



Planning Panel
Sir Charles Frossard House
La Charroterie
S. Peter Port
Guernsey GY1 1FH

Appeal Decision Notice

Planning Tribunal Hearing held on 28th June 2016 at Les Cotils Christian Centre, St. Peter Port, followed by a visit to the appeal site

Members: Mr. J King (Presiding), Ms. J White and Mr. J Weir

Appeal Site: Field adjacent to 7 Longfield, Maurepas Road, St. Peter Port

Property Reference: A102180000

Planning Application Reference: FULL/2015/2843

Appeal Case Reference: PAP/008/2016

- The Appeal is made under the provisions of Part VI and Section 68 of The Land Planning and Development (Guernsey) Law, 2005 (“the 2005 Law”).
- The Appeal is by Mrs. Anna Phillips against the decision of the former Environment Department made on 22nd January 2016 under Section 16 of the 2005 Law to grant planning permission subject to conditions.
- The development permitted was described on the application form as: *To pollard trees overhanging garden.*
- The appeal relates to all four of the conditions attached to the permission.
- Mrs. Phillips represented herself, assisted by her father, Mr. J Tyson, and her neighbour, Mrs. E Agnies.
- The Development & Planning Authority was represented by Ms. E Hare, Development Control Manager, Ms. J Roberts, the case officer, and Mr. A Ritchie, the Landscape and Countryside Officer.

Decision

1. The appeal is allowed and consent is granted under the provisions of Condition 3 to planning permission PAPP/2006/2681 for work to reduce the height and extent of five trees in the field adjacent to No. 6 and No. 7 Longfield, Maurepas Road, St. Peter Port, subject to the following conditions:
 - (a) The development hereby permitted shall be begun within 3 years from the date of grant of this permission.
 - (b) Prior to commencement of any work to the trees pursuant to this consent, a full survey of the trees shall be carried out by a suitably qualified person and a written report submitted to the Development & Planning Authority. A scheme shall be submitted for approval of the Development & Planning Authority in writing showing in detail specifications for the manner in which each of the trees is proposed to be reduced in height and spread. The schemes of works shall be carried out as approved.
 - (c) All work to the trees shall be carried out in accordance with good arboricultural practice, having regard to the advice of BS3998/2010 – Tree Work Recommendations.

Background and the Application

2. The decision was made by the former Environment Department, which has since been re-constituted as of 1st May 2016 as the Development & Planning Authority. For simplicity, in this decision it is referred to as “the Authority”.
3. The appellant lives at No. 7 Longfield, a fairly new dwelling. Its short rear garden and that of its neighbour, No. 6 Longfield, back on to an open area intended to serve as open space associated with another housing development “The Oaks”, situated to the west. But in practice it appears to be used for the grazing of animals. This land is at a slightly higher level than the gardens, from which it is separated by a close-boarded fence approximately 2m in height. Close to the boundary are five trees, with a considerable number of branches projecting over the garden.
4. Mrs. Phillips is concerned at the effect of the trees on her quality of life, principally the shading effect on her house and garden; and consequently wishes to pollard them in order to reduce their height and spread. She does not own the trees, but the owner of the land has given permission for the proposed work to be carried out.
5. Mrs. Phillips enquired of the Authority as to whether the trees were subject to any planning regulations. In a letter dated 3rd November 2015, she was told that, “... *the proposed trees to be pollarded are protected by planning condition and as such your proposal requires planning permission*”. She duly applied. Permission was granted to “pollard, crown lift and crown thin five trees”, subject to four conditions which are now the subject of this appeal.

The Conditions

6. The conditions appealed are:
 1. All development authorised by this permission must be carried out and must be completed in every detail in accordance with the written application, plans and drawings referred to above. No variations to such development amounting to development may be made without the permission of the Environment Department under the Law.
 2. The development hereby permitted shall be begun within 3 years from the date of grant of this permission.
 3. The five trees hereby subject to this permission shall be pollarded to a height not less than 7.5m from ground level.
 4. Notwithstanding the submitted details, the remaining crowns shall be thinned in accordance with BS3998/2010 – Tree Work Recommendations.

