STATES OF JERSEY

STATES OF JERSEY COMPLAINTS BOARD: FINDINGS – COMPLAINT BY MS. A. McGINLEY AGAINST THE MINISTER FOR THE ENVIRONMENT REGARDING THE ENFORCEMENT OF PLANNING CONDITIONS BY THE PLANNING DEPARTMENT

Presented to the States on 2nd August 2019
by the Privileges and Procedures Committee

STATES GREFFE

REPORT

Foreword

In accordance with Article 9(9) of the Administrative Decisions (Review) (Jersey) Law 1982, the Privileges and Procedures Committee presents the findings of the Complaints Board constituted under the above Law to consider a complaint against a decision of the Minister for the Environment regarding the enforcement of planning conditions by the Planning Department.

Deputy R. Labey of St. Helier
Chairman, Privileges and Procedures Committee

STATES OF JERSEY COMPLAINTS BOARD

28th May 2019

Complaint by Ms. A. McGinley against the Minister for the Environment regarding the enforcement of planning conditions by the Planning Department

Hearing constituted under the Administrative Decisions (Review) (Jersey) Law 1982

Present

Board members –

G. Crill (Chairman)
S. Cuming
J. Moulin

Complainant –

A. McGinley, the Complainant
G. Holley, the Complainant's partner
S. de Sousa, a resident of Retreat Farm
Mrs. X, a resident of Retreat Farm
Deputy K.F. Morel of St. Lawrence

Minister for the Environment –

A. Townsend, Principal Planner, Department for Growth, Housing and Environment
C. Jones, Senior Planner, Compliance, Department for Growth, Housing and Environment
R. Bowditch, Environmental Health Officer, Department for Growth, Housing and Environment

States Greffe –

L.M. Hart, Deputy Greffier of the States
K.L. Slack, Clerk

The Hearing was held in public at 10.00 a.m. on 28th May 2019, in the Blampied Room, States Building.

Note: throughout the report, any reference to the 'Planning Department' is taken to mean the relevant section of the Department for Growth, Housing and Environment and, by extension, the Minister for the Environment.

Reference to 'Tamba Park' is also taken to refer to the company, or individual, owning or occupying that site.

1. Opening

1.1 The Chairman opened the hearing by introducing the members of the Board and outlining the process which would be followed. He indicated that the purpose of the Board was to establish whether the Planning Department ('the Department'), and / or the Minister for the Environment, had adhered to the relevant policies and had appropriately enforced the conditions associated with planning application P/2016/0503, which related to Tamba Park, La Rue de la Frontière, St. Mary. He stated that it was not within the remit of the Board to determine whether there had been a breach of those conditions by Tamba Park.

2. Brief background to the site of Tamba Park

2.1 Tamba Park, which straddles the boundary between St. Lawrence and St. Mary, opened in June 2015 and is located on the site that had formerly been occupied by Flying Flowers and Jersey Gold's Lion Park. In September 1991, the Retreat Farm (1988) Ltd. had obtained permission to change the use of the site to a reservoir and tree-scaped land, open to the public (CU/1991/0846). In February 1993, permission had been obtained to change the use of Field 770 from grassland to a fixed display of a model village (CU/1993/0108) and in August 1995, permission had been granted to relocate the café and flower shop and to provide new toilets and disabled facilities (D/1995/0291). The conditions that had been attached to that permission had stipulated, *inter alia*, that the opening hours of the proposed café should be limited to between 8.00 a.m. and 6.00 p.m. In November 1996, Flying Flowers Limited had been granted permission to form hardstanding for staff car parking in the area that had been used as a model village. In 2014, planning permission had been obtained to construct houses adjoining the site, including that of the Complainant.

2.2 In April 2016, Tamba Park had made a retrospective planning application (P/2016/0503) for a change of use to facilitate the creation of a car park and to construct various structures, including aviaries, storage buildings, a café and seating area. Permission had also been sought to install various animatronic sculptures, to create an outside children's play area, to install 6 air conditioning units and to erect acoustic boundary fencing. The Planning Committee had considered the application at its meeting on 22nd September 2016 and had noted that 7 different parties had objected to the application. This notwithstanding, the Department had recommended the scheme for approval, subject to the imposition of certain conditions and the applicant entering into a Planning Obligation Agreement. The Planning Committee had approved the application and the decision notice had been issued on 24th November 2016.

2.3 Within the decision notice it had been stated, '…the representations raised to the scheme have been assessed. It is considered that the long established tourist facility represents a strong material consideration for reviewing the impact of amenities and with the framework of conditions there is not considered that there will be unreasonable harm to amenities of neighbours.'

3. Summary of the Complainant's case

3.1 The home of Ms. McGinley and Mr. Holley is located approximately 10 metres from Tamba Park and the properties of some of their neighbours at Retreat Farm, St. Lawrence, are even closer. In the Complainant's submission, which had been circulated to both parties in advance of the hearing, she stated '… we have been subjected to noise and disturbance emanating from Tamba Park for a very long period of time (years in fact) … Whilst we have been in regular contact with the Planning Department, we are unhappy with its lack of enforcement action. Specifically, we are unhappy that the Department has failed to enforce the planning conditions attached to the relevant planning application … Tamba Park continue to breach the planning laws which are not being 'enforced' by Planning and we feel that our complaints are not being taken seriously. It appears that Planning continue to turn a blind eye to all Tamba Park's breaches with no consideration for the nearby residents. We have been met with excuses, inconsistency and delay by Planning which has meant that we have suffered considerable inconvenience, distress and ill-health.'

