



jersey**construction**council

Proposition P.76 / 2021

The Jersey Construction Council's response to the Environment, Housing and Infrastructure Scrutiny Panel's request for observations.

7 September 2021

Background & Overview

Background

The States of Jersey Environment, Housing and Infrastructure Scrutiny Panel (the "**Panel**") has invited the Jersey Construction Council ("**JeCC**") to write to the Panel to note any concerns or observations that the JeCC have with Proposition P.76 / 2021 ("**Proposition P76**"), which was lodged by the Minister for the Environment (the "**Minister**") on 2 August 2021 and is presently scheduled to be debated by the States Assembly on 5 October 2021.

Given the nature of the Proposition P76, in preparing this response the JeCC has taken soundings from the Jersey Chamber of Commerce (Buildings and Development Sub-Committee) ("**JCoC**") and the Association of Jersey Architects ("**AJA**"). Therefore, the Panel can assume this submittal to be representative of the construction and development sector in the island.

Overview of Proposition P76

Proposition P76 seeks to make several (20) changes to the existing Planning and Building (Jersey) Law 2002 (the "**Planning Law**"). Page 5 of the Proposition P76 notes that three of the changes will 'have a significant impact on individuals', namely:

- powers for the designation of Conservation Areas (the "**Conservation Areas Change**");
- the determination of public inquiries by a determining body of Minister, Assistant Minister(s), and Planning Committee Chair (the "**Determination of Public Inquiries Change**"); and
- the introduction of controls of any felling, lopping, pruning and any alteration of any tree (the "**Tree Control Change**").

Seven of the proposed twenty changes are described as minor changes that have arisen (i.e., they update the Planning Law to reflect changes in case law and precedents) (the "**Planning Law Changes**"). Finally, ten of the proposed twenty changes are described as change the Planning Law to reflect 'current practice', to 'explicitly clarify' how the Planning Law is applied in practice (the "**Current Practice Changes**").

Executive Summary

The JeCC offer the following observations on Proposition P.76 / 2021 (each of which are discussed in detail in this document):

1. There has been an absence of public or industry consultation on the changes proposed under Proposition P76, prior to the Minister lodging Proposition P76.
2. Proposition P76 as drafted does not accurately reflect the likely implications on resourcing the potential impact of the changes to the Planning Law proposed.
3. Proposition P76 as drafted is silent on the detail about how all of the changes to the Planning Law proposed within will be implemented.
4. Proposition P76 as drafted may not meet the requirements of the States Assembly guidance on including the relevant level of information needed to justify the changes.
5. The implications of the Conservation Area Change are extensive, and as drafted will result in considerable additional resource burden for the Government's IHE Department, if required to implement them.
6. The implications of the Determining of Public Inquiries Change are as drafted also extensive, and will result in considerable additional resource burden for the Government, if required to implement them.
7. The implications of the Planning Law Changes may actually increase the uncertainty, complexity and efficacy of the Planning application process.
8. The changes imposed by the ten proposed Current Practice Changes are not perceived as a risk and are generally acceptable.

In conclusion, the JeCC feels that:

- The implications of Proposition P76, as drafted, are far too wide-reaching for there to have been no structured consultation with the public on their implementation.
- The Minister has not sufficiently raised awareness of the Proposition P76 prior to it's lodging, and States Assembly Members' are potentially unaware of the full impact of it's implementation.
- There is insufficient evidence within either the Ministerial Decision or the Proposition P76 to support the assertion that the implementation of the changes proposed will not result in any manpower or financial implications for the Government.
- The Minister has not provided evidence that the proposed changes have been discussed rigorously by the Council and are supported by the Council.
- The case for the Conservation Areas Change, the Determination of Public Inquiries Change, the Tree Control Change and the seven Planning Law Changes, in particular, has not been made by the Minister within Proposition P76.

