



**APPEAL UNDER SECTION 57 OF THE DEVELOPMENT AND
PLANNING ACT 1974 AGAINST THE DECISION OF THE
DEVELOPMENT APPLICATIONS BOARD
ON BEHALF OF
BERMUDA ENVIRONMENTAL SUSTAINABILITY TASKFORCE
BERMUDA NATIONAL TRUST
BERMUDA AUDUBON SOCIETY**

PLN:	P0429-21
APPLICANT:	ISLAND CONSTRUCTION SERVICES LTD.
SITE:	79 MIDDLE ROAD, DEVONSHIRE
PROPOSAL:	PROPOSED THREE TWO-STOREY MAINTENANCE AND STORAGE BUILDINGS AND FIVE ONE-BEDROOM STAFF APARTMENTS, PARKING, DRIVEWAY AND LANDSCAPING
DECISION:	APPROVED BY THE BOARD ON 11 TH AUGUST 2022

APPELLANT'S CASE

1. Site Description

- 1.1 The appeal site consists of an irregularly shaped site of approximately 3 acres located at the junction of Middle Road and Parson's Lane at the western end of Devonshire Marsh in Devonshire.

- 1.2 Once a part of Devonshire Marsh, the site has been used for industrial purposes in connection with a construction company's activities for a

number of years. Over time the ground has become compacted with fill to provide a consolidated surface for the industrial activities.

- 1.3 The site currently contains four existing buildings. The largest of these, located in the centre of the site, is an industrial-type building containing a vehicle repair and maintenance facility in which a tyre sales and fitting service also operates. A residential structure is located near the site entrance off Middle Road and houses three dwelling units. Additionally, there are two smaller buildings used for office purposes, one to the rear of the residential building and the other west of the industrial-type building.
- 1.4 Elsewhere on the site numerous shipping containers used for storage purposes have been stationed in various locations, often on or near the perimeters of the property and stacked. Also kept on the site are various vehicles and boats, heavy construction equipment and trucks.
- 1.5 The storage and processing of rubble, soil and sand has been undertaken in the southwest corner of the site and on the adjoining property to the west. The latter has now ceased and the activity has diminished significantly within the site itself.
- 1.6 Vehicle circulation within the site is informal as is an existing parking area near the office/residential buildings. The main entrance/exit for the site is located at the junction of Parson's Lane and Middle Road.
- 1.7 The appeal site is entirely zoned Open Space Reserve and almost all of it lies within a Water Resources Protection Area (WRPA), which requires that extra care is taken in the disposal of sewage and stormwater run-off. The WRPA in this location covers the largest fresh groundwater lens on the island which extends through Devonshire and Pembroke. The lens is extremely important for abstracting freshwater.

- 1.8 The adjacent property to the west of the appeal site which the industrial activities had previously spilled on to has been rehabilitated to provide stabling and horse paddocks. This property, too, is zoned Open Space Reserve and is within the Water Resources Protection Area.
- 1.9 To the immediate north and east of the appeal site are extensive natural areas of Devonshire Marsh, including the Winifred Gibbons Nature Reserve and the Freer Cox Nature Reserve. These are important wetland areas and have been zoned Nature Reserve in the Bermuda Plan 2018.

2. Proposed Development

- 2.1 The appeal proposals (see Appendix 1) primarily involve the construction of three industrial-type two-storey structures. Two of these buildings would be arranged along the northwest boundary of the site and each would provide 9600 sq. ft. of storage floorspace together with staff facilities and electrical/mechanical rooms.
- 2.2 The third building would be positioned along the western boundary of the site. This building would provide 4800 sq. ft. of storage space on the ground floor with five residential apartments on the upper floor for staff accommodation.
- 2.3 A new vehicle circulation and parking system would be introduced. Vehicles would enter the site via the eastern access and would be directed around the eastern side of the property to reach other main buildings. Vehicles would exit via a separate western egress.
- 2.4 Parking would mainly be provided in the southwest corner of the site including 33 car spaces and 10 motorcycle spaces. Eight existing car spaces near the offices would also be retained and an additional 10

motorcycle parking spaces would be provided near the two new storage buildings in the north of the site. All the proposed roadway and parking areas would be hard-surfaced, presumably with asphalt although this is unstated.

