
STATES OF JERSEY



STATES OF JERSEY COMPLAINTS BOARD: FINDINGS – COMPLAINT AGAINST A DECISION OF THE MINISTER FOR PLANNING AND ENVIRONMENT REGARDING THE REFUSAL FOR PERMISSION TO CHANGE A DORMER WINDOW INTO A BI-FOLDING DOOR AND BALCONY

**Presented to the States on 3rd September 2009
by the Privileges and Procedures Committee**

STATES GREFFE

REPORT

Foreword

In accordance with Article 9(9) of the Administrative Decisions (Review) (Jersey) Law 1982 as amended, the Privileges and Procedures Committee presents the findings of the Complaints Board constituted under the above Law to consider a complaint against the Minister for Planning and Environment regarding the refusal for permission to change a dormer window into a bi-folding door and balcony.

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

STATES OF JERSEY COMPLAINTS BOARD

12th August 2009

Findings of the Complaints Board constituted under the Administrative Decisions (Review) (Jersey) Law 1982 to consider a complaint by Mrs. R. Paling (represented by Mr. S. Osmand) against the Minister for Planning and Environment regarding the refusal for permission to change a dormer window into a bi-folding door and balcony

1. Present –

Board Members

Mrs. C. Canavan, Chairman
Mrs. M. Le Gresley
Mr. T.S. Perchard

Complainant

Mrs. R. Paling
Mr. S. Osmand

On behalf of the Minister

Mr. J. Gladwin, Senior Planner (Appeals)

Others present

Mr. and Mrs. Daligault (neighbours of the applicant)
Mr. S. Platt (Complaints Board member designate)

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Mrs. L. Hart, Assistant Greffier of the States

The Hearing was held in public at 9.30 a.m. on 12th August 2009 at St. Clement's Parish Hall.

2. Summary of the dispute

- 2.1 The Board was convened to hear a complaint by Mrs. R. Paling against a decision of the Minister for Planning and Environment to refuse permission to change a dormer window into a bi-folding door and balcony.

3. Site Visit to Willowmere, Willow Grove, St. Clement

- 3.1 After the formal opening of the Hearing at St. Clement's Parish Hall, the parties went together to visit the site, and viewed the proposed balcony from the garden of Willowmere, as well as the outlook from the extension over the neighbouring properties. The parties also visited the garden of Mrs. Paling's neighbours, Mr. and Mrs. Daligault, the owners of the property known as Li-

Vana (35 Victoria Court), over which it was claimed the balcony would impose.

- 3.2 On returning to St. Clement's Parish Hall, the Chairman advised the meeting that Mr. S. Platt was in attendance in an observational capacity, as he would soon be joining the Complaints Board, and all of the parties agreed that Mr. Platt could ask questions if he wished during the proceedings.

4. Summary of the Complainant's case

- 4.1 The Board had received a brief summary of the Complainant's case, together with photographs, before the Hearing and had taken note of the submissions made on her behalf.

- 4.2 Mr. Osmand, representing Mrs. Paling as her Design/Consulting Agent, observed that the site visit taken by the Board had been extremely useful. He advised that planning approval had been given for a two-storey extension to the northern elevation of the property, with opaque dormer windows fixed at the bottom to the west and east elevations. During construction, the plans had been altered and a small balcony with bi-folding doors installed on the western elevation. Mr. Osmand had been under the impression that, as the balcony would face directly west, there would not be any cause for concern by the owners of the properties to the north and he claimed that the Planner assigned as Case Officer had visited the site and raised no formal objections to its creation. A refusal notice was issued for the revised plans and, following a public Ministerial Hearing, Senator F.E. Cohen, Minister for Planning and Environment, had agreed to defer his decision until he had visited the site. On 2 occasions the scheduled visit had been cancelled and the actual visit had taken place when Mrs. Paling was not at home. Upon her return later in the day Mrs. Paling had discovered a message on her answerphone recorded at 12.57 p.m. advising that a visit would possibly take place that day between 2.30 and 3.30 p.m. Mr. Osmand contended that, as the Minister had been unable to access the balcony area, he could not have been able to properly assess the extent to which it overlooked the neighbouring properties and therefore his decision had been taken without full knowledge of the facts and was unfair.

