STATES OF JERSEY

STATES OF JERSEY COMPLAINTS BOARD: FINDINGS – COMPLAINT BY MR. T. BINET AND MS. R. BINET AGAINST THE MINISTER FOR THE ENVIRONMENT REGARDING THE PROCESSING OF PLANNING APPLICATIONS BY THEM AND THE VARIOUS COMPANIES IN WHICH THEY HAVE SIGNIFICANT INTERESTS

Presented to the States on 27th September 2019
by the Privileges and Procedures Committee

STATES GREFFE

2019 R.125

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 a decision of the Minister for the Environment regarding the processing of Planning applications by Mr. T. Binet and Ms. R. Binet and the various companies in which they have significant interests.

Deputy R. Labey of St. Helier
Chairman, Privileges and Procedures Committee

STATES OF JERSEY COMPLAINTS BOARD

19th June 2019

Complaint by Mr. T. Binet and Ms. R. Binet against the Minister for the Environment regarding the processing of Planning applications by them and the various companies in which they have significant interests

Hearing constituted under the Administrative Decisions (Review) (Jersey) Law 1982

Present

Board members –

G. Crill (Chairman)
C. Beirne (Deputy Chairman)
J. Eden

Complainants –

T. Binet
R. Binet

Minister for the Environment –

A. Scate, Group Director Regulation, Department for Growth, Housing and Environment
A. Townsend, Principal Planner, Department for Growth, Housing and Environment

States Greffe –

L.M. Hart, Deputy Greffier of the States
K.L. Slack, Clerk

The Hearing was held at 10.00 a.m. on 19th June 2019, in the Blampied Room, States Building. It started with an interlocutory hearing in private, during which both parties were afforded the opportunity to make representations as to what the Board should, or should not, be able to take into account when considering the complaint, and then moved into public session.

Note: Throughout the report, any reference to the 'Planning Department' is taken to mean the relevant section of the Department for Growth, Housing and Environment and, by extension, the Minister for the Environment.

1. Site visit

1.1 In advance of the hearing, on 7th June 2019, the Board members, accompanied by the Principal Planner, Department for Growth, Housing and Environment, the Deputy Greffier of the States and the Clerk, attended West Point Farm and Sandhurst in St. Ouen, where they met with Mr. T. Binet and were shown around those sites and saw *inter alia* the staff accommodation for the farm workers. They then travelled to the Jersey Royal Company packing facility at Peacock Farm in Trinity, and were given a comprehensive guided tour by the Technical Director of the Company.

2. Opening

2.1 The Chairman opened the hearing by introducing the members of the Board and outlining the process which would be followed. He informed those in attendance, including representatives from the media, that any reporting of the proceedings should not identify particular individuals employed by the Planning Department other than those listed as being in attendance, because their identities were irrelevant for the purpose of the hearing, which would focus on the function and processes of the Department. If that strong request was not respected, the Board would report to the Privileges and Procedures Committee and ask that body to take the necessary steps. It would also have a material impact on how future hearings were conducted.

2.2 The Chairman indicated that he intended to invite the Complainants to outline their complaint (without reference to the exhibits they had provided in advance of the hearing). Representatives from the Planning Department would then answer questions from the Board, with the Complainants having the ability to intervene if they required clarification on any point.

3. Summary of the Complainants' case

3.1 Mr. Binet indicated that over the previous 5 or 6 years, the Planning Department had treated applications for planning permission, made by the Complainants, as 'sport'. This had concluded in the 2018 decision to refuse the Complainants' outline application (PP/2017/0034) to demolish a shed containing a workshop and 3 staff bedsits as well as 13 polytunnels at West Point Farm and to construct an agricultural shed to the south of the site and 4 three-bedroomed staff accommodation units. Mr. Binet described the refusal decision as 'quite outrageous', and informed the Board that it was at this point that he and his sister had realised that they 'might as well not bother applying for anything'. They had been reluctant to make a formal complaint, but had felt that they had been left with no choice.

3.2 The Complainants' case was set out in a detailed written submission, which had been provided in advance of the hearing and which set out the background to their dealings with the Planning Department, which had culminated in the complaint.

3.3 The Complainants, who are brother and sister, had been in business together for in excess of 40 years, with their interests primarily in farming, but also in property development. They had originally wholly owned Fairview Farm Ltd.

and, at the end of 2003, had formed the Jersey Royal Company into which they had transferred Fairview Farm Ltd. and had invited other local farming businesses to do likewise. The Binets had remained as Directors of the Jersey Royal Company and, at the time that that the trading element of the Company had been sold to Produce Investments Limited, a United Kingdom plc. in May 2014, had held 38.8% of the shares

3.4 The property holding companies, which had formed part of the Jersey Royal Group and which were owned by the Complainants, were not acquired at this juncture, but a 9-year lease had been entered into in respect of the key properties and a 'call option' in favour of Produce Investments Limited had been placed on Peacock Farm, West Point, Sandhurst and l'Emeraude. Peacock Farm, which was the original and main facility, had already been purchased by Produce Investments Limited, and the Complainants informed the Board that Sandhurst had recently been acquired.