2.5 Two further areas dedicated to parking are provided on the eastern side of the site. The most northerly is an area measuring 36ft x 75ft set aside for “temporary container parking” and, to the south of this an area 60ft x 60ft is provided for “tractor trailer parking”. These areas are proposed to be surfaced with unspecified “permeable paving”.

2.6 The application also includes a conservation management plan. This plan divides the site into four areas to which different types of management objectives and planting treatment would be applied. The areas are:

Area A – Roadside buffer area – along the Parson’s Lane/Middle Road frontage

Area B – Nature Reserve boundary berm/buffer – the western, northern and eastern perimeters of the site

Area C - Green pockets – miscellaneous “left over” spaces within the site

Area D – Industrial area – the existing and proposed buildings, roadways and parking areas.

2.7 The proposals were approved by the Board subject to various conditions (see Appendix 2).

3. Relevant Planning History

3.1 In a court case in 1991 brought about by enforcement action taken by the Minister responsible for Planning it was recognised in the judgement that

the use of the site by Island Construction Services Ltd. commenced in 1964 and that the use consisted of parking for heavy construction equipment and trucks and “as a place where it deposits large quantities of rubble, sand and soil that it excavates from job sites, or otherwise acquires, and process such rubble, sand and soil at the site” (see Appendix 3).

- 3.2 There is a lengthy history of subsequent attempts at further development of the site and of various complaints about unauthorized development. A complete list of the history is included in the report to the Development Applications Board and also provides a fuller account of more recent planning applications (see Appendix 4). During the 1990’s and up to around 2010 a number of planning applications were submitted and some were refused as being non-compliant with zoning and some, for relatively minor development in connection with the industrial use, were approved.
- 3.3 In 2010 a planning application was submitted for more significant industrial development on the site. The in-principle application (P0333/10) proposed 60,000 sq. ft. of additional floorspace in three warehouse buildings and a relocated access drive. The application was refused by the Board for various reasons including non-compliance with conservation zoning. The decision was appealed to the Minister. The inspector recommended that the Board’s decision be upheld but the application was approved by the Minister. The planning permission has now lapsed.
- 3.4 In 2015 the Board also refused planning permission for an in-principle planning application for a new commercial building (P0112/15) because of non-compliance with Open Space Reserve zoning. Once again, the decision was appealed to the Minister and, once again, the inspector recommended that the Board’s decision be upheld. In this case, the Minister agreed with the inspector and planning permission was refused. In issuing his decision, however, the Minister did suggest that, subject to various

provisos, there may be scope for a building on the site to replace the storage containers (see Appendix 5).

- 3.5 A further planning application was submitted in 2016 (P0344/16). This sought final planning permission for a maintenance and storage building and a new parking area. It also included a conservation management plan. This application was also refused by the Development Applications Board for similar reasons to the previous applications. In response to an appeal to the Minister the inspector recommended that the Board's decision be upheld and the Minister agreed and planning permission was refused.
- 3.6 In addition to the foregoing the property owners have also submitted objections to the draft zonings in the Bermuda Plans of 2008 and 2018 seeking to change the base zone of the site from Open Space Reserve to Industrial. In both cases the Department of Planning did not agree to the requested change and the conservation zoning was confirmed by the Objections Tribunal and the Minister. The Minister's reports on these zoning objections are attached at Appendix 6.

4. Grounds of Appeal

- 4.1 The grounds of appeal in this case are that the Board has erred in granting planning permission for the proposed development as, in taking its decision, it
1. Paid insufficient regard to the Open Space Reserve zoning of the appeal site and for the need to protect the adjoining Nature Reserve;
 2. Did not take adequately into account the intensification of the industrial use on the site and the proposed change of use in the proposals;

3. Misapplied paragraph APC.7 of the Planning Statement as a means for approving the proposed development; and
4. Should have determined that further residential development on the site was inappropriate

1. Open Space Reserve zoning and Nature Reserve

4.2 This appeal arises out of the appellants' deep concern about the potential for harm from the proposed further industrial development to the environmentally sensitive wetlands that border the appeal site. These concerns are expressed in their respective letters of objection to the planning application, which are attached for reference at Appendix 7.

