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# STATES OF JERSEY



## **PLANNING DEVELOPMENT CONTROL: PROCESS IMPROVEMENT PROGRAMME (PIP) – POLITICAL STEERING GROUP REPORT JULY 2011**

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**Presented to the States on 12th July 2011  
by the Minister for Planning and Environment**

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**STATES GREFFE**

## REPORT

### Introduction

During early 2010, the Minister for Planning and Environment and the Chief Executive Officer for Planning and Environment – now known as the Department of the Environment – have become concerned over a perceived lack of consistency of approach being taken within the Development Control service. Incidences highlighted included a lack of a standard approach in the use of conditions by officers, queries over the consistency of recommendations by officers against approved policy, and concerns over how officers communicate with applicants over process and outcome.

The situation was exacerbated by a recently published Committee of Inquiry report into one specific planning case which had been running from 2005, and which had also called into question processes and protocols operating over that time.

The Process Improvement Programme (PIP) was commissioned in the context of essential CSR cuts over the coming years and in the realisation that if Planning is to continue to deliver good buildings and protect the environment, it is essential that services can be provided at a lower cost through process efficiencies.

The aim of the PIP was to audit all current development control planning processes and procedures in connection with the processing of planning applications, and to deliver more robust procedures, eliminate unnecessary processes and effort, streamline the service, extend exempted development and save money.

Section 8 of the final report addressed issues that directly pertain to States Members, in particular the Planning Applications Panel (PAP) and the Minister for Planning and Environment. In response to the report, the Minister answered a written question in the States on 18th January 2011, part of which stated –

“The second section (of the report) deals with recommendations for change in the mechanisms of determination. In this area I am concerned that we need to fully respect the very special nature of the expectations of Islanders in respect of the determination of planning applications. Furthermore Islanders have a justifiable expectation to have direct access to the Minister who is after all responsible for all decisions emerging from the Department. I believe that a wider group of politicians needs to examine the report’s recommendations in this area and determine the best method of change. Consequently I have decided to establish a small group of politicians to consider the reports recommendations in this area and work will begin in the next few weeks. I will not take a personal role in the Group as it will be making recommendations about my role. It will be chaired by the Assistant Minister for Planning and Environment who will be pleased to receive expressions of interest from Members who would like to play a role in participating.”

Following this response, a Group was convened to consider the recommendations of the report as follows –

- Deputy R.C. Duhamel of St. Saviour (Chairman)
- Deputy of St. Peter
- Senator F. du H. Le Gresley
- Deputy R.G. Le Hérissier of St. Saviour.

Their Terms of Reference were agreed as –

- To examine, consider and comment on the recommendations which involve States Members – the Minister and Assistant Minister(s) and Planning Application Panel (PAP) Members – of the Development Control Process Improvement Programme (PIP) report produced by POS Ltd. in December 2010.
- Those recommendations are included in Section 8 of the report and also include recommendations at paragraph 4.100.
- The Group would also like to view and make comments on the structure of the Process Manual that was identified as being important by the report.
- To report back to the Minister for Planning and Environment in a written format the findings in relation to the recommendations, and where appropriate suggest actions that may address those recommendations, and to request the Minister to report to the States on the basis of the Group's findings.
- To finalise any report before the end of May 2011.

The Group met a total of 4 times and from the outset determined that the relevant recommendations that accorded with their Terms of Reference fell under 4 main headings. These were –

1. Planning Applications Panel
2. Ministerial Decisions
3. Ministerial pre-application advice
4. Appeals against decisions.

The Group Members felt that with one past Member of the Island Development Committee (IDC) (Deputy R.C. Duhamel of St. Saviour), one very recent member of PAP (the Deputy of St. Peter), and at the time of finalising their report a new member of PAP (Senator F. du H. Le Gresley), that they were happy to work on their recommendations without referring directly to other States Members. However, the Group did meet with the Planning Applications Panel at the conclusion of their work and shared their broad findings with the Panel. The Panel indicated that they concurred with those broad findings and made a suggestion over the functioning of the Panel which has been incorporated into this report.

