Planning & Building (Jersey) Law 2002, Article 109.

REPORT TO MINISTER FOR THE ENVIRONMENT

By Graham Self MA MSc FRTPI

Appeal by Mr S Boydens and Mr M Boydens against an enforcement notice.

Reference Number: ENF/2018/00010

Land east of Field No. B351, La Route du Petit Port, St Brelade.

Introduction

1. I held a hearing into this appeal on 22 August 2018. I inspected the site briefly during the previous evening and again in more detail on 22 August after the hearing.

2. In this report after referring to the enforcement notice and grounds of appeal I provide a description of the appeal site and surroundings, followed by summaries of the cases for the appellant, the planning authority, and other parties. I then set out my assessment, conclusions and recommendation. The appeal statements, plans and other relevant documents are in the case file for you to examine if necessary.

3. The summaries of the cases for the parties are based on their written submissions. New points which emerged during the hearing are incorporated where appropriate into my assessment.

The Enforcement Notice and Grounds of Appeal

4. The main provisions of the enforcement notice are as follows.

- The notice is dated 6 June 2018.
- The alleged breach of development controls is:

  "(i) Without planning permission a storage (ferryspeed) container and second open fronted structure have been sited adjacent to the western boundary with Field no.B351. The latter open fronted structure providing a machinery store and 5no workstations.

  (ii) Without planning permission the use of the land for the working of stone, including the use of a generator, mechanical tools and cutting equipment."

- The requirements of the notice are: "Cease using the land for the unauthorised stone working and processing operations and to remove the unauthorised storage (ferryspeed) container and the open fronted machinery store and workstations."
- The period for compliance is three months.

5. The appeal was originally made on grounds (a), (c), (e), (f), (g) and (h) as set out in Article 109(2) of the 2002 Law. However, the fee for the application for

planning permission arising from ground (h) was not paid, so this ground has lapsed.[1]

6. Section 6 of the standard form which appellants are required to use when submitting a notice of appeal asks for "a brief summary of the grounds of appeal". The text on the sheets attached to the form, headed "Grounds of Appeal", is set out in 13 numbered paragraphs with no indications as to how each piece of text relates to the grounds pleaded under Article 109(2) as shown on the appeal form. The same applies to the expanded arguments in the appellant's later statement of case. I comment further on the appeal grounds in my assessment below.

Site and Surroundings

7. The location of the appeal site and its spatial relationship with nearby properties can be seen by reference to the plan attached to the enforcement notice. The site lies north of La Route du Petit Port. The part of the site nearest the road is an access track which passes between the plots of two houses, Newlands to the west and Holmsdale to the east. Further to the north, the site widens and has a roughly rectangular shape. The landform of the site has the general appearance of a former gravel quarry, most of the site being below the level of the surrounding land, with steep sides varying between about 2 metres and 4 metres vertically.

8. At the time of my inspections there were various items on the site. Towards the west there was a shipping container - the "Ferryspeed" container mentioned in the enforcement notice (so-called because it is labelled with this name). Immediately north of the container stood a structure with two parts, made of scaffolding with fabric or plastic sheeting and roofed with corrugated sheets. One part was roughly rectangular in shape, about 7 metres by 6 metres in area; the other was more elongated in shape, about 10 metres by 2 metres in area with its longer dimension close to and roughly parallel with the west boundary of the site. A stone-cutting guillotine (labelled as manufactured by Wells Wellcut Ltd) stood in the rectangular part of the structure, and some other smaller items of equipment under the other part. Near the guillotine was a petrol-powered generator. Both parts of the structure were open-fronted where they faced east into the site.

9. A small timber shed and a separate portable toilet unit stood near the container mentioned above. Near the eastern site boundary was another structure rather similar to a shipping container but with a small doorway. Another shed was sited in the northern part of the site.

10. Piles of stone blocks, which mostly appeared to be granite, were stacked loosely near the sides of the site towards the east and west. Some blocks of stone, and a smaller quantity of bricks, were also stacked on pallets near the Ferryspeed container. Elsewhere on the site I saw a skip and some water tanks or tubs.

11. Inside the Ferryspeed container I saw various items including ladders, wheelbarrows of the type normally used by builders, scaffolding and platform supports, a cement mixer, lengths of timber and planks, lengths of rope, and Acrow props. The nearby shed contained numerous hand tools, some cabling, and small items of workshop equipment. Inside the container-type structure near the site's eastern boundary I saw various hand tools, two Stihl circular saws, road

[1] The payment submitted with the notice of appeal (£102.50) only covered the basic appeal fee. The ground (h) application fee for all the various developments described in the allegation (including the double charge for a retrospective application) would have been over £2,000.

signs, traffic cones, and a large reel of electric cable. I did not go into the shed in the north part of the site (the door was padlocked) but several large wheels and tyres were visible through a window.

12. The land immediately to the west of the site is an open field, except for the house next to the access track. To the east there are residential properties, with access along an unnamed roadway off the north side of La Route du Petit Port. The two dwellings closest to the central part of the site are Hazy View (on the east side of the access road proceeding from La Route du Petit Port), and Le Jardin, which is further to the north and stands north of the access road near a point where it bends towards the east. These dwellings are bungalow-style but have rooms on both first and ground floors. Windows in these dwellings face towards the appeal site, although clear intervisibility is only obtainable at first floor level. At Le Jardin there is a first floor bedroom which has a large full-length glazed opening in the west elevation and a balcony about 7 metres from the appeal site.

13. One of the dwellings in the group of properties served by the unnamed road is Goblins Glade, which is evidently occupied by Mr and Mrs Boydens. An outbuilding within the curtilage of this property is laid out with office furniture and equipment and is apparently the office base for the appellants' business. A mobile stone-cutting machine was standing in the driveway of this property at the times of my inspections.

