Planning & Building (Jersey) Law 2002 - Appeal under Article 109

REPORT TO MINISTER FOR THE ENVIRONMENT

By Graham Self MA MSc FRTPI

Appeal by Mrs S Cohen.

Reference Number: ENF/2021/00018

Site at: Field No. C70, Jardin de la Blinerie, St Clement.

Introduction

1. This appeal is against an enforcement notice issued on 7 January 2022. The appeal is being decided by the written representations procedure. I inspected the site on 6 April 2022.

2. This report contains a brief description of the 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.

The Notice

3. The alleged breaches of planning control were specified in Section 3 of the enforcement notice as follows:

> "Without planning permission development has occurred at;
>
> Field No. C70, Jardin de la Blinerie, St Clement
>
> 3.1 At the north-west end of the boundary between Field C 70 and Rue du Coin a section of hedgerow and banque has been removed to create a new field vehicular access path (as indicated 5.1 on the attached *'Enforcement Notice Location Plan')* together with the introduction of hard standing and plastic vehicle matting at the entrance (as indicated 5.2 on the attached *'Enforcement Notice Location Plan').* The removal of the hedgerow and banque was originally carried out whilst authorised development (under P/2019/0344) was being undertaken at the adjacent premises of Petit Champeaux, La Rue du Coin, St Clement JE2 6QR. Conditional permission existed for the temporary removal of the hedgerow and banque by virtue of Part 3, Class C of the Planning and Building (General Development) (Jersey) Order 2011. The authorised development under P/2019/0344 is now complete. The conditional permission by virtue of Part 3, Class C of the Planning and Building (General Development) (Jersey) Order 2011 no longer exists. The removal of this section of hedgerow and banque and the introduction of hard standing and plastic matting amounts to development, as defined in Article 5 of the Planning and Building (Jersey) Law 2002 and is not currently granted permission by way of the Planning and Building (General Development) (Jersey) Order 2011.
>
> 3.2 Within field C 70 and adjacent to the north-west end of the boundary between Field C 70 and C 69, two wooden timber raised beds have been constructed (as indicated 5.3 on the attached *'Enforcement Notice Location Plan').* The operation of constructing these two structures within and agricultural field constitutes development that requires planning permission. The construction of these two structures amounts to

development as defined in Article 5 of the Planning and Building (Jersey) Law 2002 and is not currently granted permission by way of the provisions of the Planning and Building (General Development) (Jersey) Order 2011."

4. The requirements of the notice were set out as three steps:

"Step 1 - Reinstate the previously removed banque as set out in 3.1 above and as indicated by the blue shaded area marked 5.1 on the attached '*Enforcement Notice Location Plan'*, so that the dimensions of the reinstated banque are between 1.80m and 2.00m wide at the base of the banque and between 0.65m and 0.75m high at the top. The reinstated banque to be made up of topsoil mixed with stones in a proportion suitable for growing shrub vegetation.

Step 2 – Remove the hard standing and plastic vehicle matting from the north west corner of field C70 as set out in 3.1 above and as indicated by the yellow shaded area marked 5.2 on the attached plan headed *Enforcement Notice Location Plan'*. Having removed the hard core and plastic matting, reinstate the ground level back to its original state so that it matches the ground level for the immediate land, adjacent to the area of unauthorised hard core and plastic matting.

Step 3 – Remove the two timber raised beds and all drainage aggregate therein, as set out in 3.2 above and as indicated by the two green shaded areas arked 5.3 on the attached plan headed *'Enforcement Notice Location Plan'.* To reinstate the ground level back to its original state so that it matches the ground level for the immediate land, adjacent to the unauthorised timber raised beds."

5. The period for compliance with all three steps was specified as 60 days.

Ground of Appeal

6. The appeal was made on ground (i) as set out in Article 109(2) of the 2002 Law, which states:

"Where the notice is served under Article 47(2), that the condition with which compliance is required by the notice should be discharged."

Site and Surroundings

For the purposes of description, the references to compass points below are approximate. Thus for example I refer to the "north-west" boundary, although to be strictly accurate this is more north-north-west than north-west.

7. The appeal site is on the southeast side of La Rue du Coin. At the time of my inspection most of the site was covered with rough grass with rows of young fruit trees planted at intervals (about 50 trees in total). The trees are staked and have protective wire netting surrounds.

