haye after the sale.

4.13 Deputy Hill concluded that, in accordance with Article 9(2)(b) and (d) of the Administrative Decisions (Review) (Jersey) Law 1982 the decision of the Minister for Planning could be regarded as being '*unjust'* and '*could not have been made by a reasonable body of persons after proper consideration of all the facts'*. He contended that the decision was unjust, oppressive and

discriminatory and he could not see how the wall could be regarded as unsightly and out of place within the rural setting when the access road to the wholesaler food outlet was considered acceptable.

5. Summary of the Minister's case

5.1 The Board noted that the application site was situated within the Countryside Zone and the Water Safeguard Area. Policy C6 was of particular relevance. The application had been refused on the grounds that the size, scale, situation and design of the walls resulted in a development which was prominent and visually harmful to the character of the Countryside Zone, contrary to Policy C6 of the Jersey Island Plan 2002 which sought to protect the character of the countryside.

5.2 The Senior Planner (Appeals) gave a brief history of the site. He advised that in 1999 Mr. De La Haye had sought permission to build 2 houses in the garden of Leighfield, but this had been refused. He highlighted that the informal advice given by the Planning Officer on 26th August 2009 had centred on the possibility of building either a new dwelling in the garden area of Leighfield, or to demolish the existing property and rebuild as 2 or more dwellings. The officer concerned maintained that any advice given regarding the construction of walls on the site was based on the assumption that they would be within the domestic curtilege of the site and therefore exempt from the required planning permission provided that they did not exceed 2 metres in height from ground level on either side. The Department was unaware that the property had been sold, but that the former garden had been retained. During March and April 2010 construction of the walls took place and in April the works had been noted by the Director of Planning when he passed by the property. The infringement, once identified, was acted upon swiftly. The Enforcement Officer wrote to the complainant on 30th April 2010 to advise that there appeared to be a problem with the height of the wall and pillar at the point at which the wall abutted the pavement. It was accepted by the Senior Planner (Appeals) that this initial letter had contained inaccuracies and had not highlighted the requirement for planning permission for the walls as they were no longer deemed to be within the domestic curtilege of the property. This mistake was compounded in a further letter on 4th May 2010, when again no mention was made of the need for planning permission for the entire wall. However the Senior Planner (Appeals) emphasised that in the third letter sent on 11th May 2010 the error was addressed and the complainants had been fully apprised of the situation. He pointed out that the omissions in the advice had been rectified within a 2 week timescale and, as the wall had been built and the associated costs already incurred at this stage of the proceedings, the complainants had not been disadvantaged as a consequence of this misinformation.

5.3 The Board noted that even at the time of the retrospective planning application the Department had believed that the land in question was in the full ownership of Mr. De La Haye, particularly as he had signed the declaration on the application form to this effect. The Department had therefore proffered planning advice to the complainant on this basis.

5.4 The Senior Planner (Appeals) referred to the fact that Mr. De La Haye had ticked the section on the planning application form denoting that a new or altered vehicular access to a road was included in the proposals and it was on this basis that the Transport and Technical Services Department had been asked to comment. The Senior Planner (Appeals) advised that the Transport and Technical Services officers' comments had related primarily to the access to the area of land to be used as a fruit garden, which was presently roped off, although they had also highlighted that the new pillar situated on the south side of the Leighfield access slightly obscured the 50m visibility line. Despite the fact that the northern wall was now deemed to be located within the domestic curtilege of Leighfield, Class D2(b)(i) of the Planning and Building (General Development) (Jersey) Order 2008 still applied in relation to the pillar, which, irrespective of ownership and Permitted Development Rights, would need to be altered to ensure appropriate visibility splays were achieved.

5.5 The Senior Planner (Appeals) reiterated that the application had been refused under delegated powers on the grounds that the size, scale, situation and design of the walls resulted in a development which was prominent and visually harmful to the character of the Countryside Zone, contrary to Policy C6 of the Jersey Island Plan 2002 which sought to protect the character of the countryside. The matter was reconsidered by the Planning Applications Panel on 24th November 2010 and the original refusal was maintained. The Senior Planner (Appeals) advised that the protection of the character of the countryside was extremely important and he stated that the walls were deemed harmful to that character as they were 'ugly and inappropriate for the rural setting'. Furthermore he considered that the concrete render gave a grey 'dirty' appearance and he contended that the use of numerous 'grand' pillars were more suited to an urban context or to be connected to a dwelling house. The Senior Planner (Appeals) opined that the walls were incongruous and therefore 'very visually harmful' to the character of the Countryside Zone. Any application within this Zone was subject to a presumption against development under Policy C6 of the Jersey Island Plan 2002 and it was not normally permissible for walls to be built which were unconnected to an agricultural holding or dwelling house. Whilst exemptions could be made in special circumstances, the Senior Planner (Appeals) advised that no justification could be made for the complainants' wall, which could be replaced with a hedge or landscaping which would not require permission and would be more appropriate to the rural context. He considered that the appearance of the wall was 'grandiose' and unnecessarily harmful to the character of the countryside.