## COMMENTS ON THE RECOMMENDATIONS

The comments are ordered in the references identified by the PIP report.

### Planning Application Panel Protocols

Prior to turning to the recommendations made in the PIP report relevant to the functioning of the Planning Applications Panel (PAP) the Group would like to make a comment on the context of the role of PAP.

Firstly, and most importantly, there is no equivalent of PAP in any other part of the States machinery. Members of PAP are charged with discharging a statutory function in determining planning applications and exercising that function in some 200 cases each year. Consideration of applications takes place in a formal and public arena with all the decisions, comments and actions of the Panel open to direct public scrutiny. There is no suggestion from the Group that these arrangements should change, as it represents an appropriate and proportionate situation in determining applications that attract public interest. However, it is only fair to acknowledge how unique this situation is and recognise the circumstances within which PAP operates.

Secondly, notwithstanding policy advice there will always be an element of subjectivity in considering and determining planning applications. PAP will always be open to accusations of making the wrong decisions on the basis of subjective arguments, but this is unavoidable in the context of some of the decisions they are required to make. PAP do make their decisions with the best of intentions and on the basis of all the information that is available to them.

#### *“Site Visits*

*4.100 Revise para. 11 of the PAP Code of Conduct to reflect the current arrangements made for site visits.”*

The Code of Conduct was drawn up early in the life of PAP and has not been updated to reflect actually how site visits occur. The Group were content that the current actual arrangements and that the Code of Conduct should be amended as follows to reflect current practice –

- Applications that are considered to be worthy of a site visit, so as to fully understand their context, will be identified shortly after the PAP Agenda is finalized. Often in conjunction with the Chair of PAP, a site visit schedule shall be drawn up and the visit is undertaken in the days immediately preceding the Panel meeting.
- If during consideration by PAP of an item relating to a site which has not been visited it becomes apparent that a site visit would be beneficial, then the item can be deferred by the Panel for a visit prior to the next available meeting.

Members’ training should reinforce the purpose of site visits, which are solely intended to familiarise the Members with the site prior to formal consideration.

*“4.101 Regularly review the conduct of site visits to ensure that no impression of pre-emption of the decision is taken.”*

Members’ training should reinforce the behaviours during a site visit, namely that specific merits of the case – and intentions of decision-making – should not be specifically discussed, either within PAP itself or with anyone present on the site.

*“8.13 PAP should be asked to determine most controversial applications. It should be able to make a decision on all applications other than a major proposal of Island wide significance, or a significant proposal on which the Minister has published or recorded Ministerial pre application guidance, or any proposal not in accordance with the Island Plan.”*

PAP should be the primary political decision-making forum in relation to planning applications. Only in cases where there is a not-insignificant departure from the Island Plan or the application is considered to be of Island-wide significance will the Minister be expected to become involved in a decision.

*“8.14 The Minister should retain reserve powers to determine applications by exception when not in accordance with the Island Plan and the PAP are minded not to accept an officer recommendation (known as the cooling off period) as set out in Ministerial decision PE 2006/0012. (Substantial departures are required by article 12 of the Jersey (Planning and Building) Law 2002[sic] to be subject to a public inquiry after which the Minister would receive a report from the independent inquiry chairperson and issue a written decision.)”*

The Minister would retain reserve powers to intervene in applications which are not in accordance with the Island Plan, and PAP are minded not to accept an Officer recommendation.

*“8.15 That training should be provided for any new members of the PAP and for all following the 2009[sic] Island Plan’s\* adoption, and the issue of any new Ministerial guidance (see also recommendation for including staff in such training in the Staff Section)”*

\* this should be the 2011 Draft Island Plan

Training for PAP Members should form an integral part of their role. Training should include broad planning principles that underpin the system, along with specific training/discussion about new policies, Supplementary Planning Guidance (SPG), appeals and Royal Court decisions.

An introductory training session should be introduced and all new Members of the Panel should attend. There should also be regular updates for all Panel Members of any relevant information.

Training should be provided in-house so as to reflect the Jersey perspective, but advantage should be taken of professional bodies which may be able to provide resources.