8. The northwest boundary is mostly bordered by a hedge, except for the disputed access in the northwest corner. The southeast boundary is not marked by any physical feature, except for some scrubby vegetation and some lengths of timber including tree branches laid along part of this boundary. In the east-south-east corner there is what appears to be a little-used access from the adjacent track. This track leads eastwards from a nearby tarmac-surfaced lane which serves a small group of houses just to the south.

9. The site is "reverse L-shaped", with its wider part lying behind (south-east of) the residential property known as Le Petit Champeaux. The house is of modern

design and has large glazed openings in its rear (southeast) elevation. The front part of its plot contains a double garage and vehicle parking area. Next to the road there is a high boundary wall and metal enclosing gate. At the rear of the house most of its plot is surfaced with stone chippings. There is a pedestrian-sized gate in the rear boundary of the plot. At the time of my inspection the adjacent area to the southeast within the appeal site (the rectangular area with a green shade in the photograph labelled "Aerial Image -2021" attached to the enforcement notice) was mown grass, as distinct from the rough grass cover on the rest of the site.

10. Within the area of mown grass just mentioned were two timber "planter" structures each about 4 metres by 1 metre in lateral extent and about 0.6 metres high. They appeared to be lined with plastic sheeting and were filled with soil.

11. The access to the site from La Rue du Coin is about 4 metres wide. Visibility along the road from a set-back distance of either 2.4 or 2.1 metres is obstructed by the roadside bank to the east and by a high wall to the west. (These features can be seen in Figure 2 of the attachment to the enforcement notice titled "Enforcement Notice Site Images".) The land next to the access within the site was surfaced with what appeared to be mainly compacted earth, although some underlying plastic mesh could be seen in places around the edge of the surface.[1]

12. La Rue du Coin appears to be a lightly trafficked road. A roadside sign about 70 metres east of the site access (approximately where the location plan shows the boundary between Grouville and St Clement parishes) a roadside sign indicates the eastern end of the designation of this road as a Green Lane.

Case for Appellant

13. The main points made for the appellant are, in summary:

- The refusal of the retrospective application for a new access was unreasonable. The access was for agricultural use, not domestic.
- The 4 metre opening in a 60 metre length of roadside bank is not a significant loss of the bank. The access is not damaging to the area's landscape. There was an existing one-metre opening and there are other accesses nearby.
- The opening in the bank has no implications for wildlife, or for the agricultural use of the land, which is to remain as an orchard.
- The access should anyway be allowed under Class E of the Planning and Building General Development Order 2011, which permits one access per field boundary. Approval has been obtained from the St Clement Parish Highway Authority.
- The new entrance to the orchard will allow easier access for equipment, instead of using access through the appellant's adjacent potato field and in front of neighbouring properties.
- The appellant is prepared to remove any hardstanding and matting to within 3 metres of the road and reinstate the land.
- The raised vegetable beds were created during the covid restrictions. Their height is for therapeutic reasons as the appellant has lower back problems. The beds are not of permanent construction and could be removed if the use

[1] A mesh material is visible in Figure 3 of the attachment to the enforcement notice titled "Enforcement Notice Site Images", but at the time of my inspection the mesh was much less visible and appeared to have been re-covered with additional earth or other material.

of the field were to change. The beds present no harm to trees or to use of the orchard.

- The appellant did not realise the beds required planning permission; if they do, the appellant would be prepared to submit a retrospective application.
- The appellant wishes to have amenable relations with neighbours and to be tolerant of tourists visiting the nearby orchid field who cause obstruction when parking. The new access could be used for short-stay off-road parking by visitors to the orchid field.

Case for Planning Authority

14. The planning authority's main comments are, in summary:

- Before the enforcement notice was issued, planning applications for the creation of the vehicular access and the formation of a parking area for Le Petit Champeaux were refused. These were unauthorised developments. The aerial photographs attached to the notice show the changes which have occurred since 2008.
- The appeal is on ground (i) which relates to a breach of condition, but the enforcement notice was served in respect of a breach of development controls. The appellant appears to be contending that planning permission should be granted, but there is no ground (h) appeal and no planning application has been submitted.
- The appellant's offer to remove the hardstanding would not overcome the requirements of the notice as a whole and has not been undertaken.
- Although the appellant has claimed that the access is for agricultural purposes, other evidence including application P/2021/0812 shows that use for parking for residential purposes (including parking by party or dinner guests) was sought. Extending residential use into a field designated as part of the Green Zone s an unacceptable form of development under Policy NE7 of the Island Plan.
- The Land Control Section also opposed the development on the grounds that an additional access to the field was not required and that agricultural land would be lost.