5.6 The Senior Planner (Appeals) maintained that even with some landscaping the wall would be incongruous and would essentially enclose an open rural site which would not ordinarily be expected to be walled in so severely. Landscaping would not resolve the fact that it was an 'ugly' wall and, whilst not wishing to pre-empt any future decisions, he suggested that a post and rail fence or even a low granite wall could prove more appropriate for the setting, although he considered that the 'need' for any permanent boundary structure was still questionable. He stated that a reduction in the height of the wall would not resolve the problem and he concluded that the western wall needed to be demolished and the northern wall altered to meet the requirements of

Class D2(b)(i) of the Planning and Building (General Development) (Jersey) Order 2008.

5.7 Mention was made of the fact that anyone looking at the site might assume that the works were a preamble to future residential development and it was considered that the works urbanised the rural location. The Senior Planner (Appeals) warned that a dangerous precedent would be set should the wall be permitted to remain. He refuted the suggestion that the application was comparable to that submitted in respect of the access road to the neighbouring wholesale unit. He reminded the Board that the complainants' application had been reviewed by up to 8 individuals and had therefore been treated fairly and in accordance with normal procedures. The complainants had been given the opportunity to speak at the public meeting and the correct processes had been followed and it could not therefore be claimed that the decision reached was either 'unjust, oppressive or discriminatory' or had not been made by a 'reasonable body of persons after proper consideration of all the facts'.

5.8 The Board sought clarification as to whether there was a restriction on the height of walls built within the domestic curtilege of a property and was advised that the limit was 2 metres from ground level on either side. It was noted that there had been some ambiguity within the letters sent by the Enforcement Officer to the complainants and the Board agreed that, as a public body, it was incumbent on the Department to ensure that clear advice was provided to applicants. The Senior Planner (Appeals) accepted that the correspondence had contained mistakes but he reminded the Board that the correct advice had been given within 2 weeks of the initial letter and he gave assurances that such errors would not be repeated.

5.8 Connétable P.F.M. Hanning of St. Saviour wished to emphasise that the Planning Department could not be blamed for the confusion relating to the advice given, and he reminded the Board that the advice had been correct at the time it had been given based on the information provided by the complainants. He argued that it was the actions of the complainants, most notably in not informing the Department of the changes in ownership of the plot, which had exacerbated the situation. Connétable Hanning considered that the complainants had been treated reasonably in accordance with due process. The walls were not considered by the Planning Applications Panel and Planning Officers to fit within the countryside setting, in fact he believed that they stood out 'like a sore thumb'. The Planning Applications Panel had been unanimous in its decision to maintain the refusal and regarded the walls as damaging to the countryside. He questioned whether there had been sufficient justification for an Administrative Appeal Board to be convened in respect of the complaint, which he judged to be based more on the complainants' dissatisfaction with the decision made by the Planning Applications Panel, than with the process and procedures followed. The Connétable advised the Board that whilst the Planning Applications Panel had no objection to the northern wall, this was simply because it was exempt and therefore the Panel was powerless and could not object. It was noted that this situation highlighted a failing within the present Planning Law which allowed property owners Permitted Development Rights to construct items within the domestic curtilege of a dwelling house, whilst identical structures not within such a curtilege were unlikely to be granted permission.

5.9 The Board asked whether the Planning Applications Panel could have sought to place conditions over both walls and was advised that the Panel had considered the construction of the walls to be totally inappropriate and therefore conditions would have been ineffective.

5.10 The Board questioned whether the complainants had been the victim of chronology – had they constructed the wall whilst they owned the adjacent property then it would have been exempt from planning restrictions (providing it was no more than 2 metres in height). Connétable Hanning responded that whilst that appeared to be the case, there was also a sense that the complainants planned to urbanise the area, and whilst this had not been the basis for the decision, the fact that there had been previous applications to build on the site had somewhat coloured the Panel's view. However it was maintained that the Panel had considered the application on its own merits, irrespective of any planning history and the Connétable affirmed that the Panel's decision had been reasonable. He stated that the notion of the urbanisation of the plot had developed after the matter had been considered by the Panel. It was noted that the current Planning Law did not protect against 'bad' buildings being constructed if they were exempt and this was acknowledged as an issue to be addressed in Law. The Panel were not 'happy' with the north wall remaining but they were powerless in Law to do anything about it.

5.11 The Board questioned why the planned fruit garden was deemed out of character within the countryside when Jersey had a history of walled gardens and orchards. Connétable Hanning responded that such gardens were normally adjacent to the property owned by the gardener and it was difficult to justify in this instance as the complainants no longer lived next door to the site.

5.12 The Board enquired whether it was reasonable to serve an enforcement notice on the complainant when they were simply the victims of timing and the Connétable replied that the Law to protect the countryside could not simply be ignored because of poor timing. He reminded the Board that the issue of timing had been solely a matter for the complainant. Policy C6 was in place to prevent the urbanisation of the countryside and to ignore infractions would set a dangerous precedent.