*“8.16 The 2007 PAP Code of Conduct should be amended to omit references to possible PAP discussions with applicants, and to update the site visit procedures section to reflect PAP site visits which now take place before the Panel meetings.”*

See 4.100 above.

*“8.17 Where a Member of PAP is conflicted it will assist the public if the Member explains this when withdrawing from the Panel for that item. This will pass a clear message about standards and behaviour to any public present and ensure that there is no misunderstanding or perceived of lack of interest on the Member’s part.”*

Paragraphs 22–24 and 27–28 of the Members’ Code of Conduct for Development Control (October 2007) relates to the declaration of interests by Panel Members in considering planning applications. In the main, this advice follows the States Members’ Code of Conduct in declaring an interest. However, the declaration does not address any potential or possible perception of prejudicial interest by PAP Members when considering applications from within their own Parish or District.

So as to avoid any potential impression of conflict, it is recommended that any PAP Member representing a Parish/District which they represent shall withdraw from PAP for the consideration of that item. Further the Member should not make any representation in connection with an application which is to be considered by PAP.

This will allow Panel Members to be seen to be removing themselves as far as is practicable from creating an impression that they have any undue influence over the determination of an application.

It would, however, involve ensuring that in the rural parishes – with a Connétable and one Deputy – that both of those members should not sit on PAP at the same time. To do so would deprive the constituents of gaining political representation in connection with an application.

In addition to the above issues, the group raised a suggestion in connection with the make-up of PAP. The Group felt that there was significant merit in having a Chair of PAP who was not an Assistant Minister. The Chair would be appointed by the Minister, but in separating that role from Ministerial or Assistant Ministerial office it would help clearly define the roles of the Minister and his/her Assistant(s) and PAP. The Minister may wish to consider whether he would like his preferred candidate for the role of Chair when he nominates Panel Members for approval by the States Assembly. This would mean that the Chair of PAP would receive a similar endorsement of States Members as Scrutiny Panel Chairs.

*“8.18 If independent planning appeal arrangements are introduced (see below), RfRs should be deleted from the delegation agreement.”*

See Appeals commentary below.

## Ministerial Protocols

### Ministerial pre-application role

*“7.23 These are set out in the decision-making protocol section which follows.”*

This issue was addressed separately in connection with recommendations concerned with Ministerial Protocols as set out in paragraphs 8.40 to 8.44.

*“8.40 Planning and Environment Minister roles in guiding pre-application discussions on major schemes and promoting development to implement the Island Plan for the benefit of Jersey can be vital. Departmental staff resources need to be harnessed to supporting the Minister in this role. To avoid unstructured approaches and promote transparent inclusive pre application discussions we commend to the Minister that for major sites –*

- inclusive ministerial guidance is developed through masterplans, planning and development briefs*
- initial pre application meetings should always involve officers and the Minister, in order that the Minister always has appropriate officer advice available when first involved in any pre application meeting (even if this means arranging a later meeting)*
- a Ministerial guidance output is published following forums or other appropriate consultation, for guidance of PAP, the public, and developers, and*
- the Minister needs to refer other enquiries for minor development to the officers to avoid getting drawn into such extensive involvement as previously and reduce the unreasonable expectations on the Minister’s time on minor matters.*
- To assist the Minister in changing expectations the proposed Code needs to make it clear that the Minister would only be expected to engage in pre-application discussions on minor applications if asked to do so by the Chief Executive Officer, Director or by an Assistant Director.”*

The suggested protocol from PIP (see Appendix to this report) appears fit for purpose in that it sets a framework that is practical in terms of allowing pre-application involvement by the Minister, but limiting in terms of the influence of the Minister thereafter. The protocol sets out clear mechanisms of offering advice and importantly requires a public record to be kept of that advice. This public record would provide transparency of process AND provide guidance to other potential developers regarding the same or even similar sites.

The Group feels that the Minister should move toward issuing briefing notes on sites and pro-actively develop development strategies for sites/areas or types of development. This is reflected in the current Draft Island Plan.