- 4.3 Mr. Osmand accepted that the balcony had been installed without the requisite permission, but argued that it was created whilst the application was still 'live', with an expectation that it would be acceptable, and it had been essential during the winter months to ensure that the area was wind- and water-tight, as Mrs. Paling had been living in the property during the construction period without any heating. It was envisaged that the room would be used as a small study or hobby room, rather than a bedroom and therefore its use would be limited. Mr. Osmand accepted that a part of Mr. and Mrs. Daligault's garden was visible from the balcony area, but he suggested that there remained other areas of their garden which would continue to afford them privacy.

- 4.4 It was noted that Mrs. Paling was not a developer wishing to extend the property for financial gain, but a homeowner wishing to simply maximize the

enjoyment of her house during her retirement. She had lived in the property for over 20 years and Mr. Osmand opined that she was, to all intents and purposes, an 'ideal' neighbour, being a single occupant with a pet dog as her companion, disinclined to holding noisy social gatherings and suchlike.

- 4.5 Mr. Osmand advised that when Willowmere had been constructed during the 1930s, it had been a solitary building in the area, but over the years had been surrounded by new properties which had reduced the privacy of the site. Indeed he highlighted that the dormer windows of Mr. and Mrs. Daligault's home overlooked Mrs. Paling's garden and conservatory. Mr. Osmand reiterated that he considered the Minister's decision to refuse the application to have been unfair. He referred to photographs which had been included in Mrs. Paling's submission and indicated that netting which Mr. and Mrs. Daligault had placed across their boundary, which had served to obscure any view of their patio area from the proposed balcony, had been removed since the photograph had been taken. Furthermore, in a photograph taken 6 weeks ago, there was seemingly more foliage within the border of their property, which served as a natural screen, and the outside furniture which the Board had been shown during its site visit to Li-Vana was not visible. Mr. Osmand emphasized the outline of the proposed balcony screen, which would be stainless steel and glass and some 1,100 centimetres in height. He also produced a plywood template, representing the usable space on the balcony, which would be extremely limited and sufficient only for one or 2 persons to stand upon at the same time.
- 4.6 It was confirmed that the conditions imposed upon the original application had stipulated that the dormer windows be obscured glazing and fixed at the base. Mr. Osmand advised that the window needed to be a certain height in order to comply with building control regulations to allow an egress should there be a fire. However, this was at odds with the conditions imposed by the Planning Department. It was noted that during construction of the second storey it had only been possible to fully appreciate the amount of space available once it was almost built, at which point Mrs. Paling had decided that the room would benefit from a full length window and small balcony in order to extend the perspective of space in what was quite a small room. Mrs. Paling considered that there would be a very limited sense of light within the room if she was required to replace the bi-folding door with the type of window required by Planning.

5. Summary of the Minister's case

- 5.1 The Board had only received the Request for Reconsideration report prepared for a ministerial meeting and some associated correspondence setting out the Minister's case before the Hearing but did not receive the normal full written summary of the case. The written submissions were amplified by the Senior Planner (Appeals).
- 5.2 It was confirmed that the application site lay within the Built-Up Area and the property concerned was located to the rear of a row of terraced houses fronting Green Road. A large number of individual detached properties were interspersed along the north boundary and these were set 2–3 metres higher