***"Observation 1.
There has been an
absence of public or
industry consultation on
the changes proposed
under Proposition P76,
prior to the Minister
lodging Proposition
P76."***

Neither the Minister nor the Government of Jersey have consulted properly on the changes prior to the Minister lodging Proposition P76. Ministerial Decision Reference MD – PE – 2021 – 0048 dated 30 July 2021 (the "**Ministerial Decision**") confirms that the Minister has 'consulted with officers and several members, prior to deciding to make several amendments' to the Planning Law.

Proposed changes to laws and regulations (and proposed orders issued under legislation) are regularly consulted over with the public at large (www.gov.je presently records eight such consultations, and over 90 such consultations over the past four years). These includes changes to land use policy (for example, under the Bridging Island Plan, which has been the subject of an extensive and very widely publicised public consultation). Even the changes proposed with the island's Tree Strategy have been consulted on (noting that this consultation does not cover all of the changes proposed by the Tree Change Order).

Yet, the changes proposed to the Planning Law within Proposition P76 – which if approved and subsequently implemented will impact on every application for Planning Consent submitted, including those submitted by Departments within the Government of Jersey – have not been shared with the public at large for consultation prior to the Minister lodging Proposition P76 on 2 August 2021. Both the Ministerial Decision and Proposition P76 detail no formal consultation with the public on:

- the impact of the changes; or
- any involvement of industry in the way that the proposed changes are worded, or how they are to be introduced and / or applied.

Finally, the JeCC notes:

- The Minister has himself only recently acknowledged the need to consult on changes to legislation impacting the built environment. During the Quarterly Hearing with the Panel on 1 June 2021, when challenged by the Deputy of St Martin on changes to the Building Bye-laws to promote greater carbon neutrality, the Minister responded: 'Since I have the lever on building regulations, absolutely. But I have to go through a process of consultation on the detail with the industry. As the Scrutiny Panel you would be the first to tick me off if I did not go through a process of consultation with the construction industry on those changes.'
- During both the Panel's Quarterly Hearing with the Minister on 1 June 2021, and the Minister's hearing with the Panel's review on affordable housing on 27 July 2021, neither the Minister or any officer present made any reference to the proposed changes to the Planning Law that would be lodged on 2 August 2021, despite their very significant implications on the existing Planning Law.
- See also our notes under Observation 4 below regarding the absence of any evidence of consulting with the Council of Ministers (the "**Council**") on the implications arising from Proposition P76.

It is the JeCC's opinion (shared by JCoC and AJA) that States Members are being asked to vote on changes to a law before the full implications of these changes have been fully consulted on. States Members should therefore be aware of the speed with which the Minister is proposing these changes, and the fact that no formal, structured, public consultation on the proposed changes to the Planning Law. This is particularly concerning on a proposition where, as noted within, several of the proposed changes will have significant impact on individuals.

***"Observation 2.
Proposition P76 as
drafted does not
accurately reflect the
likely implications on
resourcing the potential
impact of the changes
to the Planning Law
proposed."***

The States Assembly website states that, *'a draft proposition must be accompanied by an estimate of the financial / manpower implications and an explanation as to how, when and from where these could be realistically sourced.'*

Proposition P76 states that, *'There are no new financial or manpower implications for the States arising from the adoption of this draft Law'* (our emphasis added).

There is not a single piece of evidence in the Proposition P76 to support this assertion.

- On the matter of the Tree Control Change, the JeCC notes that the *'introduction of controls of any felling, lopping, pruning and any alteration of any tree'* (which, in fact, includes for any tree and hedge within the proposed changes to the Planning Law included in Proposition P76), is likely to have significant resource implications for the Government in:
 - creating and establishing a register of any tree (and hedge);
 - receiving applications for 'any felling, lopping, pruning and any alteration' of 'any tree' (and hedge);
 - processing applications for permission to carry out works to any tree and / or hedge;
 - notifying of the outcomes of any applications for permission; and
 - managing a suitable appeals procedure for applicants to progress their entitlement to an appeal.
- (The JeCC does note the reference within Proposition P76 to the use of an Appointed Day Act, which would follow the results of the recently-closed consultation of a possible Tree Strategy for the island. However, the concern is noted that the approval of legislation without the full assessment of the resource and manpower implications for the Government (in administering) and the industry (in complying with), or the proposed plans for the implementation of the legislation, would be counter-productive, and require two sets of legislation (i.e., that arising from Proposition P76 and then that arising from the Appointed Day Act) to implement).
- On the matter of the Determination of Public Inquiries Change, the JeCC note that the proposed procedures detailed will involve further administration and governance associated with administering the additional procedures arising from the Minister exercising their proposed rights to refer a decision to an additional panel (to that of the existing Planning Committee).
- On the matter of the Conservation Area Change, the JeCC note that the proposed changes will require the establishment of a new designation (the 'conservation area'). Again, this will require administration and governance.