4.3 Furthermore, the appellants are shocked at the reversal of approach by the Department of Planning in its handling of the proposals for additional development at the site. Up until this application the Department and the Board had adopted a consistent approach to further industrial development in this location based on the need, first and foremost, to protect Devonshire Marsh, which is largely zoned Nature Reserve. This is best explained by the then Minister in his appeal decision on a previous application (P0112/15) when describing the reasons for the Open Space Reserve zoning on the appeal site

"The conservation and protection zonings on this site are purposely in place to curtail the negative impacts of the industrial activities on the adjacent nature reserve and water lens. This is the public policy rationale for the zoning."

(see Appendix 5, p.3)

4.4 In one go this approach seems to have been totally abandoned by the Department and the Board despite the fact that only recently was the zoning

of the appeal site re-confirmed as Open Space Reserve (see Appendix 5). In the report on the zoning objection the Department echoed the Minister's sentiments above stating

The overriding issue of concern remains the highly sensitive surrounding natural environment and the Department does not see any way in which an industrial zoning of this site would be appropriate within the existing land use context.

(See Appendix 6 – FWD0022-19, p 216)

- 4.5 The Department was adamant at that time that the Open Space Reserve zoning was correct for the site. This zoning does not necessarily preclude further development at the site but it does provide the regulatory imperatives for assessing the scope and scale of further development. This is far exceeded in the appeal proposals.
- 4.6 The Department's about-turn on dealing with applications on this site is unjustified and sets a dangerous precedent for how it will consider proposals affecting conservation areas elsewhere on the island. This can only lead to confusion and uncertainty about the implementation of planning policy and undermine confidence in the planning system.
- 4.7 It is clear from the way in which the appeal site has been managed over the years that the applicant has little regard for the impact that the industrial activities on their site can have on the adjoining nature reserve. With container parking right on the boundary there is little separation between the industrial use and the Nature Reserve and incidents resulting from the industrial activities at the site have caused damage to the marsh environment in the past.

4.8 The marsh and the freshwater lens are susceptible to contaminated run-off from the site and as the Pollution section of the Department of Environment and Natural Resources noted in its email correspondence with the Department of Planning on the application referring to the collection and disposal of waste oil at the site

...there have been spills from improperly sealed drums during periods of heavy rain and there are drums that are not stored in the proper bunds etc...

(see Appendix 8)

4.9 The marsh and the freshwater lens are highly valuable natural resources and they should not be put at risk by allowing intensified industrial activity at this site.

4.10 Such activity could lead to further incidents such as when an extensive area of vegetation in the Nature Reserve was burnt as a result of a fire in 2018. The fire was found to have been caused by welding operations on containers located immediately adjacent to the marsh. The report into the cause of the fire by the Bermuda Fire and Rescue Service is attached at Appendix 9.

4.11 It is incidents such as these and the threat to the freshwater lens that make it essential that a precautionary approach should continue to guide planning policy in assessing development proposals at the appeal site.

4.12 This is clearly absent from the decision to approve three new warehouse buildings on the site. Construction details for the buildings are sketchy but the conservation management plan suggests that they will be built at or near current grade level. This would be close to water table level and the

additional weight of these structures in the locations indicated would be bound to have an impact on the adjoining marsh.

- 4.13 An attempt has been made in the appeal proposals to introduce a separation between the industrial operations and the Nature Reserve in the conservation management plan. This proposes a setback along the western, northern and eastern boundaries with a berm to be constructed to retain run-off. This is welcomed but along the eastern boundary the proposed setback does not meet the minimum required width as specified in paragraph NAT.6 of the Bermuda Plan 2018 Planning Statement. This requires that

*“Any development proposed in a zone adjacent to a Nature Reserve zone shall have a minimum setback of 15 feet from the boundary of the Nature Reserve zone **except for industrial development which shall have a minimum setback of 20 feet in accordance with policy APC.18.**”*

(Planning Statement, p.117)