than the ground level of Willowmere. The Senior Planner (Appeals) referred to the reasons for refusal and emphasized that due to the close proximity of the north boundary, the proposed balcony would result in unacceptable overlooking to the private amenity spaces of the neighbouring properties 'Li-Vana' and 'Wichita' and would also afford direct overlooking to their principal windows contrary to Policy G2(ii) of the Island Plan (General Development Considerations). The Board was advised that the decision to refuse the application had originally been made under delegated powers and signed by the Assistant Minister at the time, Deputy A.E. Pryke of Trinity. A number of photographs had been taken of the site by the Planning Officer involved and these had been provided to the Assistant Director of Planning and the Assistant Minister when the case was considered. Both had agreed with the officer's recommendation to refuse the application on the grounds that there would be unacceptable overlooking into the neighbouring 2 properties. The matter had been considered by the Minister at a public Ministerial Hearing, at which Mr. and Mrs. Daligault had been supported by former St. Saviour Deputy Mrs. C.J. Scott-Warren. The matter had been deferred in order to enable the Minister to visit the site. It was noted that there were approximately 2,500 planning applications every year, and it was impossible for the Minister to visit each one, but he had indeed visited Willowmere and viewed the balcony from Mrs. Paling's garden area, in conjunction with the aforementioned photographs and background information provided by the Case Officer. The Senior Planner (Appeals) conceded that it could have been useful for the Minister to have seen the perceived visual impact from the balcony itself and also the gardens of the neighbours concerned, but was content that the Minister, having regard to the objections received in relation to this application, and with the information provided by the Case Officer, had made his decision to maintain the refusal in full knowledge of the facts.

- 5.3 The Senior Planner (Appeals) outlined the history of the application, which had originated in 2007. Binding conditions had been attached to the planning permit regarding the windows on the second storey of the extension, which were to be obscured glazing and fixed. Concerns had been raised regarding the proximity to neighbouring properties and the relative heights of the same, and Mr. Osmand had been advised that a proposed balcony would not be approved on the basis that this would contribute further to the unacceptable overlooking of the adjacent properties. It was noted that there was a large disparity between the agreed dormer style window with obscured glazing and the balcony which had been constructed in contravention of the planning permit. Although it was accepted that Mrs. Paling would be using the room on a limited basis, it was argued that there was a possibility that future owners of the property could seek to remove the partition wall within the room and create a larger space with increased usage and this would be to the detriment of the neighbours. It was noted that in response to the initial application in 2007, there had been 2 letters of objection from the owners of Li-Vana and Wichita citing overlooking issues.
- 5.4 The Board was advised that 3 letters of objection had been received, along with several electronic mail messages from Mrs. Scott-Warren in relation to the revised application. The Senior Planner (Appeals) attempted to read excerpts from the letters in order to highlight the strength of feeling against

the creation of the balcony at Willowmere, but was reminded that neither the letters, nor indeed the photographs upon which the Minister had based his decision to refuse the application (in the absence of viewing the vantage point from the balcony himself), had been included within the Department's submission and therefore could not be part of the Board's considerations.

- 5.5 The Senior Planner (Appeals) advised the Board that he understood the reasons for the neighbours' concerns. Overlooking was a key issue in Jersey, particularly in St. Clement where it was a prevalent problem, given the large proportion of infill development. The extension was 0.9 metres from the boundary, whilst the balcony was 3.4 metres from the boundary to the west, and 4.5 metres from the boundary with Li-Vana. There was a difference of approximately 2 metres between the ground levels of the application site and the neighbouring properties, and the balcony would enable Mrs. Paling to look directly into Mr. and Mrs. Daligault's garden causing, in the neighbours' and the Department's view, an unacceptable level of overlooking. The Senior Planner (Appeals) quoted the Planning Policy in respect of private gardens, which had also not been submitted as part of the Department's bundle for consideration by the Board. The Department's policy in relation to private gardens advocated that the amenity space should provide adequate separation between properties, as well as adequate light, privacy and security. It was extremely difficult to provide private amenity space in the Built-Up Area, but up until now Mr. and Mrs. Daligault had enjoyed a relatively private space. The Senior Planner (Appeals) argued that the existence of the current abundant landscape screening was not relevant as this was not permanent, and the foliage could decrease during the autumn and winter allowing a greater view of the Daligault's garden from the balcony area. He opined that should the existing shrubs and trees need to be removed (as would be the case should the fence need to be replaced or the roots of the tree in one corner continue to undermine the patio area), then the level of overlooking would be extremely unacceptable. The Senior Planner (Appeals) suggested that it was not just the physical impact of overlooking which affected residents, but also the 'fear' of being overlooked which contributed to the invasion of privacy. Planning Officers now placed a large emphasis on the impact of developments on neighbouring properties and consulted fully to ensure a balance between an applicant's desire to improve a dwelling and the neighbour's loss of privacy. As there were no exact standards within the Jersey Planning Law it was very much a judgement call, and the rights of the wider community and neighbours' objections were taken into account to perhaps a greater degree than in the past.
- 5.6 The Senior Planner (Appeals) reiterated that the strength of the objections received from the owners of Li-Vana and Wichita, and emphasized that the degree in which they would be overlooked had been the main determining factor in upholding the refusal of the application. Overlooking caused distress and affected the enjoyment of one's property. The occupancy of Willowmere could change in the future and this could increase the level of use of the balcony. In response to Mr. Osmand's reference to the dormer windows at Li-Vana which overlooked Mrs. Paling's garden and conservatory, the Senior Planner (Appeals) reminded the meeting that the said property had been constructed in 1965 under different planning rules. He maintained that it was important that the current laws and policies were applied in relation to