**“Observation 3.
Proposition P76 as
drafted is silent on the
detail about how the
changes to the Planning
Law proposed within
will be implemented.”**

Responsibility for the implementation of the Planning Law falls to the Government’s Infrastructure, Housing and Environment (“IHE”) Department. It is widely-known that the IHE Department is already struggling to cope with the resource needs for managing existing applications for Planning Consent under the present Planning Law, whilst at the same time (and until Spring 2022 at the earliest) concluding the development of the Bridging Island Plan and progressing with other regulatory issues (the JeCC commented on this very matter, with anecdotal evidence of present problems, when responding to the Panel during the request for responses on the matter of affordable housing in Jersey).

The Minister himself acknowledged these challenges when giving evidence to the EHI Panel’s review into affordable housing on 27 July 2021, when he stated:

“in fact the I.H.E. team that have shed staff as a result of the target operating model and have gone through huge changes and uncertainty in the last 3 years. As a result we lost very experienced staff and we have ended up, I am afraid, with a number of teams who are demoralised and feel very let down by the States. My information is they are looking to leave the States employ and go into the private sector. I am extremely worried about it. I banged the table at the Council of Ministers again yesterday. I have made it quite plain to our new interim chief executive that this has to be sorted out. However, somehow or other I do not seem to be cutting through. If we look at the volume of workload that we have now, with the backlog of planning applications - because after COVID-19 they are flooding back in and good job they are - and what we are going to see from the development in the next 3 years, I desperately need some flexibility in H.R. (human resources) policies and an end to the dreadful mess that our previous chief executive saddled us with in terms of the I.H.E. fundamentally flawed target operating model that has caused immense damage. Sorry, Chair, it makes me so angry. I cannot reassure you. My successor will have to take up this challenge. There we are.”

The introduction of further legislation for the IHE Department to police and manage, in addition to their already over-burdened workload and in absence of a robust, sustainable, well-resourced target operating model, will only result in negative outcomes and even more strain on the existing system.

The JeCC would expect Proposition P76 to include a full implementation plan, in detail, setting out the timescales for drafting the changes to the Planning Law, the dates from when (in the future) the changes will be implemented (noting the resource implications and the need for approval of budget for the Government to initiate their implementation; and the present progress of other related matters like the Bridging Island Plan), a detailed governance procedure setting out roles and responsibilities of the Council, the Minister, and the Government, and officers, for implementing the changes. At present, this is missing from Proposition P76.

“Observation 4.
Proposition P76 as drafted does not meet the requirements of the States Assembly guidance on including the relevant level of information needed to justify the changes.”

The States Assembly website states that, ‘*a proposition also needs to be supported by a report which outlines the background to the proposal and gives greater detail or statistical information.*’ Proposition P76 includes a report, but it does not however provide the ‘*greater detail or statistical information*’ that supports, for example, either the Conservation Area Change, the Determination of Public Inquiries Change or the Tree Control Change.

