TYNWALD COMMISSIONER FOR ADMINISTRATION

REPORT ON CASE TCA 2001

Complaint

1. Mr Y complained that the decision by the Department for Environment, Food and Agriculture (DEFA) to grant planning consent for a neighbour to construct garaging was unlawful, being contrary to DEFA Standing Order No. 2018/01.

Background

2. In December 2018 Mr Y and his wife returned to live in the Isle of Man after living in the UK for 11 years. They purchased a property in a rural coastal location, which had been identified in the 1982 Development Plan as an "area of high landscape value". The property is situated in 2.75 acres of grassland on an exposed site. To the south was another property with an old outhouse which formed part of the boundary between the two properties.

3. In Spring 2019, Mr Y received a visit from the owner of the adjoining property. He wished to build garaging using the footprint of the existing outhouse. Indeed, Mr Y understood that three garages would be created within the existing structure under a new hipped roof. The outbuilding was not visible from Mr Y's lounge, so he was not averse to the proposal, but wanted to see the architect's drawing. His neighbour subsequently showed him a drawing marked "SK-01" and Mr Y saw that was a plan for three garages with a low hipped roofline. He then provided his neighbour with a letter in support of the application. The letter addressed to his neighbour and dated 6 April 2019 stated:

> "Re Drawing SK-01 – plans for alterations to form garages and associated works.
>
> Thank you for taking the time to show us the drawings of your proposed new garages and associated works. We confirm that we do not have any issues concerning the drawings and we wish you well with the development."

The letter is signed by Mr and Mrs Y. Having provided the letter Mr Y took no further interest in the matter. He did not check the plans submitted to DEFA, which were published on the Department's website and the unopposed application was assessed by a Planning Officer who made a recommendation to approve the application. The application was considered by a Principal Planning Officer who permitted the development on 31 May 2019. Unfortunately, the planning application submitted by his neighbour differed significantly from what Mr Y thought he was agreeing.

4. Mr and Mrs Y went away on holiday and on their return, they discovered that the existing building was not being altered. It had been demolished. Extensive foundations were being

laid and the builder informed Mr Y that the garaging was for four vehicles, increasing the footprint by 25%. Further in place of a low hipped roof it later became clear that there was a metal frame and the building was to be much higher than expected and was clearly visible from the lounge window of Mr and Mrs Y's property.

5. Mr Y contacted the Planning Directorate and was told that nothing could be done. He considered that his reference to "SK-01" was sufficient to put them on notice that what they had received was not the plan he had agreed. He spoke to his neighbour who told him that he should have looked at the plans and when Mr Y suggested that he had been dishonest, his neighbour was dismissive. His request that his neighbour consider reducing the size of the garage or moving the structure further west, so it was not visible from the lounge, was rejected on the grounds of cost and inconvenience.

6. Mr Y then carried out further research and examined the papers on the planning file and realised that the application had not been considered by the Planning Committee but by a Principal Planning Officer appointed so to act under a delegation by the Minister. Mr Y considered that the Minister's powers of delegation were limited to locations where there was an Area Plan. There was no such Plan where he lived so the 1982 Development Plan applied. The Planning Officer's Report contained fundamental planning errors and was "unreliable" and showed "scant regard for planning issues". Mr Y raised this with the Planning Office and in his letter to me he suggests that the decisions to refer the application to a Principal Planning Officer may have been "a deliberate attempt to circumnavigate[1] legitimate consideration of a planning application of this sort by the Planning Committee in favour of a quick and ill-informed decision by a Principal Planning Officer who should have known the limited extent of [the] delegated power". Mr Y also commented on the reduction of the class of people with "interested party" status and the reduction of cases referred to the Planning Committee concluding that "this corrupts the valid application of planning law, defeats the democratic process and undermines the intent of Tynwald.". In summary, he concluded that the building which had been constructed breached the provisions of the 1982 Development Plan which, according to him, required developments in areas of "high landscape value in a coastal location not to be permitted unless there is an over-riding national need in land use planning terms which outweighs the requirement to protect these areas and there is no reasonable and acceptable alternative."

7. Mr Y set out 7 outcomes which he sought from his complaint:

"(1) A clear statement that the scope of Delegation 2018/08 has been exceeded in PA 19.*****;
(2) A clear statement that PA19.***** should have been considered by the Planning Committee;

[1] Sic: presumably the writer intended "circumvent".