- 4.14 It is imperative that the minimum setback distance be adhered to given the sensitive nature of the surrounding ecosystem. Indeed, in this instance it is recommended that the setback should be increased to 25ft.
- 4.15 The appellants are further concerned about the implications for stormwater drainage especially in view of the extensive hard surfacing for roads and parking areas in addition to the very substantial increase in site coverage on the property that would result from the implementation of the appeal proposals. This would amount to about 45% of the site area.
- 4.16 Little information is provided as to how the rainwater shed from the proposed buildings is to be contained but it does not appear to be proposed

to collect it in potable water tanks beneath the buildings. This seems strange as residential development is proposed which would normally require water tanks for potable water. Further confusion is caused by the inclusion of condition 11 on the planning permission which requires that details of potable water storage locations and specifications to be submitted. Does this mean that random excavations can be expected across the site to construct water tanks? This planning application should not have been approved without the details having first been established and agreed!

- 4.17 Stormwater drainage from the roads and parking areas, on the other hand, would be drained to sumps at various locations around the property. There is a serious risk of contaminants entering the groundwater at these points. Of particular concern is the parking areas designated for containers and tractor trailer parking. The surfacing for these areas is intended to be “permeable paving” and the risk of groundwater contamination is even greater at this location where there seems to be no intention to install preventative measures to avoid such pollution. As has been noted above there are already causes for concern about the potential for contamination of groundwater from the industrial activities at this site and these parking areas can only increase these risks.
- 4.18 Additionally, the proposals include surfacing access roads outside the existing vehicle maintenance and repair facility. This facility has the potential to pollute the groundwater lens and general marsh environment. It is important that details are provided to show improvements in the control and management of washdown water and waste oil to prevent pollution.
- 4.19 The appellants would, of course, dearly love to see this site cleaned up. But this should not be at the expense of legitimizing a range of unauthorized uses or to the extent that it would involve a major expansion of industrial activity at the site. And, if approved, the conditions attached to the

permission do not provide any confidence that the worst aspects of the site and its proposed development would be managed in a manner that would be in the best interests of the sustainability of the marsh and the freshwater lens. They are largely standard conditions and fail to cover the need to manage important aspects of site development or leave far too much detail to be provided at later stages of the process after permission has been granted for the development. This is too late.

- 4.20 Naturally the appellants would prefer that the site be restored to its former marsh habitat but accept that this is not a realistic ambition. At the very least, though, what they expect is the occupation of the site by a neighbour that cares for and respects the surrounding natural environment. The conservation management plan could provide the basis for a more settled relationship, subject to the provisos mentioned above, but the excessive additional development means the plan is unlikely to be effective.

2. Intensification of industrial use

- 4.21 The Department and the Board have also failed adequately to consider the change in and intensification of industrial use that has occurred on the site over the years.
- 4.22 In the second paragraph of the report to the Development Applications Board on the planning application the Department of Planning describes the uses currently being carried on at this site as

“...storage and processing of construction material, maintenance of construction equipment, storage of machinery, vehicles and shipping containers, tire replacement and sales and tree transplanting. This site is also used as a base for trucking services including shipping container haulage.”

(Appendix 4, p.3)

- 4.23 This is materially different to the description of the existing uses referred to in the court case in 1991 especially in its reference to the site being used as a base for trucking services. The company's success in that court case did not write a blank cheque for permitting it to develop the industrial use further without the benefit of planning permission. It is clear from the differences in the descriptions of the uses as well as from the appearances of the site in aerial photographs over the years (see Appendix 6) that significant intensification and change of use has occurred at the property.
- 4.24 Faced with this, the Department of Planning has now taken the view that everything that has taken place on the site is now immune from enforcement action. However, it has supplied no evidence to confirm this nor does it appear that the Department has attempted to restrain the use of the site despite complaints having been received. Instead, it appears that the applicant has been allowed to develop the site how it pleases. The applicant company should not be rewarded for flouting planning regulation but should be required to regularize matters as would be the case with other landowners. To approve the application in this way would set a very unfortunate precedent for other similar cases and it can be expected that notice will be taken of the way in which this applicant has been treated and others will expect the same.
- 4.25 This is especially pertinent in the context of trucking services and shipping container haulage. The introduction of this type of use would be a material change from the original uses of storage and processing of rubble, soil and sand and the parking of construction equipment and trucks. As far as is known planning permission has not been granted for such a use at this site. The current application is solely for the construction of buildings and site layout changes. This application should be accompanied by a retroactive

planning application for the use of the site as a base for a road haulage business. This use is separate and distinct from the use of the site as a contractor's storage yard and has significant implications for traffic generation at the site.