The “*Codes of Conduct and Practice for Ministers and Assistant Ministers*” (States of Jersey Report R.116 / 2018) (the “**Ministerial Code**”) requires (at paragraph 10) that:

- ‘*Matters wholly within the responsibility of a single Minister and which do not fall under the functions of the Council need not be brought to the Council. However, matters that affect more than one Minister should be brought to the Council.*’
- ‘*As a guide, the Council should consider matters of importance, and the more important a matter, the stronger the rationale for bringing it to the Council.*’
- ‘*It is the responsibility of the proposing Minister to ensure that a matter is brought before the Council.*’

The changes proposed will significantly impact all Government Departments that use the Planning application process (either as Agents, Applicants or end-users), or who have any trees and / or hedges on their property (as may be expected, for example, in schools, hospitals, and other public buildings). However, there is no evidence in Proposition P76 that the Minister has either presented the matters arising to the Council of Ministers, and that the Council have discussed and considered the implications of Proposition P76 before it was lodged with the Greffe on 2 August 2021.

(Note: we have been unable to corroborate whether there has indeed been any discussion of the matter at Council as the minutes of all Council meetings since the commencement of 2021 have not yet been published, contrary to the directions in the Ministerial Code and the States of Jersey Law. This may be a matter than the Panel can explore and seek evidence of).

***“Observation 5.
The implications of the
Conservation Area
Change are extensive,
and as drafted will
result in considerable
additional resource
burden for the IHE
Department, if required
to implement them.”***

The JeCC considers the introduction of a designation for Conservation Areas is perhaps a matter of land use policy rather than legislation, could be ‘jumping the gun’ slightly as it already forms part of the Bridging Island Plan process (which is presently in process and involves considerable public consultation and a States Assembly debate). The designation of Conservation Areas under Proposition P76 in advance of this would appear to be ignoring the democratic process.

Further, the designation of a Conservation Area will remove permitted development rights meaning planning applications will be required even for minor changes to property. This approach could be counter-intuitive: it is actually imposing even more restrictions and constraints on how domestic home-owners (and other owners of listed buildings) manage their properties, creating even more applications for the IHE Department to manage.

To counter this, the JeCC would like to suggest Proposition P76 be amended to simplify the existing Listed Buildings process to a three-tier process (removing the existing Grade IV status for those buildings to be designated within a Conservation Area).

***“Observation 6.
The implications of the
Determining of Public
Inquiries Change are as
drafted also extensive,
and will result in
considerable additional
resource burden for the
Government if required
to implement them.”***

Whilst it is assumed that the Determining of Public Inquiries Change are aimed at larger projects (such as perhaps the Our Hospital or Fort Regent redevelopment projects), there is a concern that many other applications for Planning Consent (or appeals) will inevitably come before a ‘Determining Panel’, particularly if the Minister does not want to make the decision unilaterally (as the present Minister has explained he often feels reluctant to do so).

Further, the final say on planning appeals being by the Determining Body is meant to avoid accusations of personal bias or agenda by the Minister. However, the JeCC is concerned that – in the beginning – the opposite is like to happen, and the process is likely to cause some delay as the Minister waits to make any controversial decisions until they can put them before the Determining Body for a panel decision (the JeCC are aware through our work with the Planning Section of the Environment Department that there are a number of Third Party Appeal Inspector Reports presently awaiting determination by the Minister and which possibly are pending the outcome of this matter. This is further delaying the decision making and progress on important applications for Planning Consent).

The JeCC notes that there is nothing in Proposition P76 that shows how the proposed Determining Panel is anything more than a second Planning Committee, and an additional layer to the application process, which will thus result in further delays to the application for Planning Consent process. The inclusion of the Chairman of the Planning Committee on the proposed Determining Panel is also likely to cause conflict, as they are likely to have been involved in most appeal or previous panel decisions. The references to the process being similar to those presently used in Guernsey is also misleading, as the use of a Determining Panel in Guernsey’s planning replaces the ‘decision by committee’ process that would remain in place under the Determining of Public Inquiries Change.

The JeCC also notes additional risks to the existing Planning process from the introduction of the Determining Panel: three States Members now being involved in a decision effectively increases the risks of a delay arising from:

- the combined availability of all three States Members;
- a possible conflict of interest arising from three States Members private or public interests;
- a Determining Panel not being quorate; or
- a decision from the Determining Panel being made on the basis of either political grounds or a subjective application of the Planning Law (rather than the application of the Planning Law and Planning Policy, as they should be).