Case for Appellants

14. When the appeal was lodged, the main grounds were that the planning authority had failed properly and appropriately to consider a number of points. In summary, these were:

- The working of stone including the use of generators, mechanical tools and cutting equipment had taken place regularly at the site since 1981.
- The use of the site had taken place with the knowledge and agreement of the planning department since 1991. The Department had confirmed in March 2017 that the site had been used for its current purpose for more than eight years.
- Cutting and dressing stone takes place for limited hours and periods. The permitted use as a storage yard for granite was likely to cause greater noise, dust and vibration than cutting and dressing stone.
- The site's previous use as a quarry would have created greater noise, dust and vibration than the current use.
- The nearest dwelling to the site was constructed at a time when the site was used for storing granite including cutting and dressing stone. Three of the dwellings east of the site were constructed after the site was first used for storing, cutting and dressing stone, so inhabitants should have been aware of the established use.
- Utilitarian structures were necessary for the use of the site. Legislation required an employer to provide adequate working conditions for employees. The structures were ancillary to the use of the site and conformed with policies NE7 (paragraphs 5-8 and 12) and E1.
- The planning department had refused to allow homes to be built on the site.

15. In the later statement of case the points above are expanded and supporting documents are attached. These include: copy extracts from Mr Michel Boydens' diary for the years 1997 to 2009; photographs labelled with dates in 1984 and

1991; copies of an exchange of emails in March 2017 between Mr Michael Stein and Mr Keith Bray; photographs of structures at other sites; drawings of a proposed building; and documents relating to the application for housing development at the site (P/2016/0460), including extracts from a Design Statement, the inspector's report and Minister's decision on the appeal against refusal of planning permission.

Case for Planning Authority

16. In response to the appeal, the planning authority make the following comments.

- The issues of concern are the structures on the site and what the Department considers is a change of use of the land from storage to a mixed use including storage and the working and processing of stone. The buildings are of poor design and conflict with Island Plan policy. The changed nature of the use from storage has caused unreasonable harm to the amenities of neighbouring properties.
- The ceased quarry use is not relevant. The 1991 planning permission and attached conditions only permitted the storage of granite.
- The nature of the work on the site, facilitated by the unauthorised erection of work-stations, cannot be considered ancillary to storage. The use now being carried on has not been ongoing for eight years or more.
- The approved storage use would not be likely to cause greater noise, dust and vibration than the mixed use.
- The obligations of an employer to provide adequate working conditions do not override planning law.
- Adjacent houses were permitted and occupied before the nature of the use changed.

17. Documents attached to the Department's statement included a copy of the enforcement notice, the original officer's report on application P/2017/0482, the final report to the planning committee, committee minutes, and the inspector's report on the appeal against the refusal of planning permission for housing development.

Representations by Other Parties

18. A group of local residents[2] submitted a joint written statement and a later document called "follow-on representations". The first document sets out a "summary rationale to reject the appeal" and comments on the grounds of appeal. Appendices contain supporting material including activity logs and copies of letters of objection, which were apparently available until recently on the public registry but have been removed in accordance with normal practice following refusal of an application. A USB stick submitted by residents also contains video recordings during which noise from machinery can be heard.

19. The main points made by local residents are summarised below.

- Allowing the appeal would support the continued breach of several laws. The refusal of planning permission and enforcement action was proper and appropriate. Local residents have suffered unreasonable levels of noise and dust caused by the unapproved intensified commercial use of the site since 2015.

[2] The people listed on the front page of the written representations are: Mr Jon and Mrs Tanya Chinn; Mr Gary and Mrs Susan Parrott; Mr Alex and Mrs Ceri Belcher; Mr John and Mrs Sylvia Noel; and Mr Simon and Mrs Catherine Fenton.

- Residents objected to planning application P/2017/0482 and submitted individual complaints to the planning or environmental health departments after complaints to Messrs Boydens were ignored. Prior to 2015, residents did not experience any nuisance from the site when it was used in accordance with its permit for storing granite.
- The appellants and their agent knowingly misled the planning department and committee about the use of the site when making the original planning application and have continued to do so.
- The site was derelict in 1981 and was used for storage from 1991 to late 2015. That changed when the intensified use with mechanical stone cutting or dressing operations started in late 2015. The claim that the site has been used for its current purpose for more than eight years is false.
- The residents' activity logs confirm that cutting stone was not confined to the days or hours claimed by the appellants. Conditions 2, 3 and 4 attached to the 1991 permission for the storage of stone have been breached.
- The site ceased to be an operational gravel pit in the late 1950s or early 60s. It was derelict when planning permission was issued for dwellings nearby. Later conveyancing checks when properties changed ownership did not reveal any misuse of the site or unreasonable noise or dust from commercial activity. Storage of granite before 2015 did not cause any problem or result in any complaint by residents.

20. The follow-on representations comment on the appellants' statement of case and include an appendix containing an analysis of the diary extracts submitted in evidence by Mr Boydens. In summary, it is contended that the 13 grounds within the appellants' statement are either false, misleading, improper or inappropriate, are not evidence based, and largely support the enforcement notice; that the enforcement notice restores compliance with Jersey law; and that the refusals of planning applications P/2017/0482 and MS/2017/0483 were proper and appropriate.

Assessment

21. As can happen in enforcement cases involving multiple grounds of appeal under Article 109(2) as well as two different types of development (as described more fully below), there are numerous factors to consider. It is also necessary to explain several legal issues. The assessment below is therefore more extensive than might be typical for appeals against the refusal or grant of planning permission.

Some General Principles of Planning Law

22. I think it would be helpful if I set out here three general principles of planning law relating to changes of use of land and intensification of use. These points are derived partly from case law from UK court judgments, which apply in Jersey as guidance where the legislation is similar and there are no relevant or contrary Royal Court judgments. (No such judgments on these points have been mentioned by the parties to this appeal and I am not aware of any).