(3) Advice to the Department that complainants in planning and building control matters should always receive a visit from a member of staff at least once to discuss and witness first-hand what the issues are and to act on them;
(4) That the timescales for processing planning and building control complaints be reviewed;
(5) That complaints regarding the actions of Departmental Staff be referred to an independent person not another member of Departmental Staff;
(6) Compensation in lieu of adequate landscaping conditions so that my wife and I can purchase sufficient suitable trees and shrubs to screen as much as possible of the offending structure;
(7) The red tiles approved by [the Principal Planning Officer] be replaced or colour coated at cost to the Department to match the existing dwelling or compensation to us in lieu if the property owner refuses to let this happen."

Investigation

8. I visited Mr and Mrs Y in September 2020, by which time the building had been completed. It is not an attractive building and, as Mr Y pointed out, its roofing tiles are red whereas the neighbouring house has brownish tiles. He had complained unsuccessfully about this to the Department. Mr Y had always been interested in planning matters and told me about an application which had been made in Ballasalla, which he had successfully opposed. This was obviously a historic case, which DEFA could not identify so I sought further details. Mr Y then stated that, on reflection, he had concluded that it was not relevant to the issues which now concerned him.

9. Mr Y subsequently contacted me about another planning application which he considered important. A neighbour in the vicinity had also applied for permission to build a structure to house vintage motor vehicles. That application had gone to the Planning Committee and, although planning consent was given, conditions were imposed including landscaping. I have examined that planning file and am satisfied that there are material differences. First, that was a new build rather than replacement and the application was opposed by the Wildlife Officer. Its proposed site was in an area used by ground-nesting birds and would have an adverse impact on their habitat. It had been referred to the Planning Committee for that reason and not because it was in a location with no Area Plan. The requirement to landscape was to provide the nesting birds with an alternative habitat. The landscaping was on the developer's own land. There was no provision which would enable the Planning Committee or a Principal Planning Officer to require a neighbour's land to be landscaped.

Discussion

10. Mr Y has raised a number of arguments about actions taken by DEFA which I need to examine, although some can be dealt with briefly. The first is that the letter he wrote, and

which I quote in full in paragraph 3 above, should have put DEFA on notice that he was consenting to Drawing SK-01 and the Principal Planning Officer should have realised that the application being considered was not the plan which Mr Y had seen. Mr Y has used very precise language in his letters to me. In his letter of complaint, he told me, in his first sentence, that he was "a qualified Manx Advocate and English Solicitor although not practising at the present time in either jurisdiction". I was initially unsure of the relevance of this, but concluded that Mr Y was anxious that I understood that he was educated, articulate and knew what he was talking about. He might, therefore, have been expected to state in his letter of support any conditions or limitations to his agreement to the neighbouring development. He did not do so. Given such unequivocal support, I do not consider that the Department was negligent in not checking that Mr Y's letter referred to the application which had been submitted. This might have happened in the past when there were fewer applications and a more paternalistic approach was adopted, but plans are now readily accessible online: someone in Mr Y's position whose property abuts a proposed development might be expected to look at the plans, once their existence is advertised by the yellow notices, exhibited in the vicinity of the proposed development, appear. I do not consider that DEFA's action in taking the letter at face value was maladministration.

11. I also reject Mr Y's complaint that his neighbour should have been required to landscape Mr Y's land to screen the building which he erected. Aside from the problems in imposing such a condition, it was not something Mr Y sought prior to the grant of planning consent and he himself accepted that the environment did not lend itself to tall trees and shrubs. The landscaping required in the other planning decision was low growth shrubs on the developer's own land to provide the habitat for ground nesting birds. Landscaping on his neighbour's land would not screen the building since it was on and formed part of the boundary. I have found no example of a developer being required to landscape someone else's land. In essence, I regard this aspect of the complaint as running counter to the long-held view of the courts that there is no right to a view (see *Hunter v. Canary Wharf Limited* [1997] Appeal Cases 655 (House of Lords), referred to in the recent case of *Fearn and Others v. Trustees of the Tate Gallery [2019]* Chancery 369 (where a claim was also made to a right to privacy, which is not argued here).

12. Mr Y has now withdrawn the argument he put to me, based on the Ballasalla application so I do not need to deal with it.