3.2 The Complainant drew the attention of the Board to the decision notice in respect of application P/2016/0503, referred to at paragraph 2.2 above, to which a number of conditions had been appended. The first 2 included a restriction on times and read –

> '1. No machinery shall be operated, no process shall be carried out and no deliveries taken at or despatched from the site outside the following times 08.00 to 18.00hrs weekdays, 08.00 to 13.00hrs Saturdays, and 10.00 to 11.00hrs on Sundays, Bank or Public Holidays. For the avoidance of doubt, this does not include the animatronic features within the external areas of the park.
>
> 2. The external areas of the site shall not be open to visitors before 10.00hrs daily, and shall be closed to visitors before 18.00hrs daily.'

3.3 In the Decision Notice, the reason for imposing these conditions had been stated as, 'To protect the amenities of occupiers of neighbouring properties in accordance with Policy GD1 of the Adopted Island Plan 2011 (revised 2014).' In Ms. McGinley's written submission, she had made reference to Policy GD1 which *inter alia* stated –

> 'Development proposals will not be permitted unless the following criteria are met such that the proposed development: …
>
> 3. does not unreasonably harm the amenities of neighbouring uses, including the living conditions for nearby residents, in particular,
>
> a. not unreasonably affect the level of privacy to buildings and land that owners and occupiers might expect to enjoy, …..
>
> c. not adversely affect the health, safety and environment of users of buildings and land by virtue of emissions to air, land, building and water including light, noise, vibration, dust, odour, fumes, electro-magnetic fields, effluent or other emissions.'

3.4 Ms. McGinley informed the Board that her complaint centred around the noise, particularly in the evenings, emanating from activities, which were either in breach of planning conditions, or had not been given planning consent, *viz* the indoor opening times and Zap Zone parties; the ice skating rink; and the noise from the air conditioning units. Despite her and other neighbours complaining to the Department, the latter had failed to take any enforcement action. She said that she and her neighbours did not particularly take issue with the noise that came from Tamba Park during the day, but stated that for them to have to endure loud, thumping bass music, within their own properties, until 9.00 p.m. was 'not fair after a hard day at work'. In her written submission, she indicated that she had previously lived on the outskirts of town and had never been subjected to as much noise as she had since moving to the Retreat Farm in July 2016. Mr. de Sousa referenced the loud noise coming through the walls of the properties, causing them to resonate and said, 'we want the owners [of Tamba Park] to understand from our side and be fair with us.'

3.5 In the 'Relevant Planning History' section of the Planning and Design Statement ('the Statement') which had been submitted with the 2016 planning application, Tamba Park's agent had written, 'In August 1995 permission was granted … to relocate café and shop to the building formerly occupied by Jersey Gold and which included a children's play area'. Ms. McGinley stated that the planning permission obtained at the time (D/1995/0291) had made reference to the café, flower shop and toilets, but had not mentioned a children's play area. The Board recalled that the children's play area at Tamba Park now exceeded the size of the café. Mrs. X, a resident at Retreat Farm, described it as 'an industrial play site' that was akin to a warehouse. Moreover, the Board was reminded that when Jersey Gold had occupied the site, the children's play area had been outside, whereas the Tamba Park play area was inside, where the jewellery shops and a café had previously been located. The volume of noise in the evenings, coming from the play area, combined with amplified music played until late was, in the view of the Complainant, a change in the use of the building, which should have required planning permission.

3.6 Deputy K.F. Morel of St. Lawrence asked to be provided with the definition of what constituted a 'tourist attraction' and a 'play area'. On the basis that Mr. Townsend, the Principal Planner, was unable to provide the same, he argued that the Department could be as fluid as it wanted to be if such terms were not clearly defined and he questioned how Islanders could hold the Department to account.

3.7 The attention of the Board was drawn to the section of the decision notice, in respect of planning application P/2016/0503, in which it was written that –

> 'This permission is granted subject to compliance with the following conditions and approved plan(s) –
>
> A. The development hereby approved shall be carried out entirely in accordance with the plans, drawings, written details and documents which form part of this permission.

B. Reason: To ensure that the development is carried out and completed in accordance with the details approved.'

3.8 One of the documents, which had been included in the list of approved 'plans' referenced above, had been the Statement (referred to in paragraph 3.5 above). That had set out the operating times for the various attractions within Tamba Park, including those located in the indoor area, for which the opening times had been stated to be from 10.00 a.m. to 7.00 p.m. Sunday to Thursday and from 10.00 a.m. to 8.00 p.m. on Fridays and Saturdays. Opening times for the outside attractions and the exterior car park had been identified as from 10.00 a.m. to 6.00 p.m. throughout the summer and from 10.00 a.m. to dusk during the winter months. Despite this, Ms. McGinley indicated that at the time of the submission of her formal complaint to the Deputy Greffier of the States (March 2019), Tamba Park opened at 9.00 a.m. and regularly closed after 9.00 p.m., due to the holding of Zap Zone parties.

3.9 The Zap Zone was open on 5 evenings each week during term time and on every evening during the school holidays. During the first 3 weeks of January 2019, the Complainant had kept a record of the 12 times on which the parties had been held. On each occasion, the parties had continued beyond the stated closing times for the indoor areas (7.00 p.m. Sunday to Thursday and 8.00 p.m. on Fridays and Saturdays) and had often gone on until as late as 9.00 p.m.