23. First, when considering the use of land and whether a use has materially changed, it is necessary to decide on the "planning unit" - that is to say the area of land involved - since various different activities or uses can often occur within

parcels of land which may or may not be linked.[3] The starting point for determining the appropriate planning unit is the unit of occupation. In this instance, the planning unit which has to be considered when assessing the use of the land is the appeal site as a whole.

24. Second, the mere intensification of a use would not normally in itself amount to a material change of use. This point has been the subject of court judgments where, for example, the number of caravans on a caravan site, or the number of tables at a restaurant, has increased. However, this is not an absolute or universal rule since numbers alone may not reflect whether a use has materially changed: for example in a case involving keeping 44 dogs at a dwelling in Wales, the court upheld an enforcement notice requiring the number of dogs to be reduced to six.[4]

25. Third, the intensification of one element of a dual, mixed or composite use can amount to a material change of use of the planning unit as a whole. Alternatively, a planning unit may be used for a single primary purpose with some other use or activity being ancillary or incidental. The ancillary or incidental use or activity may change without constituting development provided that the effect does not go beyond the point where its subsidiary ancillary or incidental status is lost. Similar considerations apply to activities which may be minimal in scale (or *de minimis* to planning lawyers[5]). A key question to be asked is whether the character of the overall use of the planning unit has materially changed, or whether what has happened is "more of the same".

The Enforcement Notice

26. The allegation in the enforcement notice describes two different types of development. One refers to operational development as defined in Article 5 of the 2002 Law; the other refers to the use of land. Although the dual nature of the allegation causes complications, it does not make the notice invalid. However, the allegation is flawed in two other ways.

27. First, sub-paragraph (ii) of the allegation does not properly describe a breach of planning control, because it alleges "the use of land", and the mere use of land is not development under the 2002 Law. What is development is *making a material change of use*.

28. Second, it was apparent to me from the written evidence supplied before the hearing that at the time the enforcement notice was issued, the appeal site was in mixed or composite use. Indeed, the Department's statement argues that there has been "a change of use of the land from storage to a mixed use including storage and the working and processing of stone". But what the Department alleged in the enforcement notice only referred to "the working of stone", with no mention of storage.

29. Where a site comprising a single "planning unit" is in mixed use, an enforcement notice directed at an unauthorised material change of use should include *in its allegation* all the components of the use, even if the *requirements* of the notice

[3] To take a simple example, for planning purposes the use of a garden with a vegetable plot attached to a typical house is not normally "leisure" or "horticulture" - it is "residential", because the land is part and parcel of a residential unit.

[4] *Wallington v Secretary of State for Wales* [1990] JPL 112.

[5] This is an abbreviation of *"De minimis non curat lex"*, which roughly translates as "The law does not care about minimal things".

are only directed at one component.[6] (This is commonly known as "under-enforcement".)

30. I drew attention to those points at the hearing. I also mentioned the power available to you (under Article 116 of the 2002 Law) to correct and/or vary the enforcement notice.

31. During the hearing further evidence emerged about the use of the site, particularly concerning the contents of the containers, inside which I had not seen the previous evening. Mr Michel Boydens said that most of the comings and goings to and from the site were to do with general building work, and the appellants' evidence made it clear that a material part of the mixed use of the site is use as a builder's yard. This was confirmed by what I saw later during my post-hearing inspection - many of the items I saw, as recorded in the site description above (such as ladders, wheelbarrows, scaffolding, timber planks, rope, Acrow props, a cement mixer, lengths of cable, road signs, traffic cones and bricks) are typical of a builder's yard and would not normally have anything to do with use of a site for either storing stone or cutting or working stone.

32. Although the items mentioned above do not occupy much of the site area, they almost fill the container enforced against and the other container-like object in the western part of the site, so it seems that the main reason these two objects are on the site is to provide secure shelter for general builder's equipment. Taken together with the evidence that the builder's yard activity generates most of the traffic to and from the site, it is clear that the "general builder's yard" component of the overall use of the planning unit is far more than *de minimis* or ancillary or incidental - it is a significant component of the mixed use and cannot be ignored. The actual mixed use of the site (which appears to be best described as use for storing blocks of granite, cutting or working granite and use as a builder's yard) has evidently not changed materially in the fairly short time since June 2018 when the notice was issued.

33. In these circumstances the enforcement notice needs to be corrected for the reason explained in paragraph 29 above, so that the allegation refers to the mixed use just described. Bearing in mind that I spoke about the likelihood of such correction during the hearing, so all parties had an opportunity to comment, and both main parties were legally represented, I consider that the notice can be suitably corrected without injustice being caused to any party. (If instead of correcting the enforcement notice it were to be quashed on the grounds that the allegation is incorrect, the planning authority would almost certainly immediately issue another one with a corrected allegation, leading to another appeal and causing cost, delay and inconvenience to all those involved.)

Grounds of Appeal under Article 109

34. The sub-headings in the assessment below refer to the lettered grounds of appeal under Article 109(2) as shown by the ticked boxes in the notice of appeal. They are taken not in alphabetical order, but in a sequence which is more logical when considering or deciding a multiple-ground enforcement appeal. For example, if what is alleged in an enforcement notice has not occurred (ground (e)), whether

[6] This is not the place to explain relevant planning law in detail, but in brief, where an enforcement notice is directed at an unauthorised change of use of land, and the land is in mixed or composite use, issues of both planning merits and time-related "immunity" need to be judged on the basis of the mixed or composite use. Particular problems arise if an appeal succeeds on ground (h), which results in planning permission being granted for the development specified in the allegation, because if the allegation does not properly reflect the actual use of the land, the use would remain unauthorised even after the grant of planning permission.

it occurred eight or more years ago and so gained immunity from planning control (ground (c)) would become irrelevant.