Legal and Procedural Matters

7. Considerable time was taken up at the Hearing and subsequently addressing a number of legal and procedural matters raised by this case. These are set out below in some detail as the Tribunal considers it important that, not least in the interests of ensuring that similar applications and appeals are dealt with properly, certain principles should be established.
8. The trees in question are situated within the site of the planning permission for The Oaks development [PAPP/2006/2681]. Condition 3 of that permission states: *“No trees shall be lopped, topped or felled without the express prior written consent of the Environment Department”*. This is the condition to which the Authority had regard when advising Mrs. Phillips that planning permission was required for the proposed work to the trees.
9. On receipt of the appeal, the Tribunal sought clarification in writing from the Authority on a number of procedural matters. Among other things, it asked on what basis the application had been considered. Critically, did the need for planning permission derive from condition 3 of The Oaks permission, or was it “free-standing” (i.e. was permission required irrespective of that condition)? A very brief response indicated that it was “free-standing”. Another question, asking about the basis on which Mrs. Phillips was advised that planning permission was required for the work to the trees, was not answered. There was a clear disparity between the advice given to Mrs. Phillips that the work required planning permission because the trees were protected by planning condition and the response to the Tribunal that the application was free-standing.
10. Against this somewhat confusing background, at the hearing, the Authority’s officers were questioned about the legal basis for requiring planning permission for work to

trees, as such work does not fall within the definition of development as set out in section 13 of the 2005 Law, nor is it included within the definition of development relating to works to protected trees included in section 5 of the General Provisions Ordinance, as the trees in this case are not protected. After much discussion, the officers conceded that, had it not been for Condition 3 of The Oaks permission, the work to the trees would not be regarded as development requiring planning permission. This was contrary to the information supplied to the Tribunal beforehand.

11. Discussion then turned to the nature of the application: whether it should have been for planning permission or for “*express prior written consent*” under Condition 3 of The Oaks permission; and, if the latter, whether the Authority had the power to impose conditions. The officers were unable to provide firm answers, and it was agreed that the advice of the Law Officers of the Crown should be sought. To that end, the following questions were asked by the Tribunal:

1. *The Authority has acknowledged that, if it were not for the existence of Condition 3 of the permission relating to The Oaks development, the works to the trees proposed by the appellant would not constitute development under the 2005 Law. However, in law, can such works "become" development or treated as development by virtue of the provisions of a condition attached to an existing planning permission?*
2. *In the event that the works to the trees do not involve development, but nonetheless require prior written consent from the Authority under the terms of Condition 3 of The Oaks permission, is there any provision in Law for conditions to be imposed on any such Consent granted?*

A third hypothetical question was also asked:

3. *If it is considered that the Authority adopted an incorrect approach to this case, by requesting a planning application to be made rather than seeking a request for prior written consent under Condition 3 of The Oaks permission, does the Tribunal have powers to treat the planning application (and the appeal deriving from the application) as if it were an application for prior written consent / appeal against conditions attached to such consent? The Tribunal recognises that this question is complicated by the fact that the appeal is against the imposition of conditions, which, depending on the answer to its Question 2, may or may not be capable of being imposed in principle.*

12. On receipt of the advice, the Authority responded to the Tribunal:

“With particular regard to ... the Tribunal’s Question 3, the DPA (the Authority) is indeed of the view that it is essentially a matter of form that appeal was made of an application for planning permission rather than a refusal of an application for consent. The DPA would therefore be prepared, in this particular case, to waive any defect in the manner of application; essentially, to treat the application for planning permission as an application for consent. The DPA however is of the

view that save for the requirement for publicity of the application for planning permission and the consequent 21 day period allowed for such publicity, treating the application as one for planning permission rather than as an application for consent resulted in no different process or outcome and consequently had no prejudice to the appellant”.