3.10 Moreover, despite the restricted opening hours for the café (see paragraph 2.1 above), which were from 8.00 a.m. to 6.00 p.m., the Complainant notified the Board that it served food for the Zap Zone parties. These started after 6.00 p.m., so, in her view, the café was clearly being operated in contravention of the restriction on opening times.

3.11 One of the residents of Retreat Farm opined that if a large house was situated on the Tamba Park site and the residents persisted in holding noisy parties every night, the Environmental Health Department ('Environmental Health') would have taken enforcement action, but had not done so in relation to Tamba Park.

3.12 On the basis that the Retreat Farm homes were located so close to Tamba Park, it was suggested that any expansion to the facilities on offer at that *locus* would inevitably increase the noise levels and the Complainant found it incomprehensible that there should be no restriction on the opening hours of the site, other than for the café.

3.13 With regards to the ice rink, residents of Retreat Farm had notified the Department, on 2nd October 2018, that a marquee to house an ice skating rink had been erected on an area of a glass house, which had previously been destroyed by a fire and then further dismantled. The ice skating had launched on 13th October and the marquee had remained in place until early February 2019, although it had only been used until 13th January 2019. The ice rink had been open between 10.00 a.m. and 6.00 p.m. on Saturdays and Sundays, during the school term and between 10.00 a.m. and 6.00 p.m. every day during the school holidays. Ms. McGinley and other neighbours had complained to the both the Department and Environmental Health in respect of the unreasonable levels of noise that had emanated therefrom.

3.14 In response to the complaint about the noise from the ice rink and the Zap Zone, the Department had written to the Complainant –

> 'The main issue Environmental Health had related to the combined effect of all noise sources. Once the ice rink is removed, in my opinion the noise sources that are left would not constitute a Statutory Nuisance under the Statutory Nuisances (Jersey) Law 1999. As previously discussed, the fact that the noise from the zap zone is not excessive and is infrequent and during what would be deemed to be sociable hours, means that it would not be a Statutory Nuisance'.

3.15 Ms. McGinley found the Department's views to be dismissive in the light of the frequent late closing of the Zap Zone, the many parties (as detailed in paragraph 3.9 above) and the residents being able to hear the amplified sounds in their homes, even with their windows and doors closed.

3.16 Ms. McGinley complained that the Department had not responded to the concerns that had been expressed about the unauthorised establishment of the ice skating rink and had failed to take any action until late October 2018, when neighbours had learnt that Tamba Park had been given 21 days in which to submit a planning application. It was not until November 2018 that a retrospective planning application had been sent to the Department for a temporary marquee structure to cover the ice rink, which had been situated on the concrete slab of a redundant glasshouse (P/2018/1726). When the details of the application had appeared on the Planning register, the Complainant and other neighbours had submitted objections, several referring to the lack of enforcement by the Department and the fact that Tamba Park had been made aware in June 2017 of its requirements under planning legislation when it had erected a marquee for the Big Bounce and had left it in place for more than 28 days, without planning permission.

3.17 One individual, who had objected to the 2018 planning application had written, 'I know it is us neighbours who are constantly having to bring this up, believe me it becomes very tedious, but of course it is, yet again, our peaceful existence and quality of life which is affected'. Another had stated, 'We…. are having to live in the vicinity of what to all intents and purposes is an outdoor disco, completely obliterating our rights to a peaceful and quiet existence.'

3.18 Despite the neighbours' objections, the Department had taken no enforcement action, the ice rink had remained in place and application P/2018/1726 had ultimately been withdrawn. On the basis that the original application for Tamba Park (P/2016/0503) had also been a retrospective application, the Complainant opined that Tamba Park should have been fully aware that planning permission would be required, particularly as the Department had also previously held discussions with the company over the Big Bounce marquee (as referenced above). Moreover, because the ice rink and marquee had been located on the site of a disused glass house, which had burnt down, Ms. McGinley opined that it had been inaccurate for the Department to have described it as being within an existing tourist attraction, when it, in fact, represented a change of use.

3.19 In a similar vein, Ms. McGinley drew the attention of the Board to the fact that Tamba Park had used the glass house structures and outside area, situated on

field MY770, to host the Big Bounce, for car boot sales and for the storage of cars and boats. She contended that this also constituted a change of use from agricultural / horticultural and that by so doing, Tamba Park was again in breach of planning legislation.

3.20 The Complainant indicated that the Department had failed to enforce the third condition, which had been applied to the retrospective planning consent (P/2016/0503) for Tamba Park and which read –

> '3. Within 2 calendar months of the date of this decision an acoustic survey shall be undertaken by the applicant, to a methodology to be first agreed in writing with the Department of the Environment, to establish the background noise level (LA90 dB) at the site boundary. Thereafter the noise from the site (excluding patrons) shall not exceed 10dB above the agreed background noise level.'

3.21 The decision date had been 24th November 2016. As a consequence, the acoustic survey should have been completed by 24th January 2017, but this had still not been undertaken at the time of the hearing, despite in excess of 2 years having elapsed.

3.22 In addition to the lack of action that had been taken by the Department to address the disturbance from the Zap Zone and the ice rink, the Complainant referenced the permanent humming / droning noise which had emanated from the air conditioning units / condenser from September 2018 and which was particularly noticeable at night. The units were not enclosed and were not surrounded by acoustic fencing. This had resulted in the Complainant suffering from persistent sleep disturbance, leading to a fairly profound impact on Ms. McGinley's mental wellbeing. On 10th January 2019, she had emailed Mr. Jones, Senior Planner, Compliance, to emphasise the detrimental effect that the situation was having on her health.