3.5 At the time of the inception of the Jersey Royal Company, a number of smaller farmers had left the industry, and the Company had acquired in excess of 4,000 acres of land. However, whilst many of the other farmers who had been partners in the Company were based in the east of the Island, there had been a shortage of facilities in the west. Moreover, staff accommodation had been in short supply across the board. It was noted that the Jersey Royal Company employed between 400 and 500 individuals, some of whom were accommodated as part of their employment.

3.6 For reasons of efficiency, the intention had been to create one single centre of operations for the Jersey Royal Company in the west of the Island; a suitable greenfield site had been identified, and discussions had been held in this regard with the Planning Department, which had 'informally' approved the acquisition. Following the purchase of the land, the Planning Department had advised the Jersey Royal Company that 'any [planning] permission on the site would be vigorously resisted', and had suggested that the Company should, instead, identify and buy some smaller brownfield sites, because they were a larger entity and stood a better chance of obtaining planning permission if they so did. To avoid the 'controversy' of making several simultaneous applications for planning permission, the Department had recommended a phased approach.

3.7 The Jersey Royal Company had, as a consequence, purchased West Point and Sandhurst in the west of the Island and another site in the centre. 'Given the situation, it was effectively a seller's market, and Jersey Royal Company had no option but to pay heavily for the purchases …' the Complainants submitted.

3.8 However, despite the active support of the Planning Department for the purchase of the sites, and an understanding that planning permission would be forthcoming, it had proved difficult to obtain the same.

3.9 The Complainants informed the Board that they had been to court on a couple of occasions in respect of planning matters. Whilst they expected to 'win some, lose some', they felt that there was a perception within the Planning Department that they were 'fair game', which they sensed could be a legacy issue from the time when they had dealt with politicians who had made planning decisions. They had expected a commonsense approach from the Department, but sensed

that the officers implemented planning policy 'as they [saw] fit' and would interpret it differently, depending on who had made the application. A change in senior staff in the Department had resulted in a significant transformation in the way in which applications made by the Complainants were dealt with. In their written submission, the Complainants stated, '… we have been placed in a position whereby, if we wanted to achieve anything in planning terms, we had to be prepared to challenge the Planning Department. This hasn't been appreciated ...'. Prior to this, albeit that some of the applications which the Complainants had made might be deemed controversial, they would, nevertheless, have received a 'reasonable hearing' and encountered 'commonsense'.

3.10 Mr. Binet indicated that their long-term strategic plan was 'evolutionary' and that the Planning Department were aware thereof. Following the change in senior staff at the Planning Department, the Complainants had been urged not to make 'piecemeal' planning applications, but to provide a co-ordinated plan. In 2016 he had participated in 3 meetings, lasting over 2 hours each, with senior officers from the Department, at which he had sought pre-application advice on the outstanding requirements of the Jersey Royal Company and the level of accommodation required for various sites. These had been reviewed and discussed in detail. Upon the conclusion of those meetings, one officer had summarised accurately the Complainants' intentions, whilst the other had become angry and stated that they should not receive permission for anything at all.

3.11 Subsequent to those meetings, the Complainants had engaged a professional planning consultant to handle their planning applications in order to distance themselves from the process. 'Why should we have to counter a bundle of lies, as applicants?' they asked. 'We are sick and tired of being mistreated'. They had also taken the decision to abandon their overall plan and to focus attention on 'well designed staff / operating facilities on sites where need was most urgent … then consider further applications, if any, at a later stage'. This had included development at West Point and Sandhurst.

3.12 The outline application (PP/2017/0034) for the work at West Point (referenced at paragraph 3.1 above) had been submitted to the Planning Department in January 2017. It had been assessed as a major application, for which the Department's target timeframe for process was 13 weeks. On the basis that Planning Officers recommended that the application should be refused, it had been referred to the Planning Committee, whose members had visited the site on 13th February 2018. The public hearing had taken place on 15th February 2018, some 13 months after the application had been submitted, and after court action had been threatened twice by the Complainants. The Complainants' planning consultant had attended the meeting on their behalf and had spoken in support of the application. In advance of the meeting, officers from the Department had prepared a report for the Committee ('the report').

3.13 The Complainants claimed that the report contained statements that were 'simply not true' and were not relevant to the application. In their view, this demonstrated an 'obsession with [their] applications, whether they were agricultural, or non-agricultural'. *Inter alia* it had been stated in the report that the applicant (represented by Mr. Binet) 'used to own staff worker

accommodation in the [Built-Up Area] (The Beach Hotel) and sold it for private residential development, thus creating a shortfall in their provision'. In their written submission, the Complainants had described this statement as 'highly damaging' and 'completely untrue'. It had also prompted a neighbouring resident, who had read the Minutes of the Planning Committee meeting at which the application had been considered, to complain to Mr. Binet that he and his sister were 'taking advantage'.

3.14 Mr. Binet informed the Board that the Beach Hotel had not been sold; it remained in the ownership of the same development company ('Sherrington Ltd.', which had been set up by the Complainants), which had purchased the same some 17 years previously. The hotel had been acquired, with extant planning permission for self-catering units, before the Jersey Royal Company had been established, and it had been intended to redesign the existing permission to convert it into a small number of high quality residential apartments. Mindful of the shortage of staff accommodation (referred to in paragraph 3.5), in 2005, the Jersey Royal Company had approached the Complainants to enquire whether the Beach Hotel could be leased to the Company to provide accommodation. Permission for a temporary change of use had been obtained in 2006 for a limited period, and had subsequently been extended until such time as the Hotel had become uninhabitable and had been demolished for redevelopment. The Complainants contended that those officers within the Department who had dealt with the West Point application clearly understood the situation in relation to the Beach Hotel.