The JeCC does welcome the proposals contained within Proposition P76 for setting timelines for the determination of appeals or applications by the Determining Panel (under the present arrangements, whilst the appeal process has fairly strict timelines that must be met, the Minister can then take as long as they desires to determine the appeal following receipt of the Inspector’s Report). However, as with all matters of introducing statutory timescales, these must be agreed first with the Government, in order to ensure that the IHE Department and the Government has the required budget and resource in-place to ensure that they are met (see above in Observation 3, the Minister’s concerns on this matter).

"Observation 7.

The implications of the Planning Law Changes may actually increase the uncertainty, complexity and efficacy of the Planning application process."

"Observation 8.

The changes imposed by the ten proposed Current Practice Changes are not perceived as a risk and are generally acceptable."

For example, the idea of appeal rights for parishes is likely to be welcomed by many, but those same rights for Government departments to join appeals is likely to be more problematical and risks planning appeal tribunals becoming even more complex and involved. The costs of this part of the Planning process will naturally increase (as more parties are involved).

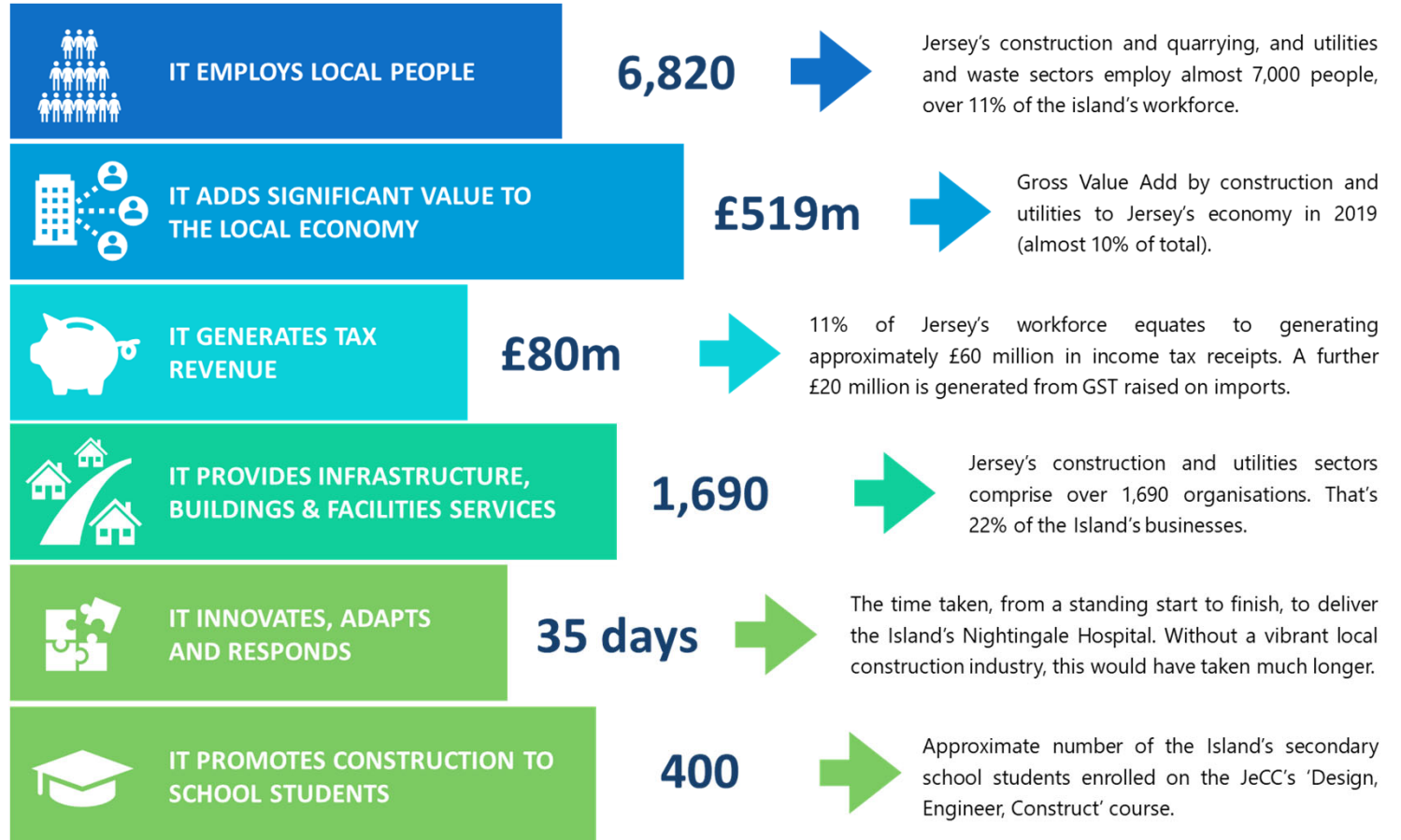
Under the changes to the Planning Law, it is proposed that the Regulation / Planning Department will ensure that it represents all the departments that are consultees on a planning application. How will this be implemented without any resource or manpower implications (as is asserted in both the Ministerial Decision and the Proposition P76)?