35. Because this enforcement notice refers to both operational development and a material change of use, it is necessary to consider each ground of appeal for each type of development. However, during the hearing the appellants' advocate stated that the appellants were not pursuing any of the grounds of appeal insofar as sub-paragraph (i) of the allegation was concerned - that is to say, they were not now disputing the allegation concerning the Ferryspeed container and open-fronted structure or the requirement to remove these items - so I can deal with this aspect of the notice briefly below for each appeal ground.

Ground (a)

36. Under this ground of appeal, it is claimed that the matters alleged in the enforcement notice are not subject to control by the 2002 Law.

37. The statements for the appellants lack any argument as to why the matters alleged in the enforcement notice are outside planning control under the 2002 Law. Claims are made that the enforcement notice "has not been issued in conformity with the law", but these claims are based on issues of timing, planning policy, or other aspects not germane to ground (a). After I made comments about this part of the appeal, the appellants' advocate accepted that the appellants had no real case on ground (a).

38. The erection of the open-sided structure clearly constituted building development requiring planning permission as defined under the 2002 Law. The container has apparently been treated in two planning applications (P/2017/0482 and 0483) as both operational development and a use of land, the latter being on the basis that it is a moveable structure. Bearing in mind that the container is not mobile in the same way as a caravan or other wheeled object could be, and there is no evidence of any intention to move it around, its presence on the site can properly be categorised as operational development (if not a building operation, it would be an "other operation" as defined in Article 5). That appears to be the way the enforcement notice treats it, and the appellants have not attempted to argue otherwise.

39. It is also clear that planning controls under the 2002 Law apply to the material change of use which is alleged to have occurred. Whether such change has occurred, and if so when it occurred, are matters for other grounds of appeal.

40. In summary, the two types of development described in the allegation are both subject to control under the 2002 Law. I conclude that there is no basis for ground (a) of the appeal to succeed.

Ground (e)

41. Under ground (e), it is claimed that what is alleged in the enforcement notice has not occurred. The shipping container and open-fronted structure are on the site. There is no dispute that they were in place on the site when the enforcement notice was issued. Thus the development referred to in the first part of the allegation has clearly occurred.

42. As regards the "use" part of the allegation, to succeed on ground (e) the appellants have to show that the development alleged (as corrected - that is to say, the material change of use to mixed use for storing blocks of granite, cutting or working granite and use as a builder's yard) has not occurred. There is abundant evidence, from the appellants themselves as well as other parties, that

at the time the enforcement notice was issued, the site was being used in the way described in the allegation (as corrected). This evidence is reinforced by what I saw at the site.

43. There is undisputed evidence that in the distant past the site was a quarry, though that use has long ago been abandoned. The use enforced against is materially different from use as a quarry or from "nil" use, so a material change of use to the use described in the allegation (as corrected) has occurred. When it occurred is not relevant to ground (e).

44. I conclude that ground (e) should fail.

Ground (c)

45. This is the ground of appeal contending that the development has become "immune" through the passage of time. The relevant period is eight years - that is to say, the operational development and the material change of use at which this notice is directed would both have gained immunity if the development had occurred eight or more years before the date of issue of the enforcement notice. In the case of the "material change of use" development, the use must also have continued and not been abandoned during the eight year period.

46. The shipping container and the nearby open-fronted structure evidently first appeared on the land in about January and November 2016 respectively, well within the eight year period before 6 June 2018. This again is not disputed by the appellants and there is no case in support of ground (c) as regards the operational development.

47. The use of the land, and the timing of a material change of use, are more complicated matters. What has to be considered for the purposes of planning law is not just when certain *activities* may have started on the site, but when *the character of use of the land* changed and whether change was *material*.

48. I have no doubt that some working and cutting of stone has taken place on the site for many years. However, the available evidence indicates that in the past (until late 2015 or early 2016) this activity was limited in scale and was sporadic. It may have involved the occasional use of powered tools, though not to an extent as to be intrusive or noticeable to residents who sometimes heard chipping noises from hand working. Part of the appellants' case relates to diary entries made by Mr Michel Boydens, which the appellants claim supports their argument that stone working has long been a significant activity at the site. However, the days or parts of days when stone working at the site is specifically noted in the diaries are few: I calculate that between the years 1997 and 2009 the average number of days when stone working in the yard is recorded is about 4 per year, ranging from zero to about 11 in any one year, though some of the latter figure were not full days.

49. When I put this point to Mr Boydens he said that time spent in the yard would not always be recorded as "in yard" in the diary. That may have been so, but these times appear only to have related to short periods in the yard before going to a construction site. The main purpose of the diary was evidently to record time so that it could be charged to customers; most stone cutting evidently takes place on construction sites, and it is difficult to see why Mr Boydens would specifically mention the yard in his diary for some, but not all, of the time spent working in the yard. Moreover there is no diary or other recorded information showing whether working in the yard was carried on to any significant extent (as opposed to being abandoned) after 2009.

50. For those reasons I find the diary evidence unconvincing. If anything, it shows that for the purposes of planning law, the extent of stone working at the site during the period leading up to June 2010 (eight years before the date of the enforcement notice) was either *de minimis* or ancillary or incidental to the overall mixed use.

51. Other evidence points the same way. The inspector's report on appeal P/2016/0460 refers to the fact that the site was marketed in 2012 and the appellants claimed it was redundant. The general thrust of the evidence by local residents is that until quite recently, activities at the site were hardly noticed or at least did not cause any disturbance. The nearest house, Le Jardin, was evidently built in about 2000, and it seems intrinsically unlikely that this property would have been designed and built with its close outlook over the appeal site and that the occupier later would have had some trees removed, if a significant amount of potentially intrusive stone cutting was being carried out at the site then. The two small sheds which were evidently replaced by the structures now enforced against do not appear to have been large enough to accommodate working with the guillotine machine and generator now on the site as well housing the builder's materials and all the other equipment.