3.15 The Complainants' application (PP/2017/0034) had sought to replace the sub-standard accommodation that currently existed at West Point with an accommodation block for a maximum of 24 workers, in order to provide 'much needed staff accommodation for the Jersey Royal Company in the West of the Island, an intention agreed with a previous Planning Minister and Chief Planner'. The Board recalled that it had visited the accommodation at West Point, which comprised 3 x two-bedroom units, and had been shocked by the condition of the same. It was noted that, in the report, the Planning officer had described the accommodation as '3 single person occupancy bedsits', whereas the units could house 6 persons. The Complainants felt that this had been done 'to exaggerate the effect of the proposed development and help justify a recommendation for rejection'.

3.16 Application PP/2017/0034 had also sought permission for a shed to replace the existing workshop and a temporary spray store that had been at Sandhurst. Ms. Binet stated that the Complainants wished for the Jersey Royal Company to work as efficiently and ergonomically as possible, and to be environmentally friendly, by reducing the carbon emissions from transferring staff from their accommodation to their place of work, or moving the seed potatoes. The staff had to work 'long hours in difficult conditions', and it was not appropriate to expect them to travel from one side of the Island to the other before starting their work. The Complainants wished to get the sheds in the correct location to facilitate efficient working.

3.17 Mr. Binet informed the Board that the Department had fully understood the Complainants' situation, but had not presented it fairly in the report. Not only did the report contain inaccuracies, but insufficient emphasis had been placed

on the importance of the contribution made by the Jersey Royal Company to the rural economy. Mr. Binet indicated that the Company maintained 500 linear miles of hedgerow and contributed to the wellbeing of the countryside. 'It looks good. Who keeps it that way?' Nor had the report referenced the work that the Complainants had undertaken in returning brownfield sites to agricultural use. Moreover, in connexion with the proposed shed, the report referenced Policy ERA (New agricultural buildings, extensions and horticultural structures). It was written, 'Policy ERE6 sets a strong presumption against such proposals unless it is essential to the proper function of the farm holding. West Point is not a farm holding.' In the Complainants' written submission they had stated, 'This claim is absurd. If this, part developed, part modernised unit, entirely central to the running of 3,000 vergées of land doesn't constitute a farm unit, it begs the question, what does?' The report had also referenced the Applicants' long-term intention for replacing the spray store as 'unclear'. This was challenged by the Complainants, who indicated that Departmental officers were fully cognisant of their intentions, which had been explained on several occasions.

3.18 The report further stated that 'The application is not accompanied by any information from the Jersey Royal Company that this new shed is essential to its proper function – thereby failing to satisfy the policy test'. In their written submission, the Complainants drew the attention of the Board to the fact that the current Managing Director of the Jersey Royal Company had provided the Department with full justification for the development in a letter dated 17th March 2017. Moreover, Planning officers had been aware that the shed was to be a replacement for essential, existing, facilities that were in full-time use, and had acknowledged that both the existing shed and the staff accommodation were sub-standard.

3.19 The Planning Committee had been informed that the Complainants' application was contrary to Policy ERE1 (Safeguarding agricultural land), because it would replace the polytunnels for growing. The Complainants contended that the only reason why the site was in agricultural use was because, when they had acquired it, they had cleaned up in excess of 20 years of 'accumulated rubbish'. Moreover, the polytunnel growing was minimal in the context of the whole area and, as previously indicated, the principal purpose for which the site was used was as the western base for a farm business that employed over 400 staff and cultivated 'over one third of the Island's workable land area'. It already housed a new 22,000 sq. ft. warehouse, which stored in excess of 1,000 tons of seed potatoes. The Complainants questioned how the replacement shed could be regarded as contrary to policy, when this shed had been approved.

3.20 The Complainants drew the attention of the Board to the fact that the Environmental Land Control section had commented in a favourable way on the application on 20th April 2017. It had written, 'The current staff accommodation, machinery workshop and store on site are reaching the end of their useful life. The workshop is unsuitable for current farm machinery (tractors are unable to enter due to height) and the staff accommodation is of substandard quality. Due to supermarket assurance protocols, staff accommodation must be fit for purpose and are audited using the Smeta Ethical trading initiative … This application would allow the phasing out of some substandard accommodation from the accommodation portfolio and assist some

company restructuring to develop an operations and staff base in the west of the island (sic).' The Environmental Land Control section had supported the application, subject to Planning Obligation Agreements that the accommodation was occupied solely by staff employed in primary agricultural production, and that the store and machinery workshop was tied to agricultural usage.

3.21 However, on 1st February 2018, just 2 weeks before the Planning Committee meeting, Environmental Land Control had submitted a further response, in which it had said, 'It is noted in the public comments that the staff accommodation will be used for senior staff members of the Jersey Royal Company … It has become unclear what type and how many staff will be placed at this site … it is understood that units of good quality staff accommodation are required for the continuation of farming within the Island … The Land Controls cannot be supportive of this application for 4 manager units without further information on the number, type and further possible requirements of the Jersey Royal Company.' In their written submission, the Complainants indicated that they had always been perfectly clear, from the time of making the application, about the number of – and intended use for – the accommodation units.