4.26 In this regard, it is particularly significant that there is an implied change of use in the appeal proposals that has not been addressed in the determination of the planning application. As noted above, the planning application proposals primarily involve the erection of three large warehouse structures, although the upper half of one is intended to be used for residential purposes. These buildings together with the parking areas for tractor trailers and shipping containers give the site an appearance of a transportation hub for storage and distribution uses in connection with the haulage business operated by the applicants. It appears, too, that this aspect of the company's activities is proposed to be the dominant operation on the property. In this context it is interesting to note that nowhere on the proposed site plan is any area allocated for the storage and processing of aggregate and other similar material.

4.27 The Department and the Board have approved a major change in the use of this site without having comprehensively assessed the planning, environmental and highways implications of such a use and which is completely at odds with the Open Space Reserve zoning of the property. At the very least one would have thought that the highways implications of such a change of use would require special attention. The site entrance is located very close to the particularly awkward junction of Middle Road and Parson's Lane. The establishment of a storage and distribution hub at this location will be bound to result in an intensified use of this access and junction. This could include container vehicles, construction trucks and equipment as well as members of the public in cars visiting the site to pick goods up resulting in hazardous traffic conditions at this busy junction. The

appeal proposals should not be approved unless and until a thorough examination of these factors is undertaken.

- 4.28 In this regard, it is certainly concerning that the appeal application has been approved without the details of the access/egress at the Parson's Lane/Middle Road junction having been finalized. The Department of Planning has apparently seen fit to leave these details for consideration at the building permit stage by condition 9 of the planning permission. These details need to be nailed down at the planning application stage and should be subject to public scrutiny. The access configuration, sight lines and other details can only be determined in the context of the range and type of vehicle likely to be using the access and the volume of traffic involved. The latter information is totally absent at present.

3. Paragraph APC.7 Misapplied

- 4.29 The Department of Planning has justified its recommendation of approval for the appeal proposals through the use of paragraph APC.7 of the Bermuda Plan 2018 Planning Statement. This paragraph provides discretion to the Board to allow improvements to be made to existing non-conforming developments. Paragraph APC.7 reads

Where an application is made for planning permission with respect to a nonconforming development which was in existence on the commencement day of the Plan, the Board may grant permission but only if the Board is satisfied

that:-

- a) the proposal is for the purpose of rehabilitating, upgrading or improving the standard of the existing development;*

- b) *the proposal exhibits a high standard of design and landscaping in accordance with the relevant policies of Section 3, General Policies;*
- c) *the proposal will not be injurious to the environment of the surrounding area, particularly any residential area, by reason of appearance, noise,*
- d) *traffic generated, odour, smoke, dust, vibration or other noxious condition, or scale of operation; and*
- e) *the grounds in support of the application as submitted by the applicant justify the exercise of the Board's discretion.*

(Planning Statement, p.41)

- 4.30 These provisions were not intended to be used for major additional new development on sites with conservation-based zones. While it is true that the use of this provision was suggested in a previous appeal decision the application context of that suggestion was in regard to a single building not the construction of three additional buildings that would more than triple the site coverage and total floorspace on the property.
- 4.31 The purpose of these provisions is to provide a modest amount of scope to upgrade existing non-conforming development on a site. The provisions have been misapplied in this case and would be likely to result in increased traffic generation and an enlarged scale of operation on the property that would pose a further threat to the Nature Reserve.
- 4.32 The appellants disagree strongly with the opinions expressed in the Board report to justify the use of APC.7. The proposed warehouses are not required for rehabilitating existing development, they are multiple new structures. While they may assist in tidying up the site this is incidental as their purpose is to facilitate a major expansion of the business. Nor do the

buildings exhibit a high standard of design. They are standard industrial structures of no design interest whatsoever and will be highly visible across Devonshire Marsh to the detriment of the rural views currently available. In fact, the development is bound to result in an increase in the scale of operation and an intensification in the use of the site which is inappropriate in such proximity to the Nature Reserve. The letter submitted with the planning application provides no justification at all for what has been approved.