52. Another pointer is the 1991 planning application and permission. Mr Michel Boydens was apparently closely involved with that permission - although he was not the applicant, the permission was addressed to him and refers to the applicant (Mr Alister Godfrey) as his agent. The application was retrospective, and described the existing use of the site as "granite storage", with no mention of cutting or working stone (or use as a builder's yard). In response, planning permission was granted for "change of use from quarry to granite storage - retrospective". One of the conditions stated that the use approved was "for granite storage purposes only and for no other purposes without the prior consent of the Island Development Committee". Another condition made clear that the permission did not allow any building works.

53. It is reasonable to assume that if cutting or working stone was at that time a significant component of the use of the site, it would have been included in the application, or that Mr Boydens would have raised questions either about the application, or at least about the permission and its conditions. No such questions appear to have been raised. The alternatives would be that either the application was deliberately misleading or that the agent was incompetent. There seems no reason to make either of these assumptions.

54. In summary, stone working has evidently been carried out at the site intermittently and mostly for short periods of time; but I find from the available evidence that the scale of this activity has until recently been, at most, ancillary or incidental to the overall mixed use for storing stone and as a builder's yard. That situation changed in 2016 or late 2015 when stone cutting became a much more noticeable activity. In planning terms, working or cutting stone was no longer a minimal or ancillary activity but became a significant component of the mixed use of the site. Referring back to the alternatives I mentioned in paragraph 25 above, this was not merely "more of the same" - rather, the character of the overall use of the planning unit materially changed.

55. I can understand why the appellants believe that because some stone working has been carried out at the site for many years unchallenged by the planning authority, it is not right now to stop it. But what the appellants and their advisers have not taken into account is the difference between a subsidiary *activity* and the *use of land* for the purposes of planning law. Just because an activity has been carried on sometimes in the past does not mean that it caused

a material change of use. Such a change of use may then occur if the scale or impact alters, and the loss of ancillary or incidental status has planning consequences. There is no evidence that the builder's yard component of the mixed use also existed for more than eight years but even if it did, it has lost any immunity it might have had because the *mixed use as a whole* (including working or cutting stone at a more than ancillary or incidental level) has not been carried on for eight years or more before June 2018.

56. I note that in a letter dated 3 April 2017, sent to Mr Bray in support of the retrospective application relating to the shelter and shipping container, the appellants' then agent Mr Michael Stein wrote :

> "Michel Boydens, of Michel Boydens & Sons Ltd, first rented the site from 1981 before purchasing the site in 1990 and used it to store and cut granite for use on building sites the company were sub-contracted on. In 1991 they applied to formalise this use and permission was duly granted.

57. That statement is incorrect, and may perhaps account for some of the appellants' misunderstanding. The 1991 permission did not "formalise the use of the site" to store and cut granite - this permission was clearly only for *granite storage*.

58. I conclude that neither of the types of development enforced against (the operational development and the material change of use) became immune through the passage of time by June 2018, so the enforcement notice was not issued too late. Therefore ground (c) of the appeal should fail.

Grounds (f) and (g) - General Points

59. These grounds of appeal are to enable an appellant to contend that if all the other grounds fail, the requirements of the notice exceed what is necessary to remedy the breach of planning control, and that the compliance period is too short. But nowhere in the appellants' statement of case or later written comments is there any stated claim or argument relating to grounds (f) and (g). No lesser requirements are suggested as a suitable means of remedying the alleged breaches of planning control, and no case is made out for a longer compliance period. The Department's statement similarly does not make any comment about grounds (f) or (g), perhaps understandably as there was no case to respond to.

60. Section 6 of the notice of appeal form contains a note stating: "You will not be able to raise any issues in your full statement that you do not indicate here". Therefore the appellants could have been told that these grounds have fallen away and could not be pursued. Out of fairness, as it might be considered harsh to penalise the appellants for what appears to be a failing by their professional advisers, I accepted submissions on these grounds at the hearing. The Department's representatives did not object to this.

Ground (f)

61. The requirement to remove the container and open-fronted structure is not in any way excessive. It is a logical and normal step to take against this part of the unauthorised development and the appellants have not disputed it.

62. The requirement relating to the unauthorised use needs to be amended to take account of the corrected allegation,[7] whilst leaving the occupier the option of

[7] That is to say, the requirement to cease the mixed use would include the stone working and builder's yard components of the mixed use - much of the latter would in effect be covered anyway by the appellants' acceptance of the removal of the container, which for security reasons has evidently been integral to the builder's yard use.

carrying on the storage use authorised by the conditional planning permission granted in 1991. The appellants submitted that the notice was not sufficiently precise because the requirements did not make clear what work could be carried on at the site or what equipment could be used.

63. As regards the appellants' point about imprecise requirements, the so-called "Mansi principle" was mentioned during the hearing. This refers to a well-known old judgment (*Mansi v Elstree RDC* [1964] 16 P&CR 153) which established in essence that an enforcement notice cannot prevent uses which are lawful; where there is a mixed use the requirements of an enforcement notice only bear on the activities associated with the unlawful component or components of the mixed use. However, there are limits to the Mansi doctrine - an enforcement notice does not have to spell out precisely what can or cannot be done at a site, or to specify what ancillary activities can be carried on.[8]

64. I am recommending variations to the requirements of the enforcement notice to make it as clear as reasonably possible what the appellants have to do to remedy the breach of planning control. It is not feasible to spell out all conceivable possibilities of what activities on the site might or might not be authorised because whether a particular activity would be *de minimis,* or ancillary, or incidental, or would amount to a material change of use of the planning unit, would depend on numerous details. If they want to be sure, all the appellants need to do is to use the site for the storage of granite in accordance with the conditions of the 1991 permission (or of course cease any use).