3.22 'Why dust off the file so long after the application?' asked the Complainants. They indicated that, on learning of these concerns, they had immediately contacted their planning consultant, who had written to the Department to state that the Complainants would be happy to restrict the usage of the accommodation to agricultural workers, or whomsoever the Planning Committee felt was appropriate, inviting conditions to be placed on the permit to this effect. However, the Complainants felt that this had been ignored by the Department and had not been passed on to the Planning Committee. Mr. Scate indicated that if a letter had been submitted, it would have been given to the Planning Committee, but might not have been specifically referred to in the meeting of the Committee.

3.23 In their written submission, the Complainants had highlighted myriad other issues with the content of the report and had concluded, '[Departmental officers] have made statements that they know to be untrue and have omitted essential information that they know would have been supportive of the application. In so doing, they have actively sought to mislead the Planning Panel with a view to discrediting both the applicants and the application.'.

3.24 The Complainants informed the Board that, in their view, planning applications should be anonymised, and the decisions should be made on the merits of the site, should be fair to all, and should not depend on who had submitted the application. They queried how the Green Zone policy could be dismissed to enable wealthy residents to construct mansions and gate-houses in the countryside whereas, 'if you're a farmer, there are pages and pages against'. In their written submission, they had referenced a property at Trident Nurseries, with which they were familiar, because they had previously owned the site and had sought to obtain planning permission for a change of use from a dilapidated greenhouse site to a domestic dwelling and restored agricultural field. They had written, 'After 2 years of intense negotiation, Planning permission was finally granted for a large farmhouse style dwelling (approx. 10,000 sq. ft. in total), the

siting of which had to be in the North West corner of the site and the entirety of which had to be constructed in traditional granite; this on the insistence of the Planning Minister of the day. In addition [the Complainants] were told, in no uncertain terms, that not one single square foot of additional development (over and above that approved on the Permit) would ever be permitted on the site'.

3.25 The Complainants had sold the property and it had ultimately been acquired by a high net worth individual, who had been given planning permission for a property, almost 3 times the size (28,000 sq. ft.), believed to be one of the largest properties in the Island, with no requirement for any granite to be used. 'We think it's shameful'. 'The rich do what they want', they said, and indicated that the gate-houses at that property were 'larger than the accommodation block for our people who work in the fields around'. In relation to the officers of the Department, the Complainants said that they 'have seen people living in standards that they wouldn't want to live in and frustrated our attempts to accommodate them properly'.

3.26 Departmental officers denied that the Complainants had been treated differently from other applicants, and further rejected the suggestion that the Department had interpreted the Green Zone policy to enable the aforementioned high net worth individual to create staff accommodation within one of the gate-houses. In their written submission, the Complainants had highlighted the content of the officer report which had accompanied the application for the development at Trident Nurseries (RP/2014/0042). Therein, it had been stated in relation to Policy NE7 'Green Zone', 'The area will be given a high level of protection and there will be a general presumption against all forms of new development for whatever purpose. It is recognised, however, that within this zone there are many buildings and established uses and that to preclude all forms of development would be unreasonable. Developments such as domestic extensions and alterations; replacement dwellings; limited ancillary or incidental buildings to appropriate and non-intrusive uses and new development on existing agricultural holdings may be permitted where the scale, location and design would not detract from, or unreasonably harm the character of the area and the distinctiveness of the landscape character of this area.'. The Planning Officer had recommended the application for approval, subject to conditions.

3.27 With regard to the delay in determining the application for West Point, the Board was referred to the minutes of the Planning Committee, in which it was stated that 'the case officer confirmed that the Department had been seeking to provide a fuller picture by obtaining the details of all staff accommodation for which permission had been granted but which may not yet have been constructed. This had taken some time and there had been some resistance.' The Complainants indicated to the Board that they had provided the requisite information to the Department within 8 days. They stated that they had been made to appear 'unco-operative' to the Planning Committee, whereas they had done 'nothing but push to get this done' and had provided all information requested, usually by return. They had contacted the Department and had not received any correspondence in return, which they opined would have 'increased the entertainment level' in the Department. 'This should not have taken 400 days to resolve', they objected. They had been unaware that there was a mechanism that enabled applicants to ask for their applications to be

determined within 28 days of a request to that effect, and indicated that they had been 'left to fend for [themselves]'.

3.28 In relation to the ability for individuals to complain to an independent Planning Inspector, if dissatisfied with a decision of the Planning Department, or the Planning Committee, the Complainants indicated that they had lodged an appeal in March 2018. They had placed the same on hold because they did not believe that it would be fair to them, because the Inspector would have recourse to the report. 'When we can't trust the officers, why would we go to appeal?', they asked.

3.29 'We have turned up with no expectations', the Complainants told the Board. 'We are used to hitting brick walls'. 'Should the process be honest? We presumed it should be and think it isn't.'