Assessment and Conclusions

Legal Points Arising from the Enforcement Notice and Aspects of Appellant's Case

15. The allegation referring to the formation of the access as set out in the enforcement notice is misconceived. It is also inconsistent within itself. It states that the removal of the hedgerow and banque was carried out while authorised development was being undertaken at the adjacent premises, and conditional permission for the temporary removal of the hedgerow and banque was granted by the General Development Order. So what happened here was not, as alleged, development without planning permission, because at the time the development was carried out it was authorised. What happened was a breach of condition.

16. The condition in question is Condition C.3(b) of Class C of Part 3 of Schedule 1 of the Planning and Building (General Development) (Jersey) Order 2011 as amended (abbreviated later to "GDO"). This legislation permits the provision of a vehicular access which is required temporarily in connection with works permitted on adjoining land, subject to two conditions, one of which (Condition (b)) states:

> "When the operations have been carried out….any land on which work permitted by Class C has been carried out must, as soon as reasonably

practicable, be reinstated to its condition before that work was carried out".

17. It should be noted that the temporary permission just mentioned is not granted where, in a case where the work is for a vehicular access, the permission of the highway authority has not been obtained. The appellant has referred to "Clause E" of the GDO and stated that she has "obtained the necessary approval of the St Clement Parish Highway Authority". No documentary evidence has been submitted in support of this statement, so I do not know details such as the date of such approval, whether it was in writing, and which part of the GDO (if any) it referred to; but the planning authority has not disputed this aspect of the appellant's case. So – giving the appellant the benefit of the doubt – I am taking it that the relevant highway authority's approval was properly obtained and that paragraph C.2(b) of Class C (which in effect negates any permission which would otherwise be granted under Class C) does not apply.[2]

18. I observe here that the planning officer's report on an application for retrospective planning permission for the formation of the access stated: "No planning history". That was incorrect, since it ignored the past grant of conditional planning permission by the GDO.

19. Mrs Cohen's reference to Class E of Part 3 of Schedule 1 of the GPDO does not help her case. Class E permits the creation of a new means of access to an agricultural field for agricultural purposes only. Several other restrictions and conditions apply, including the provisos that permission is not granted if the land has any building erected on it other than certain types of livestock building[3], and that permitted development under this class is limited to "one access per field boundary". The last item might perhaps be interpreted to mean that where a field has more than one "boundary", more than one access might be permitted; but even setting aside all the other conditions and provisos, the available evidence indicates that when the access was formed, it was not formed for agricultural purposes only (the word "only" being important here). Other factors such as the presence of structures (the timber raised beds) also means that whether the application subject to appeal is treated as retrospective or prospective, the development was not permitted under Class E.

20. A further complicating factor arises from the references in the first paragraph of the enforcement notice to Article 5 of the Law (which defines the meaning of development) and Article 7 (which states that land shall not be developed without planning permission). Those Articles relate to unauthorised development (ie development without planning permission), not to breaches of condition.

21. The first paragraph of the notice also refers to Article 40 and to a "breach of development controls". The power to issue a notice alleging a breach of condition (which the Law terms a "condition notice") is under Article 47. The Law apparently allows scope for issuing a notice relating to a conditional planning permission under Article 40, because under Article 39(2)(b) a "breach of development controls" is defined in part as where "land has been developed with planning permission but there has been a contravention of a condition of that permission"; and Article 40 refers to serving an enforcement notice "in respect of breach of development controls". Thus the law apparently allows two alternative ways of treating breaches of conditions – either by a "condition notice" under Article 47 or an enforcement notice under Article 40.

22. Even so, paragraph 1 of the enforcement notice is incorrect insofar as it relates to the access, because the references to Articles 5 and 7 mentioned above are not

[2] I regret the use here of rather confusing double negatives, but this arises from the way the legislation is constructed.

[3] "Building" is defined in the GDO as including "any structure or erection", so includes the planters.

relevant to a breach of condition. Moreover, the allegation in Section 3 of the enforcement notice that development has occurred without planning permission is basically wrong insofar as it relates to the access, because planning permission was granted (conditionally) as I have explained above.

23. The fact that ground (i) was pleaded is another complication because, as I have mentioned in paragraph 6 above, this ground of appeal can only be pleaded where a notice has been issued under Article 47(2). That does not apply to this notice, apparently because the planning authority did not treat the notice as a "condition notice".

24. The points I have explained above lead me to find that both sides in this case have misunderstood or misinterpreted the law. I can see three possible ways of proceeding.