65. The enforcement notice as issued did not require the removal of the container-type unit near the east boundary of the site or the shed near the northern boundary. The reasons for these exclusions are unexplained.[9] Enlarging the scope of the notice to include these items at this stage could cause potential injustice, so I do not suggest doing so.

Ground (g)

66. The requirements of the enforcement notice and its three month compliance period are likely to cause disruption to the appellants' business,[10] which evidently has about 30 employees, and in principle it is desirable to encourage business enterprise. On the other hand, there is strong evidence that the residential amenities of nearby dwellings are being significantly harmed by noise, dust and general disturbance caused by the unauthorised use of the site. Moreover the appellants either must have known or should have known that the planning permission granted in 1991 only allowed stone to be stored, and they must or should have realised that they were taking a risk in carrying out increasingly intrusive activities involving much more than was covered by the 1991 permission.

67. For the appellants, Mr Boothman suggested that a compliance period of at least 24 months should be granted, to give time for an alternative site to be found for

[8] There are numerous court judgments on these points. Three which are probably the most relevant, in date order, are: *Miller-Mead v MHLG* [1963] 2 QB 196; *Trevor Warehouses v SSE* [1972] 23 P&CR 215; and *Duguid v SSETR* [2001] 82 P&CR 6.

[9] Where an enforcement notice is directed at an unauthorised material change of use, the removal of operational development which is integral to and facilitates the use can validly be required, even where such development would otherwise be immune or lawful (as per the standard leading judgments in *Murfitt v SSE* [1980] JPL 598 and *Somak Travel v SSE* [1987] JPL 630, more recently confirmed in *Kestrel Hydro v SSCLG* [2016] EWCA Civ 784). But the enforcement notice subject to the present appeal did not include all the structures on the site in its requirements.

[10] Michel Boydens & Sons Ltd, which I understand uses the trading name MBS.

the business, for finance to be arranged and for a planning application to be made for residential development. Mr Boothman also referred to a Royal Court judgment in a voisinage case (*Yates and Yates v Reg's Skips Ltd* [2007] JRC 237), where the court had mentioned the need for the defendant company to have an opportunity to find another location for its operations. Mr Boothman submitted that in that case, a period of nearly six months had been allowed.[11]

68. There can be some scope for a balancing exercise when considering ground (g), but this is limited. It would certainly not be appropriate to increase the compliance period to such an extent as would be tantamount to a temporary planning permission. The suggestion of a two-year period is wholly unrealistic. There is no justification for allowing time for a planning application to be made for residential development, especially taking into account a previous refusal of permission and dismissal of the ensuing appeal. The enforcement notice has already been suspended because of the appeal against it, but the appellants are entitled to await the outcome of the appeal.

69. I have considered whether the planning authority's failure to identify the "real" use of the site and the effects of the resultant need to correct the enforcement notice could justify a longer compliance period, perhaps up to a maximum of six months. Against that, as noted above the appellants appear to have had little regard to the restricted scope of the 1991 permission, and since no case in support of ground (g) was made out in any of the appeal statements, even considering this ground at all is being generous to the appellants.

70. Another weakness in the appellants' case on ground (g) is their acceptance that the operational development covered by sub-paragraph (i) of the allegation was unauthorised and that they are willing to comply with the requirement to remove these structures. The physical task of removing the container and open-fronted structure could be carried out in a matter of hours, so in that respect three months is ample. Different compliance periods could be specified for the "operations" and the "use" but that seems an undesirable complication.

71. On balance, I judge that it would be appropriate to extend the compliance period to four months. The final decision is of course a matter for you, but if an extension is allowed ground (g) would succeed to that limited degree.

Planning Policy and Related "Planning Merits" issues

72. In their written submissions, the appellants have made various references to planning policy as set out in the Island Plan and to other "planning merits" issues. For example, they have contended that the previous use of the site as a quarry and the permitted use as a storage yard for granite would be likely to lead to greater noise, dust and vibration than cutting and dressing stone; that three of the nearby dwellings were constructed after the site was first used for storing, cutting and dressing stone; that utilitarian structures were necessary for such use; and that the disputed structures are not prominent or could be screened. They have also argued that the decision should take into account that the appellants would be amenable to you imposing restrictions on working hours.

73. Such arguments might perhaps have had some bearing on the issue of whether or not planning permission should be granted; but in the absence of ground (h) and any related application they do not provide any support for the other grounds of appeal. Grounds (a), (e) and (c) have to be decided on the facts as found and the application of the law to the facts, not on planning merits or demerits.

[11] The written judgment is dated 11 December 2007; the court granted an injunction to come into force on 1 May 2008; this is actually less than five months from the date of the written judgment.

Conditions - on matters such as working hours or screening - cannot be imposed where there is no scope for granting a planning permission.

74. The same applies to the contention that the structures enforced against are necessary because of an employer's obligation to provide adequate working conditions for employees, and to the appellants' comments about other sites, including those owned or operated by the States. Neither an employer's legal obligations towards employees nor what happens elsewhere in Jersey affect the factual history of this appeal site.

Emails/Letters Sent by Mr Bray - and Estoppel or Legitimate Expectation?

75. The appellants have maintained that the planning authority took no action against the use of the site for many years, and that the appellants have had the tacit agreement of the planning department to operate the site for working stone for more than 25 years. Another part of the appellants' case relates to a site visit and exchange of correspondence in March 2017 between Mr Michael Stein for the appellants and Mr Keith Bray for the planning authority. Mr Bray also wrote to Mr Scott Boydens, apparently responding to a complaint.