4. Summary of the Minister's case

4.1 The Department, on behalf of the Minister, had also provided the Board with a written submission of its case in advance of the hearing. Therein, the Department had stated, 'In assessing a planning application one has to consider a range of issues, which requires judgments to be made. Inevitably therefore different parties may reach different conclusions. This includes the applicant, the Department, the Committee and other interested parties. If the Department balances factors differently to others and reaches a different conclusion to any of these parties, this does not mean that it is necessarily incorrect, let alone unreasonable or untruthful.'.

4.2 The Board was reminded that the decision in relation to the Complainants' application had not been made by the Department, but by the Planning Committee, as was appropriate in any case where the application was contrary to policy and / or where more than 3 or 4 objections to the scheme had been submitted. When considering the application, the Committee would not have been solely reliant upon the report. It would have been furnished with details of the application, the applicants' Planning Statement, letters from objectors and consultees, and the responses from the Complainants. Moreover, the Complainants had been represented at the meeting of the Planning Committee by an experienced planning consultant, who, together with the Managing Director, Jersey Royal Company, had spoken in support of the application. 'The final decision lies with the Committee which can of course reach a decision which is not the same as the recommendation made by the Department', the Department submitted. 'The decision on an application must be made upon its planning merits. These will usually require subjective assessment … Parties will therefore often reach different views.'

4.3 The Department accepted that any applicant whose application had been refused would be disappointed and would probably disagree with the judgment. However, it argued strongly that it was not biased, nor seeking to prevent the Complainants from obtaining planning permission. 'We don't mind decisions being challenged', Mr. Scate informed the Board, 'it is a matter of course that decisions create conflict; we please and annoy equally.'.

4.4 The Board was reminded that there was provision within Planning legislation for any person who was unhappy with a decision of the Department, or the Planning Committee, to appeal through the Judicial Greffe to an independent Planning Inspector. This structural change to the system had been introduced in 2015 and was 'accessible and affordable'. Whilst the Complainants had appealed the decision in March 2018, they had subsequently put the appeal on hold, and that had remained the case for in excess of a year, which was 'entirely unprecedented'. In its written submission, the Department had commented that 'The planning system therefore allows the Complainant several opportunities to contest the Department's assessment and to make his case to the relevant decision-maker (at both the application and appeal stages) before, or rather than, resorting to a complaint.'.

4.5 In relation to the advice that had been offered to the Complainants in the past by senior officers, who had since retired from the Department, it was stated that 'This was given in the light of policies of the 2002 Island Plan which was superseded by the 2011 Island Plan and then again by the 2014 revision to the 2011 Island Plan'. Planning policies, which were approved by the States Assembly, would change over time, and officers were required to adhere to the policy in force at the time. Mr. Scate conceded that a 'wider debate about the relevance of those policies' needed to take place, because a modern policy in respect of agriculture in the Island was required.

4.6 The Complainants had frequently sought guidance from the Department in advance of making an application, or following a refusal. The Department was clear in its written submission that 'advice is offered, free of charge, on a *Without Prejudice* basis. It is not an opportunity to strike a deal, or to seek a commitment from the Department ahead of a formal application being submitted, as that would undermine the open, transparent application process which involves advertising an application and allowing interested parties to participate – something the informal Pre-Application process does not do. The planning service does not and cannot only serve the applicant … Such advice cannot be perceived as creating a legitimate expectation.'.

4.7 The Board was reminded that the application site was located within the Green Zone, and that the Island Plan set a clear presumption against development therein, unless the applicant could provide 'robust and compelling' evidence to demonstrate why a development justified an exception.

4.8 In relation to the claim by the Complainants that the Green Zone policy could be changed for wealthy residents, Mr. Scate denied that this was the case and emphasised that the policy was applied on a consistent basis. Mr. Townsend echoed this view, and stated that the Department did not have an issue with people obtaining planning permission for reasonable schemes. He informed the Board that the current policy in the Green Zone in respect of agricultural development was 'tighter' now than in the past, under the 2002 Island Plan.

4.9 In respect of staff accommodation, the Departmental view was that this should be located within the Built-Up area, or created by converting existing buildings. The use of temporary accommodation was a last resort, but 'new build is beyond the last resort', stated the officers.

4.10 With regard to the 3 pre-application meetings that Mr. Binet had held with Department (referenced at paragraph 3.10 above), officers confirmed that they were aware of the Complainants' proposals, but denied that they had been agreed, because there had been a difference of opinion over the way to progress. As a consequence, there was 'no bigger picture of approval'. In the Department's view, the Jersey Royal Company's facilities, demands and resources went beyond the Complainants' properties, and it was incumbent upon the Department to look at the Island as a whole. As an example, when seeking to remove an agricultural building, it was the responsibility of the Applicant to demonstrate that it was redundant to the industry as a whole. Mr. Scate suggested that if there was an 'agreed long-term vision for agriculture', it would be more straightforward for the decision-makers. There had been discussions over the Complainants' long-term vision, but it had not been agreed, and the Department was not clear on the Complainants' 'overarching plan'.