Having multiple Departments taking part seems likely to cause unnecessary delay, and it is difficult to see what the benefit is. Again, this key detail is not reported on within the Proposition P76 or the accompanying report, and the perceived benefits that are being targeted are not sufficiently explained to support the changes proposed.

Allowing planning appeals to be made outside of the time limit for doing so will cause uncertainty and delay and it isn't clear to the JeCC why this amendment is necessary. However, the JeCC does support the allowing of appeals to be dealt with by written representations (where all the parties agree), and this part of the proposed changes to the Planning Law is to be welcomed.

The JeCC does not oppose the changes to the Planning Law arising from the Current Practice Changes detailed in Proposition P76.

What does Jersey's construction industry do for the Island?





IT EMPLOYS LOCAL PEOPLE

6,820



Jersey's construction and quarrying, and utilities and waste sectors employ almost 7,000 people, over 11% of the island's workforce.



IT ADDS SIGNIFICANT VALUE TO THE LOCAL ECONOMY

£519m



Gross Value Add by construction and utilities to Jersey's economy in 2019 (almost 10% of total).



IT GENERATES TAX REVENUE

£80m



11% of Jersey's workforce equates to generating approximately £60 million in income tax receipts. A further £20 million is generated from GST raised on imports.



IT PROVIDES INFRASTRUCTURE, BUILDINGS & FACILITIES SERVICES

1,690



Jersey's construction and utilities sectors comprise over 1,690 organisations. That's 22% of the Island's businesses.



IT INNOVATES, ADAPTS AND RESPONDS

35 days



The time taken, from a standing start to finish, to deliver the Island's Nightingale Hospital. Without a vibrant local construction industry, this would have taken much longer.



IT PROMOTES CONSTRUCTION TO SCHOOL STUDENTS

400



Approximate number of the Island's secondary school students enrolled on the JeCC's 'Design, Engineer, Construct' course.



jersey**construction**council

The Jersey Construction Council (JeCC) is the voice of the island's construction industry. **Our focus is on building Jersey better.**

Our 130 member organisations include clients (developers, Government agencies), utilities companies, contractors, subcontractors, suppliers, designers, and consultants. The JeCC occupies a unique role within the Jersey construction industry. The breadth and depth of its membership means that JeCC is the only body able to speak with authority on the diverse issues connected with construction without being constrained by the self-interest of any particular sector of the industry.

This document has been prepared by the JeCC as a response to the request for written submissions made by the EHI Scrutiny Panel. This document contains the views of the JeCC as a collective, and does not comprise the views of any one individual within the JeCC. It contains the views on those matters identified as areas for consideration in the document.

Any comments or requests for further comment from the JeCC shall be directed to the address and contact below.

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