13. Unhelpfully, the response does not address the Tribunal’s questions directly. However, we consider that it concedes in relation to Question 1 that the proposed work to the trees does not constitute development and that planning permission is not required. This amounts to a tacit concession that the Authority adopted an incorrect approach by requiring an application for planning permission rather than an application for express prior written consent under condition 3 of The Oaks permission.
14. The response does not address question 2.
15. The response does not say explicitly whether in the Authority’s view the Tribunal has powers to consider the appeal as if it had been made for express prior written consent rather than planning permission, but the clear implication is that it would be content for our determination to be made on that basis.
16. Having regard to the foregoing and to the advice provided by the Law Officers of the Crown to the Authority (which is explicitly not advice to the Tribunal) we conclude, with respect to Question 1:
 - (a) The works are either development requiring permission or they are not. They cannot “become” or be lawfully treated as development by virtue of Condition 3 attached to The Oaks planning permission;
 - (b) The proposed works to the trees do not constitute development under the 2005 Law and its associated Ordinances;
 - (c) Mrs. Phillips should not have been advised that planning permission was required. She should have been informed of the need to apply for express prior written consent for the works under the provisions of Condition 3 of The Oaks permission;
 - (d) Consequently the Authority was in error in considering the application as being for planning permission and should not have granted planning permission. It should have granted consent by reference to the provisions of Condition 3 of The Oaks permission.
 - (e) The Tribunal should not consider the application as being for planning permission; and our decision on the appeal should not grant or withhold planning permission.
17. With respect to Question 2, section 17 of the Land Planning and Development (General Provisions) Ordinance, 2007 (“the General Provisions Ordinance”) states conditions may

be imposed pursuant to section 16(1) of the 2005 Law, which relates to circumstances where an application for planning permission is duly made to the Authority. In this case, although a planning application was made, it is acknowledged by the Authority that this was not the correct procedure, and so may not be regarded as having been duly made. Section 16 of the 2005 Law does not provide explicit powers to impose conditions on a consent or approval required by reason of a condition attached to another planning permission, as in this case.

18. Moreover, section 17(b) of the General Provisions Ordinance does not provide a power to impose conditions other than in relation to the grant of planning permission. It says that, notwithstanding the Law, certain works or operations may not be carried out other than expressly authorised by the planning permission in question (*our emphasis*). But in this case there can be no planning permission.
19. However, section 68(1)(d) of the 2005 Law says that an aggrieved applicant can appeal to the Tribunal, including in relation to the granting of consent or approval subject to conditions, of an application required by a condition attached to a planning permission. Notwithstanding the lack of explicit powers to impose conditions on such consents or approvals, it is clear that the Law envisaged the ability for conditions to be imposed in such circumstances. On that basis, we conclude that conditions may be imposed on a consent granted pursuant to the provisions of a condition attached to a planning permission. As such, the Tribunal has the power to impose such conditions in this case, should it decide that consent should be granted.
20. With respect to Question 3, Mrs. Phillips made the application for planning permission in good faith on the advice of the Authority. She should not be disadvantaged by the Authority's error. Under section 68(1)(d) of the 2005 Law, she has the right to appeal a decision of the Authority, whether in relation to a planning permission or the granting of consent; and the Tribunal would have had the power to deal with the latter, had the Authority dealt correctly with the application. The Tribunal takes the view that there is no bar, in Law, to it correcting the error made by the Authority and considering the appeal as if it were in relation to conditions attached to a consent. We agree with the Authority that this is a matter of form rather than anything more substantial. It is not in the interests of good administration that there should be further delay in the determination of the issues raised in the appeal; and that neither party would be disadvantaged by the Tribunal addressing the appeal in this way.
21. Pragmatically, therefore, we propose to address the appeal as if it were against the imposition of conditions on a consent required under Condition 3 of The Oaks permission.

The Main Issues

22. The main issues in this case are:
 - (a) The effect of the proposed pollarding on the health, wellbeing and value of the trees;

and

- (b) Whether the effect on the appellant's living conditions is sufficient to outweigh any harm to the trees that may arise as a result of the proposed pollarding.

Planning Policy

- 23. The so-called planning permission issued by the Authority does not refer to any planning policies. While its appeal statement refers to four policies under the Urban Area Plan, namely: GEN3 Landscape ecology and wildlife; GEN6 Character and amenity; GEN12 Effect on adjoining properties and DBE1 Design, no specific arguments are put forward by reference to them. Nonetheless, insofar as they are relevant to our consideration of the appeal, the Tribunal has had regard to their provisions.
- 24. Section 42 of the 2005 Law places a duty on the Authority to secure, so far as possible that existing trees are protected.