Mrs. Paling's application and, as a consequence, the proposed overlooking was deemed unacceptable.

- 5.7 The Chairman questioned the level of objection from the owners of Wichita, as the Department's submission appeared to suggest that just the Daligaults had written to raise objections. The Senior Planner (Appeals) advised that there had been a joint letter submitted by both neighbours and this had been part of the submission upon which the Minister had based his decision. No evidence of the objection from the owners of Wichita was, however, presented to the Board in the papers submitted before the Hearing. The Chairman sought clarity regarding the amenity space at Wichita, which the Board had not included in their site visit earlier that morning, as she had been unable to see the property, apart from its roof, from the vantage point of the balcony. The Senior Planner (Appeals) advised that he had stood in the garden area of Wichita and had been able to see the eastern dormer window of the extension at Willowmere, although the Board noted that this dormer had been approved by the Planning Department and was not relevant for this appeal. He was of the opinion that the kitchen and lounge windows of Wichita could be overlooked, but conceded that the main area which would be overlooked from the balcony would be the Daligaults' property. It was believed that the Minister had viewed the site from Mrs. Paling's garden and had not visited either of the neighbouring properties. He had been furnished with the 10 photographs taken by the Case Officer, which apparently showed the relationship between the dwellings and the level of overlooking from the balcony to both properties. The windows agreed within the permit were casement style dormers, with obscured glazing and a fixed bottom pane. The top pane would be hinged so as to reduce the capacity to lean out of the window and look out over the vista. The Senior Planner (Appeals), when questioned how such a window would meet the needs of the building control regulations in respect of emergency access, advised that the Minister was able to over-ride building bye-laws if planning concerns were of greater importance and, in this instance, as other rooms could be used to exit the building, it had not been envisaged that there would need to be an egress through the window in question.
- 5.8 The Senior Planner (Appeals) stated that the Minister had been given 10 photographs taken from the vantage points of both the neighbouring properties and Willowmere's balcony, and he had had the benefit of these photographs when he visited the site. Mr. Daligault spoke briefly to the Board and advised that one of the selling points when he and his wife viewed Li-Vana in December 1998 was that the rear garden had been bathed in winter sunshine and was such a private space. Mrs. Daligault added that in recent years a new property had been built to the west of their house and they had fought to protect their privacy and ensure that they were not overlooked by that new building. They were anxious to now also preserve their privacy on the southern boundary of their home.
- 5.9 Mr. Osmand was asked why the balcony had been installed without planning consent, given that the notion of a balcony had been withdrawn from the plans submitted at the early stages of the planning process on the recommendation of the Planner. He advised that as the application was 'live' and it was important that the kitchen was made water-tight, he had simply instructed the

builders to leave out 3 rafters, which would enable the window to be constructed in line with the original planning conditions if necessary. It was noted, however, that replacing the bi-fold door and the roof slates would represent a considerable cost to Mrs. Paling.