The protocol effectively means that whilst the Minister can offer pre-application advice, he/she would only become involved in determining applications if they were contrary to advice, policies (such as a Departure from the Island Plan) or of a scale that indicated Island-wide significance. Otherwise, PAP would determine applications in the context of public advice, policies and guidance.

*“8.41 Planning and Environment Ministers should determine major proposals of Island wide significance, or a significant proposal on which the Minister has published or recorded Ministerial pre application guidance, or a major or substantial proposal not in accordance with the Island Plan.”*

As indicated above, the introduction of the suggested protocol effectively means that whilst the Minister can offer pre-application advice, he/she would only become involved in determining applications if they were contrary to advice, policies (such as a Departure from the Island Plan) or of a scale that indicated Island-wide significance or are in connection with previously published or recorded Ministerial advice. Otherwise, PAP would determine applications in the context of public advice, policies and guidance.

In considering an application the Minister should follow the procedures that have been adopted by PAP in terms of active consideration. At present, this involves the presentation of an item by officers, listening to representations in connection with the proposal and then allowing the applicant to make representations. Questions could be asked at each stage by the Minister to clarify the situation if necessary. The Minister should also consider maintaining current practice of asking at least 2 other States Members – whether Assistant Minister(s) or PAP Members – to sit with the Minister in an advisory role.

*“8.42 All other non delegated decisions should be made by the PAP.”*

This recommendation has already been accepted in consideration of the PAP role (see 8.13 above).

*“8.43 The principles of a Ministerial Protocol or Code needed to give effect to the above are set out in a draft template in Annex F. They require:*

- *A clear indication in pre application meetings and notes of meetings that the Minister is not making or pre-empting decisions on applications.*
- *Officer presence in all pre application meetings to ensure public notes of meetings are produced and actions or negotiations following meetings are understood and implemented by officers.*
- *An indication at any Hearing that any statement of ministerial guidance, or other pre application advice has been given.*
- *an indication that a Minister has not predetermined their position when determining an application, or recognition of being conflicted and withdrawal.”*

The Protocol as drafted in the PIP report is considered fit for purpose in this respect and is a proposed process endorsed by the Group.

*“8.44 The Commission for Architecture’s role should be recognised and built in to pre application and application process as a full consultee, to ensure appropriate weight is given to its recommendations.”*

The Group recognised the potential importance of the Commission for Architecture’s advisory role, and in particular the fact that it could offer an independent source of expertise for any States’ Member. The Group foresaw a role for the Commission whereby it could advise on development briefs and area plans as envisaged by the Draft Island Plan as well as individual buildings.

As to the role of the Commission as a full consultee for application and pre-application advice, this appears to be happening as the Commission’s role has developed. This role can be formalised in the forthcoming Development Control Process Manual which would identify criteria and processes for consultation.

### **Appeals**

*“8.62 Promote legislative amendments to introduce appeals into planning merits and failure to determine an application through an independent appeals commission or environmental branch/panel of the Royal Court, and consider appropriate fees to offset the costs.”*

The Group consider that a Green Paper exploring options for an independent merits-based planning appeals process should be brought forward as soon as is practicable. The Group noted that the recently published ‘Committee of Inquiry: Reg’s Skips Ltd. – Planning Applications – Second Report’ (R.38/2011) made a similar recommendation, as did a number of other reports published in recent years (Committee of Inquiry into Fields 848, 851 and 853, Bel Royal, St. Lawrence: Final Report (R.101/2008) and the Review of Planning and Building Functions by an independent Planning Adviser, March 2006).

The Group wish to formally offer their collective services to the Minister for Planning and Environment for the development of that Green Paper should the recommendation be accepted.

### **Other Comments**

#### **Planning Applications Panel (PAP)**

The Group shared their broad findings with PAP at the conclusion of their work. PAP indicated agreement with those broad findings and welcomed the comments regarding their particular role in the process of determining applications. PAP did ask that a further 2 issues be highlighted in how they function, notwithstanding Article 9A(7) of the Planning and Building (Jersey) Law 2002 which allows PAP to determine its own procedures. That issue related to the process of voting in relation to a planning application being considered by PAP. There have been a few occasions where voting on an application has resulted in stalemate with the votes cast being tied. In other circumstances it might be considered that the casting vote of the Chair would decide the issue; however PAP felt that this should not be the case in determining planning

applications. If such a situation arose, PAP felt that the most appropriate course of events would be for the application to be referred to the Minister for consideration and, if appropriate, determination.