The Tribunal's Assessment of the Evidence and the Site Visit

The Trees

- 25. The five trees under consideration include two evergreen oaks, two sycamores and a holly. They are situated close together and their branches intertwine. They are mature and, in the opinion of Mr. Ritchie, they could have 40 or more years of life remaining.
- 26. Mr. Ritchie had examined the trees at the time of the planning application for The Oaks development, in 2005. At that time, they were around 10m to 12m in height, but have since grown to about 12m to 15m, it was estimated. Given the growing conditions in Guernsey, it is possible that the evergreen oaks and the sycamores could grow to 17m or a little more. Mr. Ritchie had assessed the condition of three as (a) (retention most desirable); one as category (b) (retention desirable) and one as category (c) (could be retained). However, he did not examine the trees again in relation to the present proposals and so no current comparable assessment has been made. Indeed, he did not go on to the land where they are situated, but viewed them from the access road, a short distance away. Similarly, neither he nor any other officer viewed them from the rear garden of the appellant. We consider that a serious omission. The Tribunal members spent a considerable amount of time on the site and in the garden. Without very close examination, we found it difficult to distinguish the branches of one tree from another, owing to their proximity and the quantity of ivy that was growing through them, or to see where each had been pollarded in the past. Even with knowledge from an earlier examination, we do not consider that the Authority's officers could have been in a position to assess either the health of the trees or their effect on the living conditions of the adjoining occupiers.
- 27. The Tribunal members are not arboriculturalists, nor do we profess any particular expertise with respect to the health of trees. However, we were able to see that most

if not all of the trees appeared to have been pollarded at a low level at some time in the past, possibly on more than one occasion, but had not been maintained. The result has been that they have matured as multi-stemmed trees.

The Proposed Works

28. Pollarding is defined in BS 3998:2010 as cutting a tree so as to encourage formation of numerous branches arising from the same height as the main stem or principal branches.
29. The appellant's intention is to reduce the trees to a level of around 1m above the height of the fence, or about 2.1m from the ground level of the field. This would inevitably involve the removal of the great majority of the leaf-bearing parts of the trees. The hope is that the trees would then be able to be maintained at a lower level, in the form of a hedge, similar to that which runs on the side boundary of the field adjoining The Oaks development.
30. The application was not detailed in respect of the proposed pollarding and the trees have not been subject to a survey. Mrs. Philips has consulted with a tree surgeon, who was confident that the proposed pollarding could be carried out successfully and that the trees would return to their original state in less than two and a half years. The Tribunal assumes that "original state" in this context means the state when the trees were originally pollarded, rather than the state immediately prior to the proposed pollarding. But the advisor did not appear at the hearing and nothing in writing was submitted in support of the contention

The Effect on the Trees

31. When questioned at the hearing, Mr. Ritchie stated that his concern about the proposed work to the trees relates principally to the effect that the pollarding would make on character of the locality. He regards the trees as making a major contribution to the landscape character and visual amenity of the area. He also referred to their wildlife value to birds. However, his consultation report to the case officer makes no reference to these matters, which are not supported by any objective assessments. Rather his report concluded that pollarding at the level proposed would result in a large amount of dense growth, resulting in a much worse situation than present.
32. The Tribunal is of the opinion that the proposed pollarding would radically affect the appearance of the trees, resulting initially in the loss of the greater part of their foliage. In this state it is unlikely that they would appear particularly attractive. But it is the long-term effects which are of greater concern.
33. With respect to the consequences for the health of the trees, we note the advice of BS 3998:2010 that an old pollard branch should not be cut back to the "knuckle", since the removal of all its attached foliage would probably lead to physiological dysfunction and decay. It should instead be shortened by cutting just above a suitable lateral branch. It advises that once initiated, a pollard should be maintained by cutting the new branches

on a cyclical basis. If, however, the pollard cycle has been allowed to lapse over many years – as in the present case – the crown should instead be reduced to the minimum necessary to fulfil current objectives. If crown reduction would be insufficient to safeguard those branches that are most likely to fail, they may be reduced to stubs in one operation (known as a “pole thin”), while the remaining branches are shortened so as to retain enough of the leaf-bearing twig structure to sustain the tree. Conditions 3 and 4 of the so-called planning permission seek to follow the advice of the BS through crown reduction.