3.23 In spite of the desperate tone of the Complainant's email, it had gone unanswered, despite several follow up messages having been sent by her in the days and weeks thereafter. Ms. McGinley had subsequently visited her General Practitioner, who had prescribed medication and had signed her off sick from work. On occasions, she had been forced to stay overnight in a hotel, in order to escape the noise and had considered resigning from her employment as she had felt unable to function adequately, due to sleep deprivation.

3.24 A substantive response to the Complainant's 10th January email had not been received from the Senior Planner until 8th February 2019. In that email he had written –

> '…what would be of assistance to local residents is the site owner's compliance with Condition 3 of planning permission P.2016/0503 [acoustic survey] … whilst [Tamba Park] has employed a noise consultant who has been undertaking a series of noise surveys on site etc, to date, the Department has yet to receive the necessary information to be able to agree the requirements of the condition … given the length of time that has elapsed since this permission [it] has duly been advised

> that the Department is in the process of serving a Breach of Condition Notice to secure this information.'

3.25 However, as detailed at paragraph 3.21 above, at the time of the hearing, the acoustic survey had not been received.

3.26 Acting on her own initiative, the Complainant had engaged a local company, specialising in sound testing and noise surveys, which had attended on site at 5.00 a.m. on 14th February 2019, in order to undertake noise monitoring. The company had been able to confirm that 'a condenser type noise source' had been audible at the fence of Tamba Park. This despite the fact that the air conditioning units were 'machinery', had formed part of the P/2016/0503 planning application and should not, therefore, have been in operation outside the hours of 8.00 a.m. to 6.00 p.m. on weekdays, 8.00 a.m. to 1.00 p.m. on Saturdays and 10.00 a.m. to 11.00 a.m. on Sundays, Bank or Public Holidays.

3.27 After the aforementioned company had made contact with Environmental Health, Tamba Park had been asked to switch off the air conditioning units at night, or mitigate the noise to a level that would not disturb the residents. Tamba Park had initially declined to do so, unless required to by law, but from March 2019, the air conditioning units had been turned off overnight, although a noise was still audible in the Complainant's home. Because of the lack of enforcement by the Department, it had taken 7 months for the disturbance coming from the air conditioning units to be addressed.

3.28 'We are reasonable people,' the Complainant concluded. 'This has had a huge impact on my life.' Addressing the representatives from the Department she said, 'I stressed the effect it had had on my health … you didn't intervene.'

4. Summary of the Minister's Case

4.1 Mr. A. Townsend, Principal Planner, informed the Board that when imposing conditions in relation to a planning application, the Department operated under the Planning and Building (Jersey) Law 2002, Article 23(1) of which read –

> 'A condition attached to the grant of planning permission (including permission given by a Development Order) shall fairly and reasonably relate to the proposed development.'

4.2 He stated that the Department would also follow the United Kingdom's National Planning Policy Framework, which had been published in 2012 and updated in 2019. That framework stipulated that planning conditions should be kept to a minimum and only imposed where they were necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects.

4.3 The Principal Planner indicated that Tamba Park's application, P/2016/0503, had related to external works and air conditioning units and had not covered the interior areas of the site. As a consequence, the Department had not been in a position to impose conditions on those interior areas. The Board felt that the wording of the conditions attached to the planning permission was unclear and questioned what the Department sought to achieve when writing 'no machinery

shall be operated' in the first condition referenced at paragraph 3.2 above. Mr. Townsend reported that it was intended to limit the operation of grass cutting, or leaf blowing machinery, for example, in the external areas of the site, but accepted that it was not clear and could have been better worded.

4.4 With regard to the second condition (see paragraph 3.2 above), the Board observed that the restriction on the opening hours of the external areas of the site to 10.00 a.m. to 6.00 p.m. daily would, clearly, cover the external car parks and would, as a consequence, make it difficult for people to access those internal areas where the Zap Zone parties, for example, were being held outside those hours. The Principal Planner accepted the point, but indicated that the condition had not been for that purpose. He informed the Board that he had spoken to the case officer in this regard and that the car parking areas had specifically not been mentioned. Some activities in the external areas of the Tamba Park had previously caused concern to neighbours and the purpose of the condition had been to address this. However, Mr. Townsend conceded that the Department could have been more precise in the wording of the conditions applied to this planning permission.

4.5 In respect of the apparent disjoint between the hours of operation on the planning permit and those set out in the Statement, the written submission provided by the Department in advance of the hearing read –

> 'The Department contends that whilst the statement was listed as an approved document, this was only given it was a background information statement of the whole development proposal and if the internal areas were deemed to have been a problem in terms of operating hours and use then it would have sought to control these by way of a separate condition on the planning permission. No such condition was imposed.'

4.6 The Principal Planner informed the Board that whilst the Complainant viewed the commentary within the Statement as binding, the Department did not, although he accepted that it was 'not abundantly clear to everyone'. He explained that if an individual wished to extend their property, it would only be the extension that would require planning permission, but the planning and design statement would set out for the reader the applicant's aspirations for the whole property or, in this particular case, the nature of the business as a whole. Those items that did not require planning permission would not form part of the approval. 'We can only attach conditions to those things needing planning permission', he informed the Board. He acknowledged that a planning and design statement might include information that was contradictory to that which appeared on the approved drawings and suggested that, in the case of Tamba Park, it would not have undermined the approval if the Statement had been omitted.