4.11 The Board queried how permission had been obtained to construct the 22,000 sq. ft. shed (referenced at paragraph 3.19 above). Mr. Townsend indicated that the original application for houses and a shed at West Point, to replace a previous shed, dated back to 2008. Since that time there had a been a change of leadership in the Department and, more significantly, 2 further iterations of the Island Plan. In his experience, at that time, if an application had the support of Land Controls, it was usually accepted that the needs test was met. However, he stated that now the 'bar [was] higher than before', and there was a strong presumption against development in the Green Zone. 'The policy is very negative towards it and we have to take that into account', he informed the Board. He accepted that the farmers were the custodians of the landscape, and acknowledged that the countryside looked beautiful, but reminded the Board that some areas had been protected and kept free from development as a result of the way in which the Department had administered the relevant policies.

4.12 Mr. Scate indicated that, in his view, the Green Zone policy was 'harsh', and that he had previously expressed the opinion that it should be reviewed. However, the policy had been set by the States Assembly, and he informed the Board that he would be more concerned 'if officers were not sticking to policy, rather than doing so.'.

4.13 In relation to the Beach Hotel, the Board opined that the information that had been provided to the Planning Committee, *viz* 'that the applicant company had previously owned staff accommodation in the Built-Up area at the Beach Hotel but had sold this for private residential development, thus creating a shortfall in the provision of staff accommodation', gave a clear impression that the Complainants had created the need for accommodation 'on purpose', and that the problem was of their own making. The Chairman indicated that he would have expected there to be a wider discussion in relation to staff accommodation, rather than focus on the absence of what had previously been temporarily available. In response to Mr. Binet's challenge that the Planning Committee should have been told that the Hotel had come to the end of its useful life, Mr. Townsend acknowledged that 'it could have been written differently', but reminded the Board that the Complainants' planning consultant had been at the Committee meeting and had been given an opportunity to make the situation

clear. He referenced the relevant section of the Committee Act, at which it was stated, '[the planning consultant] reminded the Committee … that the proposed new staff accommodation would replace accommodation lost in the east of the Island – 66 beds at the Beach Hotel – which had not been sold, as stated by the Department, but had been developed by another company in a perfectly legitimate manner'.

4.14 Mr. Townsend informed the Board that he had reviewed the Department's processes and stated, 'I was rather proud of us ... I think we are unique, probably, in the States in the way that we operate and we have continually attempted to improve.'. He emphasised that all of the Department's policies were available online, as were all applications and the departmental officers' reports and recommendations. In the past, not all applications were made public, the Planning Committee would have met in private, and the only route of appeal had been to the Royal Court. In contrast, the Complainants' case had been heard by the Planning Committee, in public; the Committee had visited the relevant site, had received background papers, and both parties had been afforded the opportunity to put their case to the Committee. 'This application … went through each part of the process and the issue of contention is the recommendation part', he said, but indicated that the broad process aligned with the 'excellent structure' that the Department had in place.

4.15 Mr. Scate explained that the Department could not consider anything that was not presented to it as part of an application. 'We can't make assumptions. Third parties need to know what we have taken into account'. He informed the Board that the Department had not had sight of a strategic need document from the Complainants that could be firmed into an agreed statement between them and the Department. He stated that he didn't doubt that, in the past, a verbal agreement had been reached between the Complainants and former officers, but that agreement had not been written down, and he identified that this way of conducting business had been a driver for the move to a transparent system, so that third parties had the ability to make a challenge. 'We have to make a decision in full public gaze', he indicated, and contended that the application made by the Complainants had not included a compelling strategic case for a decision to be made contrary to policy. Moreover, several people in the vicinity of the application site had objected to the application and had addressed the Planning Committee. He emphasised that the onus was on the Applicant to make the case and to provide all the relevant detail. The Department had to be careful not to 'lead' Applicants, and if officers continually reverted to them it could 'build an expectation of a positive decision'.

4.16 The Board was reminded that the process had not yet been completed, because the Complainants' appeal to an independent Inspector from the United Kingdom had been placed on hold. That system was administered by the Judicial Greffe, rather than the Planning Department and was robust, professional and affordable. The Inspector would review the decision and expect new evidence to be submitted. They would hear from the Complainants and the Department and would, in some cases, request the parties to submit statements of common ground. If the Complainants were of the view that the report was 'lacking', they would have the opportunity to highlight this to the Inspector. 'If we have got something wrong, we do see things challenged on appeal' said Mr. Scate.

4.17 When asked why Environmental Land Control would have changed its opinion of the Complainants' application, as referenced at paragraph 3.21 above, Mr. Scate suggested that if that team was of the view that the accommodation was to be occupied by 'managers', it would have felt that those individuals would be more able to access the wider housing market, but it would depend on their earnings, although he conceded that he did not know how Land Control would define 'management'. The Board queried whether, if accommodation was approved, the Planning Department would impose conditions to restrict the use to a particular category of user or industry. Mr. Scate indicated that some developments had had conditions applied to restrict the occupancy, but in more recent times, the Department preferred to enter into legal agreements, which had 'more weight'. An agricultural restriction would make it clear that the accommodation was for the use of 'persons employed in the agricultural industry', but the Department did not differentiate between seasonal, or longer-term occupancy, or the occupants' levels of seniority.