5.13 Deputy Hill refuted the suggestion that the complainants were using a 'wooden horse' approach to develop the land for housing and questioned why an application from 12 years earlier had been a facet of the current application. The complainants' daughter advised that her parents had decided to retain the land when they sold Leighfield, in order to prevent any opportunities for 'garden grabbing' in the future. Deputy Hill maintained that the statement within the Minister's submission that 'any third party looking at the site might assume from the appearance of the site that the works carried out so far may be a preamble to future more permanent residential development' and the reference to the application made in 1999 had placed an emphasis on the notion of future development, and contrived to introduce an element of uncertainty as to the applicant's intentions. Deputy Hill concluded that this was unfair. He also drew attention to the fact that the Chairman of the Planning Applications Panel lived alongside the site, yet had not raised

concerns before the wall had been constructed and that the Transport and Technical Services officers had confirmed that there were no visibility problems at the entrance to Leighfield. The Department had made a number of errors in communications with Mr. De La Haye and the advice given had been ambiguous. Responding to comments made by the Senior Planner (Appeals) regarding the wall's 'ugly' appearance, Deputy Hill reminded the Board that if it was permitted to remain, the wall would be covered with fruit trees and the whole site would be beautiful. He did not believe that a precedent would be set and questioned whether the fact that 8 individuals had considered the application disproved the claim of discrimination, particularly when the Minutes of the Planning Applications Panel meeting on 24th November 2010 recorded a number of subjective comments expressed by the Panel members. He concluded that no real reason had been given to explain why the access road to the wholesale food warehouse was deemed acceptable when the wall at Leighfield was not. He thanked the Board for hearing the case.

5.14 Connétable Hanning countered the suggestion made by Deputy Hill that the Chairman of the Planning Applications Panel could have taken action in the matter. He reminded the Board that there were many instances where he himself, as Connétable of his own Parish of St. Saviour, drove past developments and was entirely unaware whether they had the correct permissions – indeed it was only when a matter was presented to the Panel that he was made aware of such a fact. The Board agreed that it was therefore unfair to infer that the Chairman of the Panel was in any way culpable and that this should not be part of its consideration of the case

5.16 The Chairman thanked both parties for attending the meeting and they then withdrew from the meeting to enable the Board to consider its findings.

6. The Board's findings

6.1. The Board agreed that the site visit had been invaluable and had enabled its full assessment of the size and location of the walls. It acknowledged that it was common in the Island to see walled gardens and orchards and it was not necessary for them to be located adjacent to the owner's house. Certainly the increase in popularity of allotment gardens dispelled the myth that tending a plot some distance away from the gardener's home could not be construed as a productive and acceptable rural use of the land.

6.2 The Board whilst having every sympathy for Mr. and Mrs. De La Haye's situation, accepted that in making the decision to refuse their application, due process had been followed by the Department. It was accepted that the planning applications process had to be governed by the relevant laws and policies adopted by the States of Jersey. The Board, having carefully reviewed the decision made by the Planning Applications Panel, found it to be entirely in accordance with the policies which applied to the application. Accordingly the Board had no option but to reject the Complainant's contention that the decision made by the Minister could be criticised on any of the following grounds –

(a) contrary to law;

(b) unjust, oppressive or improperly discriminatory, or was in accordance with a provision of any enactment or practice which is or might be unjust, oppressive or improperly discriminatory;

(c) based wholly or partly on a mistake of law or fact;

(d) could not have been made by a reasonable body of persons after proper consideration of all the facts; or

(e) contrary to the generally accepted principles of natural justice.

6.3 However, the Board questioned whether the construction of a wall necessarily equated to 'urbanisation' of a site and considered that there had been scope for greater dialogue between the Department and the applicants which could have assuaged the situation. It was acknowledged and accepted that mistakes had been made in early communications between the Department and the complainants. The former could have communicated future intentions more clearly to the Department and advised of the change in ownership of the property, whilst the latter should have ensured that the advice given was consistent and unambiguous.

6.4 The Board was disappointed that a pragmatic compromise had not been sought to resolve the situation. It suggested that once it had been established that one half of the wall was exempt, conditions could have been placed on the entire structure to mitigate its impact on the setting. The Board was mindful that, had Mr. De La Haye built the wall whilst the whole area of land was in his ownership, there would have been nothing that the Planning Department could have done about it, apart from addressing the issue of visibility at the entrance to Leighfield. The fact that a wall could be slated as ugly, incongruous and harmful to the character of the countryside by the Department, yet could also be regarded as perfectly acceptable in the eyes of that same Department solely dependent upon its location within the domestic curtilege of a dwelling house, was a curious anomaly in the current Law which the Board considered should be addressed if the Department's intention to protect the countryside was to be maintained consistently and fairly.

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

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Mrs. C. Vibert

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Mr. S. Platt