25. One option would be to quash the notice on the grounds that half of the allegation (paragraph 3.1 of the notice) is incorrect and is not directed at the real breach of planning control. A key part of the allegation - the statement that when the notice was issued the development "is not currently granted permission" - is irrelevant: what matters is whether permission was granted *at the time the development was carried out.*

26. A second option would be for you to use the powers available to you under Article 116(2)(d) to correct and/or vary the notice so as to reduce the scope of its allegation and requirements in such a way that the notice only covers the operational development referred to in paragraph 3.2 (the timber raised beds).

27. A third option would be to correct and/or vary the notice so that it has in effect the same total scope as the original version, but is directed at a breach of condition as well as the operational development.

28. The amendments which would be necessary to get this notice in order (the third option) would need to be so extensive as would involve virtually re-writing the notice so as to create what would be equivalent to two notices. Such an approach could cause injustice to the appellant, or at least a perception of injustice. Other legal complications could also arise – for example, the fine for failure to comply with an Article 47 condition notice is on a specified scale (level 3) under the Law, but that is not so for failure to comply with an Article 40 enforcement notice.

29. The second option would be more feasible. It would mean making the following amendments to the enforcement notice:[4]

(i) Delete paragraph 3.1.

(ii) Delete the number "3.2", so as to leave the text of paragraph 3.2 unnumbered.

(iii) Correct the text of paragraph 3.2 by deleting the word "and" in the fourth line and substituting "an".

(iv) Delete the third (unnumbered) paragraph under the heading "Reasons for Issuing this Notice".

(v) Delete the whole of the paragraphs labelled "5.1 Step 1" and 5.2 Step 2".

(vi) Delete "5.3 Step 3 – " [ie including the dash] so that the text of this requirement is left unnumbered after the heading "Steps Required to Rectify the Breach".

[4] The corrections numbered (iii) and (viii) in this list are textual or grammatical corrections. The other changes would be to allow for the deletion of the requirements relating to the formation of the access.

(vii) Delete from the text of this remaining requirement the words "as set out in 3.2 above".

(viii) Delete the word "To" where it appears at the start of the second sentence of this requirement. (Then "Reinstate" should have a capital R.)

(ix) Delete "Periods" in the heading "Periods for Compliance" and substitute "Period".

30. Although this option would be legally possible, the changes set out above would be quite numerous, and - like the first option – it would still be necessary for the planning authority to issue another notice to enforce against the other aspects of development at this site. There would also be the problem that the appellant has pleaded a ground of appeal which only applies to a notice issued under Article 47 whilst this notice was issued under Article 40 – and this problem was caused more by the planning authority than by the appellant.

31. Having regard to all the above considerations, I conclude that the notice should be quashed using the power available to you under Article 116(2)(d),[5] leaving the planning authority the option of issuing a revised notice or revised notices. In these circumstances an assessment here about the disputed issues raised by the appeal could prejudice any future appeal or appeals. Therefore I refrain from comment on those issues, although if you decide it would be appropriate to have a published assessment of them this could be provided by means of a supplementary report.

32. Assuming that a decision on this appeal leads to a revised notice or notices being issued, an incidental benefit would be the opportunity for several minor errors to be corrected. Two of these are in the list above. The others would include substituting "led" for "lead" in the second line of the third paragraph of Section 4, and re-wording the reference to "proposal" in the same paragraph, since the enforcement notice is dealing with something which has happened in the past, not a proposal. References to Island Plan policies may also need to be reviewed if they are affected by the adoption of the Bridging Island Plan.

Procedural Matters Relating to Adoption of Bridging Island Plan

33. When the enforcement notice was issued, and when the appeal against it was made, the relevant planning policies were those in the Island Plan 2011 (Revised 2014). I understand that the new "Bridging Island Plan" was formally adopted by the government of Jersey in late March 2022. Normally, in the interests of fairness to allow for the possible effect of any policy changes, it might be necessary to offer the appellant and the planning authority an opportunity to submit supplementary written representations. In this case, however, such a step may well not be appropriate, depending on your decision. I suggest that if the enforcement notice were to be quashed for legal reasons there would be no point in inviting comments from any party on the policy implications of the Bridging Island Plan.

Recommendation

34. I recommend that the enforcement notice be quashed under Article 116(2)(d) of the 2002 Law, for the reasons explained above.

G F Self

Inspector
11 April 2022

[5] Article 116(2)(d) provides that the Minister "may reverse….any part of the decision-maker's decision", and this includes the decision to issue the enforcement notice.