34. Having regard to the advice of the BS and the evidence of Mr. Ritchie, and in the absence of any detailed technical proposals for the proposed works, the Tribunal has concerns that the trees may not be suitable for pollarding as proposed, given their age and the absence of cyclical maintenance. There is no doubt that the form of pollarding proposed is not advisable from the arboricultural standpoint; and that there is a distinct possibility, or even a likelihood, of serious damage being done to the trees that may affect their ability to thrive or survive in the longer term.

The Effect on the Value of the Trees

35. The site is located in a largely built-up area, including residential, commercial and community uses. There are numerous other trees in the locality, within and around the built development, providing an attractive green context. The trees at issue form part of this matrix, providing an effective screen to No. 6 and No. 7 Longfield. At the Hearing, Mr. Ritchie indicated that the landscape value of the trees is appreciated principally in views from Maurepas Road. It is true to say that the trees are visible from certain places in that road but, in the Tribunal’s opinion, they do not contribute significantly to the character of the area. They may be seen most clearly from the entrance to the access road to Longfield, but even this is at some distance across the field and in the context of The Oaks development, a prominent, unscreened gable to a house, a substantial office building to the east, and catch fencing at the nearby school playing fields. But the view is limited. From other locations, only the tops of the trees can be seen.
36. In the event that the proposed pollarding were to prove successful, in that the trees continued to survive in reasonable health, such contribution as they make to the landscape character of the area would be significantly reduced. They would no longer be visible over the wall that fronts the field on Maurepas Road, or over the roofs of the Longfield houses when viewed from the opposite direction. The degree of screening of the Longfield houses from the access way would also be substantially reduced. If the pollarding proved unsuccessful in the longer term, such that the trees died or failed to thrive or develop attractively, the benefit to the landscape character would be entirely lost.

The Effect on Living Conditions

37. No. 6 and No. 7 Longfield are situated only about 6m from their rear boundaries, with the trees immediately behind. At the hearing the Tribunal was told that at the time of

considering the planning application for the Longfield development care had been taken to ensure that the trees would not be harmed by the proximity of the houses. It seems unfortunate that equal concern was not taken to ensure that the living conditions of the occupiers would not be adversely affected by the existing trees and that the trees would not impact on the effectiveness of the solar panels. The effect of existing mature trees on residential amenity is a well-known planning issue and fully recognised in BS 5837:2012. This document advises that a realistic assessment of the probable impact of any proposed development on the trees and vice versa should take into account the characteristics and condition of the trees, with due allowance for their future growth and maintenance requirements. Amongst the factors to be taken into account are shading of buildings; future pressure for removal; and seasonal nuisance, all of which are relevant to the present case.

38. From our site visit and from the evidence of Mrs. Phillips and her neighbour, Mrs. Agnies, it is clearly apparent that, owing to their proximity, height, spread and the density of foliage, the trees very significantly shade the back rooms of the houses and their gardens. Our visit was in the summer, in good weather and in the early afternoon, yet the living environment was seriously degraded by the lack of light. At other times, when the sun is lower in the sky, the effect would be much greater. The shading has also caused the grass of the lawns to be thin and in poor condition, and the dropping of leaves and twigs and seeds is a maintenance nuisance. The value of the gardens for children's play, for casual recreation such as sitting out, and for common domestic uses such as clothes drying is severely limited. We have no documentary evidence about the consequences of the shading on the effectiveness of the solar panels in such circumstances but there must be little doubt that it is reduced.
39. The Authority does not object to the principle of reducing the height of the trees and, in setting a height level with the top of the solar panels it has recognised the potential for the shading to impact upon their efficiency. It acknowledges that the preferred height of 7.5m (nearer 8.5m once the difference in ground levels is taken into account) is a compromise between improving residential amenity and protecting the health of the trees and preserving their contribution to the character of the area. But it is still a substantial height for trees situated only some 6m or 7m from the house. The Tribunal takes the view that, even if a height of 7.5m were to permit the panels to function properly – and we have no documentary evidence from either party on that subject – the gardens and houses would still be subject to very significant shading and the consequences of leaf fall. Further, it would not be long until new growth made conditions worse for the occupiers and began to impact on the effectiveness of the solar panels once more. In short, it would not overcome the problems suffered by Mrs. Phillips and her neighbour.

Conclusions

40. The Tribunal has considerable sympathy for Mrs. Phillips and her neighbour. The effect of the trees on their living conditions is unacceptable; and it is reasonable that steps should be taken to improve the situation.