4. Inappropriate location for residential development

- 4.33 It is ironic indeed that had the applicants been successful in obtaining a change in zoning of the property to Industrial the inclusion of residential units in the appeal proposals would not have been permitted. Yet the Department of Planning sees fit to approve an extraordinary range and mix of uses together on a single lot of land that is zoned for conservation purposes.
- 4.34 One of the basic objectives of zoning is the separation of land uses that are considered to be incompatible because they are likely to have adverse impacts. The most obvious example of this is the mixing of industrial and residential land uses. Industrial activities have always been found to be incompatible with residential development as they give rise to effects – noise, traffic, smells etc. Clearly, when industrial and residential uses are mixed these side effects can have severe ramifications for the health and safety of residents. On this site, for instance, the operation of contractor's equipment, the use of industrial machinery, the manoeuvring of tractor trailers and the potential storage of toxic substances in the warehouses would all be within close proximity to the residential uses and pose a risk to the health and safety of the occupiers of the homes. At the very least they would seriously detract from the enjoyment of one's place of abode.

Notwithstanding that the accommodation is for employees of the company a certain level of amenity should be expected to be provided and it seems unlikely that it would be found in the middle of an industrial development.

4.35 The Department has invoked paragraph APC.6 to justify its support for residential development in this location. This policy provides discretion to the Board to approve non-conforming residential development but only in certain circumstances. Paragraph APC.6 reads as follows:

Where an application is made for some form of residential development entailing an increase in the degree to which an existing state of affairs is nonconforming, the Board may grant planning permission but only if the Board is satisfied that:-

- a) the proposal is for the purpose of rehabilitating, upgrading or improving the standard of living accommodation;*
- b) the proposal will not be injurious to the amenity or environment of adjacent properties;*
- c) the proposal exhibits a high standard of design and landscaping in accordance with the relevant policies of Section 3, General Policies;*
- d) the proposal will not create a non-conforming density of development or result in an increase in an existing non-conforming density; and*
- e) the grounds in support of the application as submitted by the applicant justify the exercise of the Board's discretion.*

(Planning Statement, p. 41)

4.36 Again, issue is taken with interpretation and use of this policy in supporting the residential development element in the appeal proposals. Firstly, the proposals do not involve upgrading the existing standard of residential accommodation, they are brand new apartments. This type of residential

development is not permitted in areas zoned Open Space Reserve or, as already noted, in Industrial zones. Secondly, the apartments are in a warehouse building. This building has no design interest and is incompatible with and will detract from the amenity of the adjoining Nature Reserve. Thirdly, Open Space Reserve only permits residential development in very limited circumstances and this case is not one of them. It will, therefore, most definitely result in an increase in non-conforming density on the site, which currently is limited to the three residential units in the original house on the property. Finally, it is irrelevant that the units would be occupied by employees of the applicant company as they are still non-conforming development. In any case, there are no safeguards to ensure that these units will continue to be occupied by company staff.

- 4.37 Most fundamentally, the discretion provided in paragraph APC.6 was not intended to be used in this way primarily because it would never have been envisaged that the Department would be prepared to approve residential development within an industrial complex. This goes against all the basic tenets of planning as an arm of public administration in its role in maintaining and ensuring appropriate levels of public health and safety in housing developments. This is rarely achieved when mixing residential and industrial development.

5. Conclusion

- 5.1 The Minister is respectfully requested to uphold this appeal and refuse planning permission for the proposed development as it
- i. Is contrary to the Open Space Reserve zoning of the property,
 - ii. Would be likely to result in further harm to the Nature Reserve and freshwater lens,

- iii. Would confirm an intensification of use at the site which has been undertaken without the benefit of planning permission,
- iv. Would result in a major change of use at the property that has not been properly considered in the application review process,
- v. Is unjustified as a result of the misapplication of policy used to recommend approval of the proposed development, and
- vi. Would result in an unsatisfactory mix of industrial and residential development, and
- vii. Would set a highly undesirable precedent for abandoning conservation objectives in favour of allowing property owners to disregard planning regulations by undertaking development without first obtaining planning permission.



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15th September 2022