- 5.10 Mr. Osmand advised that he had not considered that the introduction of the balcony would be problematic, as the main concerns expressed during the original application consultation period had centred upon the bulk of the extension. He had certainly not envisaged any problems regarding the overlooking issue in relation to Wichita, as it was impossible to see that property's garden from the balcony; indeed only part of the roof was actually visible. Mr. Osmand contended that the balcony could not be regarded to 'afford direct overlooking to the principal windows' of Wichita, as outlined in the reasons for refusal.
- 5.11 Mr. Osmand also questioned the opinions expressed by the Senior Planner (Appeals) concerning landscaping. He asked why it was that the Planning Department often requested landscaping plans to be produced in relation to certain applications if, as stated by the Senior Planner (Appeals), such landscaping was not an important factor and played only a transient role in screening buildings. Mr. Osmand, in response to comments made earlier regarding the seasonal reduction in screening levels, then advised the meeting that two of the photographs of the view from the balcony, which he had included in his submission to the Board, had been taken in February and July 2009 respectively and showed little discernable reduction in foliage density.
- 5.12 The Chairman thanked both parties for attending the meeting and also for allowing Mr. Platt to be part of the proceedings. The parties then withdrew from the meeting to enable the Board to consider its findings.

6. The Board's findings

- 6.1 The Board acknowledged that there had been a number of documents missing from the Department's submission which were actually pivotal to the Minister's decision-making process in relation to the application. Without the benefit of the 10 photographs, the letters of objection and also the Planning Department's policy in relation to gardens (alluded to by the Senior Planner (Appeals) during his verbal submission), it was extremely difficult for the Board to determine whether the Minister would have been able to make a sound judgement in relation to the overlooking issues. This was particularly pertinent in relation to Wichita, as the Board struggled to see how it could have been possible to conclude that the balcony could 'result in unacceptable overlooking to the private amenity spaces of the neighbouring properties 'Li-Vana' (35 Victoria Court) and 'Wichita' and would afford direct overlooking to their principal windows' as stated in the reasons for refusal, when no member of the Board had been able to see more than the roof of Wichita even when venturing to the edge of the designated balcony area.
- 6.2 The Board also wished to emphasize that it would have been able to reach a firm conclusion had the Department ensured that all of the relevant documentation and evidence had been included within its submission. The

Board expressed its disappointment that this had not been the case, particularly as the 10 photographs were so critical to the Minister’s decision-making process. The Board suggested that there should have been a reasonable period of notice given to Mrs. Paling when the site visit was arranged, especially as the whole purpose of the visit had been to assess the overlooking issues from the balcony, and there should have also been liaison with the 2 neighbours concerned, in order to enable the Minister to be afforded a comprehensive and authentic understanding of the site, rather than relying on the crucial 10 photographs.

6.3 The Board was mindful that the balcony had been constructed in breach of the planning permit and that this was a retrospective application. The Board nevertheless concluded, in accordance with Article 9(2)(d) of the Administrative Decisions (Review) (Jersey) Law 1982, that the Minister’s decision ‘could not have been made by a reasonable body of persons after proper consideration of all the facts’. The Board reached this conclusion because of the inclusion of Wichita within the grounds for refusal in relation to the balcony on the west of Willowmere when it was manifestly clear to the Board that no such overlooking was possible from the balcony. This inclusion, in the Board’s view, cast doubt on the validity of the whole decision to refuse. The Board does not believe it was possible for a reasonable decision to have been made by the Minister without going onto the balcony and into the garden of Li-Vana as the Board had done. The Board therefore requests the Minister to reconsider his decision within 2 months and to report back to it with his decision. Before doing so, the Board believes it is essential that the Minister conducts a full site visit, having given reasonable notice of his proposed visit to the owners of both properties and made appropriate arrangements.

Signed and dated by:
Mrs. C. Canavan, Chairman

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Mrs. M. Le Gresley

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Mr. T.S. Perchard