13. That then leaves the substantive argument that the Principal Planning Officer acted unlawfully in consenting to the planning application. Mr Y argues that any delegation could only apply to applications where there was an Area Plan and there is not one in the coastal area where he lives. He maintains that in all other areas, the operative consideration is the 1982 Development Plan. The Minister's delegation of his authority is to be found in DEFA Standing Order No. 2018/01, paragraph 3(d) of which provides that where an application recommended for approval is contrary to the provisions of the Development Plan, it **is** to be considered by the Planning Committee. Mr Y argues that either the

application did contravene the 1982 Development Plan, or that the delegation does not apply to his location.

14. If Mr Y is correct, there would have been many planning applications to which consent has been unlawfully given by the Principal Planning Officers under their delegated powers. That does not mean that the allegation can be ignored. The starting point for analysis is the 1982 Development Plan, Schedule 1 of which sets out the planning procedures. Paragraph 2 (b) clearly envisages circumstances where the powers of the Department are delegated to the Planning Committee or "to a person other than the Planning Committee". I have found nothing in the Order which would prevent such delegation, although in 1982 planning applications were routinely referred to the Planning Committee.

15. The question then arises how the propositions in paragraph (c) of general policy 3 for the Strategic Plan in relation to previously developed land are to be approached. Although "and" is normally construed conjunctively, there are many instances of disjunctive construction too. Paragraph (c) applies if the land has been previously developed and also that one (or more) of the four subordinate conditions is met. Those subordinate conditions are that –

    i. the land contains a significant amount of building;
    ii. the continued use of the land is redundant;
    iii. redevelopment would reduce the impact of the current situation on the landscape or the wider environment;
    iv. the development proposed would result in improvements to the landscape or the wider environment.

    Although within paragraph (c) of general policy 3 these propositions are conjoined by "and" immediately before the text set out in point iv. above, they are clearly not intended to be cumulative because propositions iii and iv are effectively saying the same thing in different ways. So it seems to me that the intention must be that only **one** of these four conditions need be satisfied. I note that the Chief Executive of DEFA in his note does not engage in this level of analysis and says simply that it was reasonable to conclude that general policy 3(c) was satisfied. I agree with that broad proposition. It also appears to me that the redevelopment can properly be said to reduce the impact of the current situation on the landscape by replacing a redundant building with a tidier one. The fact that the footprint is slightly larger than the building which it replaces does not of itself prevent general policy 3(c) from being satisfied, because the test is the overall ***impact*** of the development and not necessarily its size.

16. On the question of delegation, section 3 of the Government Departments Act 1987 provides a Minister with an unfettered power to delegate to an officer, or indeed to another person. The Standing Orders are made in exercise of that power and subject to the question of construction, which I deal with above, and, as here, any conditions imposed by the Minister on the exercise of delegated authority, there is no reason why an officer may not deal with

an application for planning approval. I am satisfied that the conditions for the exercise of delegated authority in respect of this application were met.

17. Section 3 of the Government Departments Act 1987 provides that:

> "(2) The Minister may authorise any member or officer of the Department, or any other person, to exercise any functions of the Department in his place, either alone or jointly with him, or with any other such person or persons."
>
> "(3) Any person authorised under subsection (2) to exercise any functions of the Department may authorise any officer of the Department to exercise of those functions in his place."

Subsection (3), therefore, expressly permits sub-delegation.

These provisions appear to me to be of general application without limitation and I therefore reject Mr Y's arguments on this point.

18. As Mr Y has commented on the reduction in the class of persons entitled to "Interested Party Status", I should address this. The purpose of granting such status is to give those with a close geographical connection with the site of a proposed development and who oppose the development a right of appeal. The decision as to who should be granted such status is made after the application is decided, whether by the Committee or the Principal Planning Officer. Mr Y had not opposed the application, so there could be no question of his being granted Interested Party Status. It is not my function as Tynwald Commissioner to determine hypothetical points, so I have not taken this concern further, although it does seem likely that Mr Y would have been entitled to Interested Party Status if he had opposed the application

Conclusion

19. This was an uncontested planning application. It fell fully within the Minister's delegation to the Principal Planning Officers and the planning consent was properly given on the evidence before the Principal Planning Officer. I therefore reject Mr Y's complaint.

20. I should say that, in accordance with my usual practice, I sent a draft of this Report to Mr Y for his comments. His response was short, stating that the Report "displayed a lack of understanding of the 1982 Development Plan Order, the limited extent of the delegated

powers and what constitutes development". He also commented that my findings "beggar belief". In the light of this criticism, I have reviewed the relevant legislation and am satisfied that the findings and my conclusions are correct.

Angela Main Thompson OBE
Tynwald Commissioner for Administration
21 October 2021