4.7 The Board expressed concerns that whilst planning consent could run *ad infinitum* on a property, a planning and design statement, particularly in respect of an active business, was liable to change over time, as the business' offerings to the public evolved. As a consequence, there was bound to be confusion over what was and was not binding. Mr. Townsend acknowledged that to be the case, unless a specific condition was applied.

4.8 The Principal Planner indicated that the Department would not consider the impact that the broader aspirations for Tamba Park, as set out in the Statement, might have on the neighbours. The background information was helpful for the Department to obtain an idea of how those works, which required planning permission, related to the wider site, but it was not 'reasonable' for the Department to impose conditions on something that did not require planning permission. Mr. Townsend referenced the introduction section of the Statement, in which it said –

> 'There is … no requirement to formalise the land use as permission already exists for the use of the land as a tourist attraction.'
>
> This clarified for the Department that there was no application for a change of use.

4.9 With regard to the times at which Tamba Park could operate, Mr. Townsend informed the Board that the only restriction was on the opening times for the café (8.00 a.m. to 6.00 p.m.), which dated back to the 1995 permission (D/1995/0291) (see paragraph 2.1 above). No conditions had been imposed in the 1995 permission on the wider use of the site and the Department could only take enforcement action where conditions were in existence.

4.10 In relation to the fact that the Statement made reference to a children's play area having been granted permission in 1995 (see paragraph 3.5 above), Mr. Townsend acknowledged that the café had evolved over time and a play area had been created at some juncture. The Department had given consideration to the size of the play area, but the expansion thereof into something wider had not been viewed by the Department as a material change of use, or operational development, so its officers would not have become involved as a matter of law.

4.11 It was a matter of degree, but the Department had looked at the wider use of space at Tamba Park and had decided that it did not need to take any action. Mr. Townsend acknowledged that the existing play area was now much larger than had historically been the case, but indicated that the Department was accustomed to tourist attractions 'evolving', as some uses came and went over time. Not all of these would require planning permission and it was a 'matter of fact and degree'. There was a point at which the Department would become involved, if the change was 'material' or things had 'gone too far'.

4.12 The Board suggested that whilst the footprint and structure of Tamba Park might not have altered, what was on offer at the Park had changed and was severely impacting on the neighbouring properties. Mr. Townsend indicated that the Department had made a judgment call and he appreciated that others might have different views. It was noted that whilst individuals could request an appeal against the granting of planning permission, there was no similar mechanism for those affected to complain when the Department had decided not to take action, other than by Judicial Review.

4.13 In its written submission, the Department had stated –

> 'The complainant's reliance on the conditions imposed on planning permission P/2016/0503 have also been considered to see if these could form part of any potential action against the site operator. Again, these related to the wider outside facilities on the site covered by the planning application and not for those buildings and structures that were already on site when the previous leisure operator was present.'

4.14 The Board queried whether the fact that a retrospective application had been requested from Tamba Park, which was indicative that there had been a notional breach of planning legislation, would result in the Department handling such applications in a different way. Mr. Townsend stated that the screening process and consideration of a retrospective application would be the same as for a development that had not yet commenced. In response to the Chairman's suggestion that the conditions for a retrospective application could be honed more precisely, because the Department would have had the benefit of seeing the development, Mr. Townsend accepted that in theory that was correct, but opined that the Department would have been able to form a clear idea from the plans, had the work not already been undertaken.

4.15 He explained that in circumstances where work had been carried out without the requisite planning permission, the individual would often be invited to make a retrospective application to the Department, in order to regularise the situation. Provided that the application met the necessary requirements and was subsequently approved, the issue would be completely resolved. He acknowledged that a developer could, therefore, have 'enjoyed the fruits' of an unauthorised development for a period of time. He indicated that if a retrospective application was not received by the Department, formal action could be taken, such as the service of an enforcement notice. However, the developer could appeal that notice and whilst the appeal process was underway he accepted that they could continue to benefit from the unauthorised development. 'It is what the law allows for', he said.

4.16 The Board was surprised that someone could carry out an undertaking, without permission, for a temporary period and that the Department had no powers to prevent it. Mr. Townsend stated that the Department could issue a 'stop notice' (under Article 45 of the Planning and Building (Jersey) Law 2002), which could temporarily halt an activity, but advised the Board that a stop notice ceased to have effect 7 days after it had been served. At that point, the stop notice could be replaced by an enforcement notice, but that afforded a developer the opportunity to appeal, which would result in further delays.

4.17 With regard to the ice rink, Mr. Townsend accepted that the Department could have issued an enforcement notice, rather than inviting a retrospective application. However, he indicated that the Department would always try to reach a pragmatic conclusion and an enforcement notice was perceived as being the last resort. He acknowledged the 'frustration' that neighbours would have felt that the operation had been allowed to continue in the meantime. However, whether the Department had served an enforcement notice, or requested a retrospective application, the result would have been the same and the developer would have been given the opportunity to appeal. He informed the Board that the legislation, under which the Department operated, did not enable it to do

what the complainant would have wished, which was to stop the ice rink from operating and force it to be removed immediately.

4.18 When asked why the Department had not responded to the neighbours' complaints about the ice rink, Mr. Townsend stated that if someone objected to a development, the Department would normally write back to acknowledge receipt of the objection and subsequently notify them of the decision.