The second issue related to the drawing-up of the PAP agenda. There have been circumstances where applications had been included on their agenda and then withdrawn immediately prior to the meeting. There have been various reasons why this has occurred and invariably there have been a variety of peculiar circumstances that have led to the situation. PAP felt that once an application had been included on an Agenda then it should remain to be considered by PAP. Any change in circumstances could be reported to PAP in considering an application, but PAP felt that they should not be denied the opportunity to consider an application that had been progressed so far as to be included on an Agenda.

### **Delegated Decisions**

The PIP report makes the following recommendation in relation to delegated decisions –

*“4.84 Levels of delegation should be reviewed to allow applications to be determined by officers when there are fewer than three outstanding representations to which the officers have responded and shown how they have balanced those representations in their decision (not necessarily resolved these representations)”*

The suggestion was made in the context of cutting down the number of applications that fell to be considered by PAP. The Minister noted the recommendation but ultimately rejected it as he felt that there was an expectation that all applications with outstanding and unresolved objections should be considered by elected representatives.

Members of the Group would like to reconsider this issue at a future date when information can be gathered that identifies how many applications of a similar nature actually reach PAP. If it is a significant number then there may be some merit in exploring a potential mechanism to allow speedy decisions that are in line with policy other than their consideration by PAP. If the number is relatively low then there is an argument to retain the current system.

### **Exempt Development**

Section 6 of the PIP report – *“Minor development: review of exempt development in Jersey”* – provided comment on the potential scale of reduction in the number of applications through an extension of exempted development. Exempted – or permitted – development is development that has been granted planning permission by virtue of the General Development Order and covers works such as minor residential extensions, domestic sheds and outbuildings, small works to commercial buildings and other similar modest and frequent types of development.

There was a general conclusion, backed by some 9 specific recommendations, that the extent of development allowed by the General Development Order (GDO) was too low and should be revised to allow more development to occur without the need for an application for planning permission. This would ease the burden on householders and

businesses, and in turn reduce the number of applications required to be processed by the Department. The PIP report suggests that extension of exempted development would be achieved through further amendments to the Planning and Building (General Development) (Jersey) Order 2008, or, preferably for users, by a revised consolidated Order. Planning permission is deemed to be permitted by Ministerial Order for development set out in a Schedule to the Order.

The suggestion of altering this extent was echoed in the ‘Committee of Inquiry: Reg’s Skips Ltd. – Planning Applications – Second Report’ (R.38/2011). Since receipt of the PIP report, a revised GDO has been prepared. The Committee of Inquiry had the benefit of appraising themselves of the most recent proposed changes and felt that the changes do *“not go far enough to enable a sufficient reduction in workload to be achieved, let alone an appropriate regulatory loosening”*. The Committee of Inquiry’s report then goes on to suggest *“To start things off, we recommend that the Minister invites his recently formed Political Steering Group to report on the matter for the (Environment) Scrutiny Panel’s benefit. This would in our opinion be a very good subject for what we understand could well be the distinguished new Group’s first published report.”*

The Group acknowledge this suggestion and would wish to confirm to the Minister that if he is so minded then they would undertake this task.

### **Development Control Process Manual**

The third Term of Reference of the Group was to have an oversight of the proposed Development Control Process Manual. Unfortunately, during the timescale of the Group’s existence and the desire to report on the PIP report as soon as possible, there has not been an opportunity to present a comprehensive report as to the progress of the Manual. This work is in hand, and a working, but not comprehensive, copy of the Manual will be available in the near future. Should the Group be asked to continue by the Minister, this oversight role could be integrated into its function.