76. Mr Stein wrote to Mr Bray:

> "It was good to hear that you understood and agreed that the cutting of stone had taken place on the above site over a period well in excess of 8 years and that you accepted that there had evolved a gradual intensification of use over that time and which could not be enforced against. Your only concern was the erection of the new shelters and container….."

77. Mr Bray wrote in response:

> "You are correct I will not act against the current use of the site that I accept has existed for more than 8 years. I will only require a retrospective planning application for the Ferry Speed container and scaffold structure."

78. In his separate letter to Mr Boydens, Mr Bray wrote (here I quote what I consider to be the key points):

> "The current operation at the site that involves the working of granite is unauthorised and constitute *(sic)* a breach of the Planning and Building Law….However….if a breach of the Law occurred over 8 years ago, as in the case of the above site an enforcement notice could not be served to rectify the matter….I accept that the current activity/operation at the above site involving the splitting or dressing of granite by Boydens Stonemasons has been such for longer than 10 years and therefore immune from enforcement action" (*sic) (presumably intended to be "…and is therefore…"*)

79. From my reading of the submitted statements before the hearing, it appeared to me that the appellants were putting forward a case based on a concept in planning law called "estoppel". There are various types of estoppel, but in essence here it refers to a situation where it may be argued that a planning authority is prevented from taking enforcement action because of something done by an officer of the authority. There is also an alternative concept of "legitimate expectation".[12]

[12] These concepts have been the subject of well-known UK court judgments, which I consider apply in Jersey for guidance as explained in paragraph 22 above. The main leading judgments are *R v East Sussex CC ex parte Reprotech (Pebsham) Ltd* [2002] UKHL; and *Henry Boot Homes Ltd v Bassetlaw DC* [2002] EWHC 546 Admin.

80. Mr Boothman submitted that the appellants' references to Mr Bray's emails were intended to support the appellants' factual arguments about the past use of the site rather than to support a claim of estoppel. Either way, my comments are as follows, both on the argument as put by Mr Boothman and on the topics of estoppel and legitimate expectation.

81. I do not know exactly what was said during conversations at the site between Mr Bray, Mr Boydens and Mr Stein. It is not clear how Mr Bray "understood" the history of the use of the site from what could be seen there in March 2017, possibly combined with oral submissions by Mr Stein or Mr Boydens. This aspect of the evidence does not provide any compelling support for the appellants' arguments about the site history, especially as there is no reason to think that Mr Bray had personal knowledge of the site going back eight years or more. Mr Bray was not present at the hearing, so I could not ask him whether he looked inside the containers or saw the large quantity of builder's equipment there. He may not have done, since the appellants' evidence about the builder's yard use seems to have been the first time the planning authority had heard about it.

82. The *Reprotech* judgment in effect signalled the end of estoppel in public law. The court (the House of Lords) held that a planning authority should not be fettered in carrying out its duties by the actions of its officers. Although the *Henry Boot* judgment suggested the possibility that a "legitimate expectation" may arise from the actions of an authority's officer, no such expectation can properly exist as a result of an officer expressing an informal view.

83. In this instance, Mr Bray's letter to Mr Stein is clearly subject to a note printed below the signature which states (again I quote only the most relevant parts; and the bold text appears in the original):

> "The content of this correspondence and any other advice from an Officer of the Department is given in good faith, but **without prejudice** to the formal consideration of planning matters and any future decision…..In all cases, formal decisions are subject to the full planning process….Consequently, the final decision on any planning matter may not reflect the initial advice given."

84. The letter to Mr Boydens (also dated 15 March 2017) apparently did not have the standard "without prejudice" note attached. Even so, the principle established for more than 15 years since the *Reprotech* judgment applies. If Mr Boydens and his advisers wanted to be sure of the situation, they could have applied for a certificate of completion under the 2002 Law, seeking a fully considered formal decision from the planning authority that the development of the land had been undertaken in accordance with the 1991 planning permission. The lack of enforcement action by the planning authority until recently is not evidence of how the site was used in the past, or of acceptance by the authority that the use was authorised; it is merely evidence that enforcement action was not taken.

85. I conclude on this issue that the statements by Mr Bray - unwise as they were - did not bind the planning authority, did not prevent the authority from issuing the enforcement notice, and do not now provide good evidence for the appellants about the site's history.

Other Matters

Potential for Neighbours' Action under Voisinage Law

86. With reference to the *Yates and Yates* judgment mentioned above, Mr Boothman suggested that if occupiers of properties neighbouring the appeal site want to object to activities there, it would be more appropriate for them to take action under voisinage law.

87. The *Yates and Yates* case related to land known as Heatherbrae Farm and to the duty of an owner or occupier of land in voisinage, in effect a mutual quasi-contract duty obliging each neighbour not to use property in such a way as to cause damage to the other. I do not consider that the Heatherbrae Farm judgment has a direct bearing on this appeal, taking into account that it involved a different location and that planning law and the law relating to voisinage are not the same. There are evidently planning policy and public interest reasons why the planning authority took enforcement action regarding the present appeal site. Those considerations do not arise in voisinage cases.

Employment Land Designation and the 1991 Permission

88. Part of the appellants' case concerns the refusal of planning permission for what the appeal statement variously describes as "housing to be built on the site" and "homes to be built on the site". The most recent proposal resulted in a refusal of planning permission for the construction of one dwelling on part of the appeal site (application reference P/2016/0460). Planning permission was refused in June 2016 and an appeal against the refusal was dismissed in November 2016.

89. The basis of the appellants' argument here is that the 2016 decision was partly because the site is designated as employment land in the Island Plan and therefore the Boydens should be allowed to run their business from it; otherwise it would be unfair if the site cannot be used either for carrying on the business or for housing.