4.19 Mr. Jones, the Senior Planner, Compliance, informed the Board that the Compliance Section received 300 complaints *per annum*. Upon receipt of a complaint, it would be assessed and assigned a level of priority from 1 (Immediate) down to 4 (Low). Development, which was causing significant harm to registered buildings, as an example, would be assigned level 1, whereas the erection of an ice rink marquee at an existing tourist attraction would not be considered such high priority. A lack of resources meant that it was not always possible for complaints to be responded to as quickly as the Department would wish.

4.20 In the case of the marquee housing the ice rink, Mr. Jones stated that the applicant had not submitted a planning application at the outset, because he had believed it to constitute a 'moveable structure', for which consent was not required. However, because the ice rink had been due to remain in place for more than 28 days, permission was required and the decision had been taken to invite an application to regularise the breach of planning control. The applicant's agent had had a significant workload, so it had taken some time for the retrospective application to be submitted and when it had been received, 2 or 3 plans had been missing. As a consequence, it had not been possible for the Department to formally register the same, until the completed application had been received shortly before Christmas 2018. On the basis that this was considered a 'major application' by the Department, the target time frame for processing it would have been 13 weeks. If the Department had recommended the application for approval, in the face of objections from the neighbours, it would then have been referred to the Planning Committee to determine, which would have further delayed the process. Ultimately, the rink had closed in January 2019, as previously agreed and before formal consideration could be given to the application, which had subsequently been withdrawn on 5th March 2019.

4.21 In its written submission, the Department had stated the following –

> 'Whilst the complainant contends that the Department should have enforced against the unauthorised structure and use, the issue was that this was a leisure activity within an existing tourism attraction and the site operator had agreed to submit a planning application to regularise the use (which was his right) and once an application was submitted (albeit incomplete), the Department could not be justified in taking Enforcement Action as it would have had a great deal of difficulty in defending its actions had the site operator chosen to appeal that notice. This would also be the same scenario once the application had been accepted as complete and formally registered.'

4.22 Mr. Jones reassured the Board that Tamba Park had been made aware by the Department that advice should be sought before erecting any such structure in the future and indicated that should an issue arise, the Department would not invite a retrospective application. 'We hope that the applicant will know now that it won't be allowed to happen again', he said.

4.23 The Board was informed that most complaints had the potential to cause harm to someone's amenity and it was for the Compliance team to decide which of the 300 annual complaints were the most serious. The way in which this was assessed was set out in the Planning section of the gov.je website: https://www.gov.je/PlanningBuilding/AppealsComplaints/Pages/PlanningBuildingCompliance.aspx.

4.24 In the case of the ice rink, the Department had taken the view that the applicant was an established leisure operator, who would only be running the ice rink for a short period. The applicant had not realised that he required planning consent and in the Department's written submission, it stated –

> 'The site operator was duly approached and confirmed that he was not aware that planning permission was required, having taken the view that this was classed as a moveable structure and as such he had the option of being able to site the marquee for a period of 28 days in any one calendar year without the benefit of planning permission.'

4.25 Mr. Jones informed the Board that Tamba Park had admitted the error and, ultimately, this was not the same, he argued, as the removal of original windows from a listed building which, once gone, would be lost forever.

4.26 The Board opined that the Tamba Park's track record of compliance with Planning legislation at the site was 'not wonderful' because of the unauthorised development and retrospective applications. It queried whether this would result in it being on a 'list for supervision', where officers would visit the site to ensure compliance with conditions, or whether the Department waited for complaints to be submitted. Mr. Jones clarified that there had been only 2 retrospective applications (P/2016/0503 and the ice rink, P/2018/1726) on what was a site with fluctuating activity use. He indicated that if a decision was taken to refer someone for breach of planning legislation to H.M. Attorney General, the latter would review the previous history of compliance when deciding whether, or not, to bring a prosecution.

4.27 Mr. Townsend apologised to the Board that it had not received hard copies of the information that was contained within the Planning area of the gov.je website, which laid out *inter alia* how the Compliance team operated. One sentence contained therein, read –

> 'Any action taken to rectify a breach of control will be proportionate to the breach itself and will not, normally, reflect the planning history of a site, previous breaches by an individual or the origin or nature of a complaint received. However, we may take into account repeated breaches by the same individual when deciding whether to refer a matter for prosecution.'

4.28 Mr. Townsend informed the Board that compliance officers were wary of attending at a site too frequently. He indicated that the enforcement opportunities afforded by the legislation, under which the officers operated, should not leave neighbours feeling 'helpless' in the longer term, but he accepted that they did not enable officers to take the immediate action that the neighbours would wish. 'We operate within what we have', he said and suggested that if the Board felt that there should be 'tougher legislation', with no appeal period for enforcement notices, it could be one of the recommendations made following the hearing. Mr. Townsend informed the Board that he could envisage circumstances where officers should be able to put a stop to a development in more 'exceptional' cases, rather than allowing the use to continue during the process of dealing with both a retrospective application and appeal, when permission was refused.

4.29 Mr. Jones indicated that 'ideally' the Compliance team liked to keep neighbours updated in respect of complaints and the officers did this to the best of their abilities, but had insufficient resources and time. Until a month prior to the hearing and at the time of the complaint about the ice rink, there had only been 1½ posts in compliance. There was one full time officer and Mr. Jones divided his time between compliance and acting as a senior planner. Another individual had recently been appointed to a compliance role and Mr. Jones hoped that this would lead to the team becoming more pro-active and efficient in dealing with cases.