### **Conclusion**

The Group concurred with the recommendations of the PIP report in relation to the involvement of politicians in the development control process and the determination of planning applications. In particular, the Group felt that the introduction of a Protocol that guided any Minister for Planning and Environment in their involvement in particular projects, either at pre-application stage or in the process of determining an application, would remove any opportunity for misunderstandings about how proposals should be considered and strengthen transparency and accountability.

The introduction of a Ministerial Protocol would underline the importance that PAP carried in determining planning applications in a forum that did not expose any individual to particular pressures or expectations, and by virtue of breadth of membership would be viewed as a consensual or majority decision. Further, the appointment of a Chair of PAP that was essentially endorsed by the States Assembly would introduce an element of support from the legislature as a whole to the PAP structure.

In considering the PIP report and indeed the subsequent ‘Committee of Inquiry: Reg’s Skips Ltd. – Planning Applications – Second Report’ (R.38/2011), the Group felt that

there were still tasks to be pursued. Investigations into an independent merits-based appeals process, reviewing exempt development rights, overseeing the establishment of a process manual for planning applications and considering the structure and provision of Member training are all tasks which should be progressed. The Group would be willing to continue with these tasks.

**APPENDIX**

Template for Code of Conduct for Minister in Pre-Application and Application determination

**Pre-Application Role**

The Minister should only be involved in pre-application discussions and guidance on major proposals or proposals of Island-wide significance, unless requested to become involved by the officers. All pre-applications with Ministerial involvement should, in every case –

- be with officers present
- be by appointment to allow time for preparation
- be with ministerial guidance, officer note of advice and/or conclusions sent to proposer and recorded on file
- avoid lobbying and explain the Minister will not be able to determine an application on which lobbying has occurred
- include a statement in the note of the pre-application discussion that the Minister has not made or pre-empted any decision on the application
- include a statement in the hearing report of the Minister's recorded pre-application advice or guidance and that the Minister has not pre-determined him or herself on the application.

If either of the last 2 bullet points cannot be included, then the Minister is conflicted and should not determine the application.

The Minister should pass requests for advice or representations on minor proposals to the case officer without comment.

If pre-application discussion and guidance is of the following categories, either –

- a substantial or major departure, or
- a proposal of Island-wide significance,

the Minister will publish guidance and make it publicly available as soon thereafter as possible, following planning forums or other inclusive public consultation.

If pre-application discussions or guidance are offered on lesser applications, the officers will record that advice and ensure it is publicly available when any ensuing application is submitted, and incorporated in the officer report to a PAP or Ministerial Hearing.

## **Potential Interests and Pre-application and Application Stages**

If –

- there is a direct or indirect financial interest or a prejudicial interest, or
- the Minister has been lobbied, or
- the Minister has been subject to personal approaches or personal interests he or she would not be comfortable disclosing,

the Minister should regard him/herself as conflicted on receipt of the application and should not determine the application, to ensure public misconceptions of undue influence do not arise.

If the Minister is conflicted, the PAP or Assistant Minister, subject to PAP Code of Conduct, will be responsible for determining the decision.

### **Application Determination**

The Minister should only use call-in powers exceptionally. The exceptions will normally be –

- Substantial departures from the Island Plan
- Proposals of Island-wide significance
- Proposals where there is published ministerial guidance or recorded pre-application advice for major proposals.

In all cases when the Minister does decide to use call-in procedures, the reasons for the intervention will be publicly recorded, and any proposed “call-in” will be discussed with the officers prior to the Minister using reserve call-in powers.

All applications determined by the Minister will be determined after a Public Inquiry or Ministerial Hearing with the Minister supported by at least 2 Members. The Members at a Ministerial Hearing need to allow a full explanation of all material considerations to be given by the presenting officer, followed by a full audible debate to assist all those present to see how material considerations are being balanced and a decision is made.

Full reasons for a decision should normally be given in writing, after the Hearing, as part of the public record of the decision.

Where the Minister does not propose to follow officer recommendations, then the decision should be deferred to ensure a full record of considerations and professional advice on appropriate enforceable conditions or reasons can be given to the Minister and considered at a further Hearing or in a subsequent written Ministerial Decision.