90. Those arguments are misguided. Planning permission was granted in 1991 for the site to be used for storing granite, not for "running a business". As noted above (paragraph 52), Mr Michel Boydens was closely involved with the application and should have been well aware of the terms of the resulting permission. Finding a suitable site to use as the base for running Messrs Boydens' business, involving more than just storing stone, may be difficult; but that is not a good reason to ignore the restrictive terms of the 1991 permission. Moreover, this matter has little relevance to the basic factual and legal considerations relevant to appeal grounds (a), (e) and (c).

Goblins Glade

91. During the hearing I asked some questions about the outbuilding at Goblins Glade. I have decided that it would not be appropriate to comment here on the planning status of that building or the use of the Goblins Glade property as a whole, as these are not matters subject to the present appeal.

Wider Legal Implications

92. I comment finally on one other matter relating to this appeal which may not affect its outcome but appears to have wider implications. As was mentioned during the hearing, under Article 7 of the Planning and Building (Jersey) Law 2002 it is an offence (liable to prosecution and a fine) to carry out development without planning permission, irrespective of any enforcement action. Taken together with Article 109, this creates what seems to be a legal conflict, with several potential effects: one is to hinder the recipient of an enforcement notice from appealing against it; another is to create at least the perception that the States, the Minister and possibly inspectors making recommendations on appeals are condoning or aiding a criminal offence. I have written a short note, attached as an appendix for your consideration, explaining more fully what seems to be an unsatisfactory aspect of current planning law.

Overall Conclusions

93. My overall conclusions are that the enforcement notice should be corrected and varied, that the appeal should be dismissed and the enforcement notice upheld as corrected and varied. The changes I am recommending are to make the notice legally and procedurally satisfactory but are intended to achieve an "under-enforcement" outcome as in the original notice, allowing the site to be used for the storage of granite as permitted by the 1991 planning permission (or the alternative option of ceasing all use of the site).

Recommendation

94. I recommend that the enforcement notice be corrected and varied in the following ways:

(i) by deleting the text in sub-paragraph (ii) of the allegation and substituting:

"Without planning permission, making a material change of use of the land to mixed use for storing blocks of granite, cutting or working granite and use as a builder's yard.

(ii) by deleting the text setting out the requirements and substituting:

"Cease the use described in the allegation above, by ceasing the use of the site other than in accordance with planning permission reference 5268/D dated 7 October 1991; and remove the "Ferryspeed" container and the open-fronted structure referred to in sub-paragraph (i) of the alleged breach of planning controls.

(iii) by deleting "three months" from the specification of the period for compliance and substituting "four months".

95. I also recommend that the appeal be dismissed and the enforcement notice as corrected and varied be upheld.

G F Self

Inspector
30 August 2018.

Appearances at the Hearing

For the Appellants

Mr Mark Boothman	of Bois and Bois, Advocate for appellants.
Mr Scott Boydens	Joint appellant.
Mr Michel Boydens	Joint appellant.
Mrs Anne Boydens	

For the Growth, Housing and Environment Department

Mr Andrew Townsend	Principal Planner, Growth, Housing and Environment Department.
Mr Duncan Mills	Advocate, Law Officers Department.

Interested Persons

Mrs Ceri Belcher	Local Resident, of Hazy View, Route du Petit Port.

(Also representing the occupiers of Les Arbres d'Or and Le Jardin. Mrs Belcher was the main third party participant and asked some questions; some other local residents spoke briefly during the hearing.)

Appendix - The Law Relating to Development without Planning Permission.

Under Article 7 of the Planning and Building (Jersey) Law 2002, a person who develops land other than in accordance with a planning permission shall be guilty of an offence and liable to a fine. This also applies to any person who contravenes a condition attached to a planning permission.

Articles 39 to 44 of the Law deal with enforcement proceedings, including provisions under which the owner of land who fails to comply with an enforcement notice shall be guilty of an offence and liable to a fine.

These parts of the law would appear to have four effects. First, potential applicants for retrospective planning permission could be deterred from applying because they would be accepting criminal guilt and opening themselves to prosecution. A similar point was drawn to the attention of the planning committee when it considered planning applications P/2017/0482 and 0483. The Director of Development Control evidently advised the planning committee that if the applicant's position regarding the site history were accepted - that is to say, if it were accepted that the disputed use involving stone cutting had taken place for the length of time claimed by Mr Boydens - he would have to admit to breaching the terms of the 1991 permission for storage, making him guilty of an offence and liable to prosecution under Article 7(1). (There could be several offences if development without planning permission and breaches of conditions were counted as more than one offence.)

Second, many recipients of enforcement notices would be justified in feeling that their rights of appeal are fettered, because several of the grounds under Article 109(2) involve accepting that the development enforced against has occurred and did not have planning permission. Thus for example a person aggrieved by an enforcement notice can only appeal against the notice on grounds (c), (d), (f), (g) or (h) of Article 109(2) if he or she is prepared to accept that a criminal offence has been committed, such that the offender (not necessarily the owner or appellant) would then be open to prosecution.

The third effect is that by not prosecuting under Article 7 but instead issuing an enforcement notice giving recipients the right of appeal, with various possible outcomes, the States as planning authority could be perceived as condoning the commission of an offence. Enforcement action should only be taken where the authority consider it is expedient, so clearly by deciding to enforce, the authority must believe that an offence (or offences) has been committed.

A fourth possible effect is that if an appeal fails on most grounds but succeeds on ground (g) of Article 109(2), so that an extension of the compliance period is granted, such an extension would have the effect of aiding a continuing offence with potential criminal sanctions.

It seems to me that these provisions create an unsatisfactory conflict in the law for all involved. In particular, I do not wish to be at risk of prosecution for aiding a criminal offence by recommending an extension to the period for compliance with this enforcement notice; and I assume the same is likely to apply to you as Minister in making the decision.

G F Self

Inspector
30 August 2018.