41. The limitation of 7.5m as the minimum height of the trees imposed by condition 3 would not in our view sufficiently overcome the harm caused to residential amenity.
42. The proposed pollarding to a height of 2.1m is not in accordance with good arboricultural practice. Not only would it radically affect the appearance of the trees, but it may have the potential to affect their health. The absence of a proper survey from either party or of detailed proposals limits the ability of the Tribunal to conclude with greater certainty as to the effect on the trees of what is proposed.
43. Trees are an important component of the local character; and the 2005 Law requires that so far as possible existing trees should be protected. However, the trees in question do not make a very significant contribution to the quality of the local environment. Any loss must be balanced against the reasonable need for householders to enjoy satisfactory living conditions.
44. It is clear to the Tribunal that the outcome of this appeal must involve a degree of compromise. We take the view that neither what is proposed by Mrs. Phillips nor what the Authority seeks through its conditions achieves the degree of balance needed for a satisfactory outcome. With care, we believe it should be possible to achieve reasonable, if perhaps not ideal, living conditions in the houses whilst maintaining moderately healthy trees that will continue to provide an attractive setting to the development and make some contribution to the character of the area. However, we do not believe this can be achieved by setting an arbitrary limit on the height of the pollarding. Rather, the works to each tree should be the result of a detailed survey undertaken by a suitably qualified person, which would provide the necessary evidence that is presently lacking. We believe it is possible to achieve this by way of a condition.
45. We appreciate that this will not fully satisfy Mrs. Phillips, in that it may involve her in additional expense and also cause delay that in turn will delay her ability to enjoy her property as she has a right to expect. In some respects the terms of such a consent would be more onerous compared to the conditions of the permission granted. Nonetheless, we believe it to be the optimum solution.

The Conditions

46. The appellant did not indicate on the appeal form the conditions against which she was appealing. However, she confirmed at the hearing that she felt aggrieved by them all.
47. Condition 1 requires the development to be carried out in accordance with the application, plans and drawings “referred to above”. But nothing in fact is referred to above, so it would appear to be void by reason of uncertainty. Moreover, as Conditions 3 and 4 prescribe works that are different to what was sought in the application, it is inconsistent and irrational. As the Tribunal proposes (under replacement Condition 3) to require submission of a scheme of specific works, all that is required is that the work should be carried out as specified in that scheme.

48. Condition 2 simply sets out a 3 year time limit for commencement, in the same way as is usual for planning permissions. We consider it reasonable to require works to be carried out within a limited timescale, as circumstances may alter and it is not desirable for a stock of unimplemented consents to build up.
49. In the light of our conclusions, Condition 3 should be replaced by the requirement to carry out a survey and to submit a specific scheme of works, which should then be carried out as specified once approved. The proposed condition does not specify the extent of the works. In the Tribunal's opinion, it could, if justified by the survey, recommend the removal of trees and their replacement, for example by species more appropriate to their location close to houses.
50. Condition 4 specifies that the crown thinning shall be carried out in accordance with BS3998/2010 Tree Work Recommendations. Whether the scheme of works required under proposed Condition 3 include crown thinning will depend on exactly what is specified. In order to cover all eventualities, we recommend that the condition should be amended to require all of the work to be carried out in accordance with good arboricultural practice, having regard to the advice of the BS.
51. The conditions specified by the Tribunal all meet the usual tests of necessity; relevance, both to planning and to the development; enforceability; precision; and reasonableness.

Overall Conclusion

52. For the reasons given above, the Tribunal concludes that the appeal should be allowed subject to revised conditions. In view of the fact that the precise works to the trees are not presently known, we have amended the description of the development to remove reference to pollarding and to crown thinning, replacing these terms with the more all-embracing "*work to reduce the height and extent of five trees*". This does not disadvantage either party.
53. We have considered all other matters raised in the written submissions and during the Hearing. We have also considered all matters pointed out at the site visit and our own observations. However these do not affect our conclusion under the provisions of Part VI Section 69 of the Land Planning and Development (Guernsey) Law, 2005 that the appeal is allowed.

Jonathan G King BA (Hons) DipTP MRTPI
Presiding Member

Date of Decision: 25th July 2016