4.18 In relation to the delay in processing the Complainants' application, Mr. Townsend accepted that the 'application took longer than we would like'. He cited 4 applications which had been made at the same time: those for West Point, Sandhurst and 2 for another farm (Woodside Farms). These had required the Department to balance environmental protection against the demands of an agile industry. He cited a lack of resources in the Department and indicated that the team had been 'struggling' with workload. In relation to the current application, Mr. Townsend said, 'It is complex. We have a complex mixture of issues, needs and indeed companies, and to try and get your head around that, and not make a rush decision is important.'.

4.19 Mr. Scate informed the Board that he found it 'startling' that the Complainants had not been cognisant that they could have made a request for their applications to be determined within 28 days (as referenced at paragraph 3.26 above), particularly because they had employed a professional agent with 'substantial experience' of the planning system in the Island, and 'any planning consultant would be aware'. Moreover, it was set out in 7 pages of guidance, published by the Department on the gov.je website under 'Making a planning or building application'.

4.20 In conclusion, he indicated that the Complainants had a long history of applying for planning permission, and many applications had been successful. In the past, they would have been dealt with on a personal basis by the Minister, or a senior officer, which was 'better' for them. However, the planning process was now tighter and more rigorous, and the introduction of 3rd party appeals meant that officers were '[kept] on the ball'. 'We have tried to be reasonable', he said, and indicated that the Department wished to achieve a 'resolution' in relation to the Complainants' case. Since the refusal of the Complainants' application, the Department had offered advice on several occasions in an endeavour to reach a constructive outcome.

5. Closing remarks from the Chairman

5.1 The Chairman thanked the Complainants and the officers from the Planning Department for attending the hearing, and for their engagement in what was a 'difficult and sensitive' matter. He indicated that a summary report would be prepared and circulated in due course for both parties to comment on the factual accuracy. Thereafter, the Board's findings would be appended thereto.

6. Findings

6.1 The Board thanks the Complainants for having put together such a comprehensive bundle in support of their complaint. This has assisted the Board considerably in understanding the complex and lengthy background to the case. The original complaint included allegations of misconduct by individual Planning Officers and argued that personal antipathy towards the Complainants had influenced the way in which their planning applications had been administered. The Board can only look at decisions, acts or omissions relating to any matter of administration by a Minister, or Department, within the context of Article 9(2) of the Administrative Decisions (Review) (Jersey) Law 1982.

6.2 Prior to the hearing taking place, following discussions with those involved, the Board had determined that it would restrict its considerations solely to administrative matters and would make no comment about specific officers' personal conduct or motivation in relation to this case. However, the Board acknowledges that there may have been moments during the hearing when this determination limited the Complainants' capacity to substantiate their claims, or to challenge statements made by the Department which they considered inaccurate or selective, particularly towards the latter part of the meeting. The Board hopes that the Complainants feel the hearing was a beneficial experience nonetheless.

6.3 The Board had considerable difficulty in determining this matter. Not only was the history of the Complainants' entanglements with the Planning Department long and complex, but the involvement of different people on the Department's side, as well as amendments to the Island Plan over the relevant period, meant that the game, rather than merely the goalposts, had moved somewhat.

6.4 Whilst it was acknowledged that the working relationships between the Complainants and previous senior officers and Ministers had been far from 'cosy', and had resulted in 3 applications for Trident Nurseries, West Point and La Hougue Nurseries being appealed through the Court system, there is no doubt that the Complainants considered that, previously, the Department had demonstrated an understanding and sympathy with their long-term objectives and those of the Jersey Royal Company, and had provided balanced pre-application advice. The Complainants had sought to present a co-ordinated approach, rather than 'piecemeal' individual applications, in order to adequately demonstrate their 'long game' and vision, as this had been the advice proffered in the past. However, they felt that situation had "all changed" when there had been new appointments to senior positions.

6.5 The Board accepts that, as well as new personnel at Planning, there had also been revisions to the Island Plan, and a completely new procedure for the consideration of planning applications had been introduced, which removed the Minister from the process. This placed a new onus on the Complainants as applicants, particularly where they were, in essence, seeking an exception to approved planning policy. As a consequence, the Board suspects that what the Complainants saw as an "about face" by the Department, driven by individual animosity towards them, was actually a result of the increased constraints of the revised Island Plan and, in particular, the increased presumptions against development in the Green Zone.

6.6 The Complainants stressed that their complaint was not about any particular planning decision, and they were right to do so. Although they have lodged an appeal against the rejection of their application in respect of West Point, St. Ouen, they have suspended that appeal, which will no doubt take its own course. They focused instead on what they refer to as "misleading information", "inaccurate statements" and "untruths" by Planning Officers in the Report put before the Planning Committee, and which they argue materially influenced that Committee's decision to reject the application.

6.7 The Department sought to downplay the influence of the Report in the Committee's deliberations, stating that 25% of decisions of the Committee went against officers' recommendations. The Department also suggested that at the public Planning Committee meeting, at which the application was determined, the Complainants' agent had taken the opportunity to rebut the errors contained within the Report.

6.8 The Board finds that none of the parties involved in this complaint is beyond criticism. The Complainants and, indeed, their professional planning agent, seem to not have fully appreciated that the onus was on them to persuade the Planning Committee that the application in respect of West Point justified an exception being made to the presumption against development in the Green Zone. They appear to have assumed that, because significant development had previously been permitted on the site, the next phase of development would receive an equally sympathetic level of support from the Planners. Given that it was for the Complainants and their agent to persuade the Planning Committee to regard their application as exceptional, the Board expresses some surprise that their arguments were not made more persuasively.