4.30 The Board suggested that whilst it was stated that the Department decided each case on its merits, if complainants were not kept aware of the process, they might form the impression that larger commercial interests had 'the ear' of the Planning Department. Mr. Townsend denied that was an accurate interpretation of events, but understood how individuals, who were not familiar with the planning system, might be led to believe that. He indicated that the Department would apply the same tests, irrespective of whether a big business, or an individual, was in breach of planning legislation. The scale was irrelevant. He reiterated that the relevant information was on the Planning area of the gov.je website, but acknowledged that, as with any website, one had to search to find things.

4.31 Although 300 complaints per year equated to fewer than one per day, Mr. Jones stated that many related to planning matters, which took time to research and Tamba Park was one such case. He informed the Board that in 2017 there had been 10 enforcement notices served and 12 in 2018. There had been 90 complaints to date in 2019 and 8 enforcement notices served. The last time an individual had been prosecuted had been in 2016 (*AG v Barette*).

4.32 In respect of the noise levels emanating from Tamba Park and the provisions of condition 3 of the decision notice, referred to in paragraph 3.20 above, Mr. Bowditch, Environmental Health Officer, informed the Board that an assessment had been undertaken on behalf of Tamba Park, but that it had not been in accordance with a methodology approved by the Department. Towards the end of 2018, an agreed methodology had been resolved and it was for experts engaged by Tamba Park to undertake their assessment. Their report would then be submitted to the Department. Mr. Bowditch explained that it was not straightforward to assess noise levels, which was why experts were

required. Mr. Jones stated that the Department had been unaware that a methodology had been agreed and that it would pursue it as a matter of urgency. However, Mr. Townsend clarified for the Board that the acoustic survey would not cover the noise from the Zap Zone, as that had not formed part of the planning application.

4.33 Mr. Bowditch informed the Board that he had been in the properties of the Complainant and her neighbours and had been able to hear the noise from the Zap Zone parties. However, he stated 'there is a difference between what is a statutory nuisance and what is audible'. Officers from the Department had visited the site on more than 20 occasions, but had not found there to be a statutory nuisance.

4.34 The Board drew the attention of the officers to signage that had recently appeared outside Tamba Park, which indicated that the Park was closed for refurbishment. Mr. Townsend stated that he had not had sight of the signs and whilst not wishing to give the site owner the impression that he was being singled out, opined that it would be reasonable for the Department to contact him to explore whether the works being undertaken required planning permission.

4.35 In concluding, the Principal Planner, stated that the Department was hampered by a lack of resources. 'It has been said a few times, it sounds like an excuse, but we have an issue.' He acknowledged that complaints were not being responded to quickly enough and indicated that, in his view, the compliance team was under staffed, which limited what action could be taken. Moreover, there was a balance to be drawn between the expectation of neighbours and what the Department was able to do under current legislation, in terms of 'stopping things immediately.'

5. Closing remarks from the Chairman

5.1 The Chairman thanked both parties for attending and for their input. He stated that a report of the hearing would be prepared in due course, which would be circulated to both parties for their feedback on the factual content. Thereafter, the Board's findings would be appended thereto.

5.2 He indicated that it was important for Ms. McGinley to have had the opportunity for her complaint to be heard and for the Department to understand the basis thereof. The Board would consider whether the Department had complied with its own policies and processes and could make recommendations, irrespective of whether it upheld the complaint, or not.

6. Findings

6.1 The Board upholds the Complaint under Articles 9(d) and (e) of the Administrative Decisions (Review) (Jersey) Law 1982 and believes that the decision, act or omission of the Planning Department when dealing with this complaint –

(d) could not have been made by a reasonable body of persons after proper consideration of all the facts; or

(e) was contrary to the generally accepted principles of natural justice.

6.2 The Board upholds the Complaint as a result of what it perceives to be a combination of shortcomings in the Planning and Building (Jersey) Law 2002 ('the Law'), the failure of the Planning Department to enforce the Law and material shortcomings in the internal systems and resources of the Planning Department.

6.3 The Board considers that it is a fundamental failing of the Law that there is no provision that effectively enables the Minister to bring an immediate halt to what he considers to be an unauthorised development or use of land. In the present case, the allegedly unauthorised use of part of Tamba Park as an ice rink was brought to the attention of the Planning Department in early October 2018, due to the unreasonable level of noise emanating from it and the consequential disturbance to residential neighbours. Had the Minister the power to immediately suspend the unauthorised use, it is quite probable that the Department would have approached the enforcement of conditions attached to the Planning consent (which was at the heart of this Complaint) and to the alleged unauthorised development in quite a different manner than appears to have been the case. As it was, the Board is left with the impression that the Department rather shrugged its shoulders, not wanting to upset a major tourist attraction in the way it chose to operate its business, and – as far as the unauthorised use was concerned – thinking that the unauthorised use would cease in four months, so there was little point in expending time and effort pursuing something that was going to end relatively shortly anyway.

6.4 The Board expresses no opinion on whether the operators of Tamba Park 'played the system', in relation to the delays in the submission of relevant documents for the retrospective application for the ice rink, but it is clear that the Department allowed the operator to dictate the timetable which was for its benefit, notwithstanding the reasonable complaints of neighbours.

6.5 The Complaint revolved around the conditions imposed on Planning consents in relation to Tamba Park and the Department's alleged failure to enforce them. The Board was informed by the Department that it took the view that, in attaching conditions to a Planning consent, the Department had regard not only to Article 23(1) of the Law, but also to the U.K. National Planning Policy Framework, which states *inter alia* that planning conditions should be relevant to planning and the development to be permitted. The Department used this to justify its position that a condition could only be applied in relation to the particular piece of land to which the specific application referred. The Board does not share this view.

6.6 Article 23(1) of the Law states –

> *A condition attached to the grant of planning permission....shall fairly and reasonably relate to the proposed development.*

The Board takes the firm view that the words 'shall fairly and reasonably relate to' creates a subjective test, which enables (indeed, obliges) the Minister to consider the complete context of a particular development when imposing a

planning condition. The Board therefore is of the view that the Department should have considered appropriate conditions relating to the whole of Tamba Park when it considered P/2016/0503 [relating to external works and air conditioning units], which could then have taken into account opening hours and the use of internal areas of the site. By taking a restricted view that it could only impose conditions that attached purely to the part of the site which was the subject of the immediate application, the Department created confusion and contradiction.

6.7 Referring to the U.K. National Policy Framework to which the Department drew the Board's attention, that framework quite rightly states that any condition shall be 'enforceable, precise and reasonable in all other respects'. The Board is of the view that the relevant conditions attached to P/2016/0503 were anything but precise. A condition which is attached to a Planning consent may be compared to a servitude or covenant in title deed; it runs with the land, it is not affected by change of ownership of the land and it will subsist until such time as it is altered or superseded by a subsequent planning decision or operation of law. As such, it should be clear in its meaning to anyone reading it in isolation. We were told that the condition that 'no machinery shall be operated' was intended to refer to such operations as grass cutting and that 'external areas of Tamba Park' was not intended to include car parks. Such intentions were not translated into the wording of the conditions. The Board suspects that the lack of clarity of the conditions may have contributed to the apparent reluctance of the Department to enforce them. Put another way, had the conditions attached to consent P/2016/0503 been precise and applied fairly and reasonably relative to the whole of Tamba Park, then the Board has no doubt that the Department could have considered the enforcement of the conditions with more robust confidence than it did.

6.8 The Department referred to its lack of resources which hampered its ability to properly investigate the more than 300 complaints that the Department receives annually. The Board was informed that each complaint takes time to research before any action can be considered.

6.9 The Board does not doubt that a lack of resources makes the investigation of complaints more difficult. However, that creates an additional responsibility on the Department to act as efficiently as possible, in particular by ensuring that planning conditions are clear and precise and readily ascertainable. By their own acknowledgement, the Department relies on the public to act as the policemen of the Law to a large extent and to report suspicions of unauthorised development or breaches of planning conditions. That being the case, the Department on its side must ensure not only that permits and conditions are clear, precise and accessible, but also that the Department will investigate complaints diligently, keep complainers fully informed and pursue planning breaches with vigour. In this case, not only were the planning conditions unclear, but by including the applicant's design statement as an 'approved document', it gave the misleading impression that assurances given in that design statement had the same effect as planning conditions.

6.10 The present case identified a failure (or perhaps the lack) of a system of monitoring planning conditions within the Department. The fact that the acoustic survey stipulated to be carried out by a specified time had not been

undertaken and that there was no apparent communication between the Environmental Health Department and the Planning Department relating to such survey indicated a complete failure of any system of ongoing supervision of planning conditions; likewise the absence of any enforcement or oversight of stipulated opening hours. This may be purely down to resources, but if that is the case, then this is a matter requiring urgent attention. If the public cannot have confidence that planning conditions and indeed the Planning Law will be enforced, then breaches will be ever more prevalent and blatant, while enforcement decreases.

6.11 In conclusion, the Board makes the following recommendations –

1. Article 23(1) of the Law should be applied subjectively when imposing planning conditions, in order that the wider consequences of any permission can be properly controlled.

2. Planning conditions must be precise and understandable at face value. It is recommended that internal systems within the Planning Department be amended to provide that a 'new pair of eyes' interpret any proposed planning conditions to ensure that as far as possible the intention of a proposed condition will be achieved.

3. A similar system that applies to applicants or persons commenting on an application should apply equally to persons making complaints, in order that they are kept informed of the progress of such complaint. If the Department is to continue to rely heavily on the general public for notification of possible breaches of the Law, then the Department must respect their stake in the complaint.

4. Only those documents that are capable of enforcement should be included in the 'approved documents'. If design statements are intended to be binding then the binding elements of them should be included in a Planning Obligation Agreement or as planning conditions.

5. Where planning conditions are imposed requiring performance by a given date, appropriate departmental systems should be in place to ensure compliance. The Department should also give consideration to some form of 'traffic light' system where it appears that a developer of land has repeatedly submitted retrospective applications, in order to ensure compliance with the Law.

6. Where Planning conditions may involve other Government departments or sections, for example Environmental Health in relation to acoustic surveys, closer cooperation should be put in place to facilitate compliance with and enforcement of such conditions.

7. An amendment to the Law to enable the Minister to stop any unauthorised development or use pending further order should be considered. Consideration should also be given to prosecution for unauthorised development notwithstanding that retrospective consent may have subsequently been granted.

6.12 The Board asks for a response from the Minister for the Environment within two calendar months of the publication of its Report.

Signed and dated by –

G. Crill, Chairman ..... Dated: .....

S. Cuming ..... Dated: .....

J. Moulin ..... Dated: .....