6.9 It is not, of course, the function of a Complaints Board to consider the quality, or otherwise, of an application, but to consider a complaint as to the treatment of such an application. It is, therefore, on this basis that the Board bases its findings as follows.

6.10 First, the Board wishes to address the matter of the length of time between the submission of the West Point application and its consideration by the Planning Committee: some 13 months. This was completely unjustified. No sound reasons for this delay were given, which the Board considers wholly unacceptable. The Planning Committee Minutes of 15th February 2018 suggest that 'the Department had been seeking to provide a fuller picture', but there is no evidence of that. Furthermore, the claim that 'there had been some resistance' insinuated that the Complainants had been unco-operative, which

was strongly contested, as they maintained that they had submitted additional information within 8 days, and this statement was never challenged by the Department. The Department accepts that the application had taken 'longer than we would like'.

6.11 The Department sought to underplay the influence of the Report on the Planning Committee's deliberations. As stated previously, the Board does not know what did, or did not, influence the Planning Committee's decision, but the Board is absolutely clear on the importance the Planning Committee may attach to a Report. As such, the Board is in no doubt that a Report must be factually correct and, when expressing an opinion, must support that opinion with sound argument.

6.12 The Board considers that the Report to the Planning Committee in respect of the West Point application fell below what should be regarded as an acceptable standard; it contained errors of fact, which were not relevant to the application, but were likely to influence the Planning Committee. It contained items of hearsay (in relation to who was intended to occupy the staff accommodation if approved) which were presented as fact and which, in any event, could have been controlled through Planning Conditions, or a Planning Obligation Agreement; and it made suppositions about the environmental and traffic impact of the proposed development, without any evidential justification. Above all, the report dwelt entirely unnecessarily and gratuitously with the question of ownership of the site and the relationship between the Complainants and the Jersey Royal Company. The identity of the owner or occupier of land should generally be irrelevant in planning matters. The identity of an owner or occupier of any land is likely to change far more frequently than the use of that land, and the Board considers that any material concerns the Department may have had regarding the restriction of the occupier of any part of the site, could have been adequately addressed through a Planning Obligation Agreement. This option does not appear even to have been considered, notwithstanding the unreasonable delay in bringing the application before the Planning Committee.

6.13 The purpose of the Report was to influence and assist the decision-making process of the Planning Committee and, whether or not it did in this case, the Department has a responsibility to ensure that its Reports are factually correct, supported by evidence, and presenting sustainable recommendations. It failed to do so in this case and, therefore, the Board upholds the complaint insofar as concerns the submission of the Report to the Planning Committee, which it considers to have been in breach of Article 9(2)(b), (c) and (e) of the Administrative Decisions (Review) (Jersey) Law 1982, in that it –

(b) was unjust, oppressive or improperly discriminatory;

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

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

6.14 The Complainants suggested, in their submission, that applications should be anonymous in order to remove questions of identity influencing the decision-making process. The Board considers that this would be impractical for a number of reasons, not the least of which is that the identification of the site of an application would immediately reveal the identity of the site owner. Rather, the Board recommends that where a development is inextricably linked to a

particular occupier, or industry, the Department should look to secure appropriate limitations through Planning Obligation Agreements where exceptions to the Island Plan may apply.

6.15 The Board welcomes the review of the existing Island Plan, particularly in respect of the Green Zone policy, which it considers to be unworkable and out of date. It appears to the Board that the current Green Zone policy was predicated on an assumption that agriculture was in decline, whereas there has been a resurgence and renewed buoyancy in the industry due to diversification. The Board is hopeful that the revised Island Plan will acknowledge the need for continued investment in the capital assets of an evolving industry, whilst providing optimum protection against unnecessary encroachments into the countryside.

6.16 The Board considers that the Department made judgements about the application within the boundaries of its authority, but it is concerned that the scope for such judgements within the current Island Plan is very wide and allows broad, subjective, professional adjudications to be made. The Board is keen to see firmer objective universal standards detailed within the revised Island Plan, which will ensure the Department will be free from any accusations of subjective bias in the future.

6.17 The Board acknowledges that exceptional circumstances to development in the Green Zone can apply, and that the Complainants should have been asked to prove the exception was warranted. Had the Department wished, it could have requested specific supporting evidence and highlighted the areas within submissions which were considered insufficient in detail. However, the Department chose instead to elongate the application process for no apparent reason, and to present a mostly inaccurate and sub-standard Report. The application was described within that Report as 'major', and the Board believes that, as such, it should have been processed in a timely fashion and with the utmost attention to detail. The Board recommends a review of the way in which pre-application advice is given, and urges a more proactive approach to be taken, especially in relation to the Island's key industries. Every effort must also be taken to process applications within the agreed timelines, and any delays caused by the Department should have to be adequately justified.

6.18 The Board asks for a response from the Minister for the Environment within 2 calendar months of the publication of its Report.

Signed and dated by –

G. Crill, Chairman ..... Dated: .....

C. Beirne, Deputy Chairman ..... Dated: .....

J. Eden ..... Dated: .....