STATES OF JERSEY

STATES OF JERSEY COMPLAINTS BOARD: FINDINGS – COMPLAINT AGAINST A DECISION OF THE MINISTER FOR PLANNING AND ENVIRONMENT REGARDING AN APPEAL IN RESPECT OF THE ISSUE OF AN ENFORCEMENT NOTICE AND FAILURE TO RESPOND TO THE APPLICANT (R.144/2013) – RESPONSE OF THE MINISTER

Presented to the States on 18th December 2013
by the Privileges and Procedures Committee

STATES GREFFE

2013 Price code: B R.154

FOREWORD

Article 9(9) of the Administrative Decisions (Review) (Jersey) Law 1982 requires the Privileges and Procedures Committee [PPC] to present to the States the findings of every Complaints Board hearing and the response of the Minister when a Board has asked a Minister to reconsider a decision. On 19th November 2013, PPC presented to the States the findings of a Complaints Board held on 23rd October 2013 to review a decision of the Minister for Planning and Environment (R.144/2013). The Minister has now reconsidered the decision as required by the Board, and the Committee is therefore presenting his response to the States as required by Article 9(9).

" **Minister for Planning & Environment**
South Hill
St Helier, Jersey, JE2 4US
Telephone: 01534 445508
Facsimile: 01534 445528

11 December 2013

Mrs L Hart
Assistant Greffier of the States
States Greffe
Morier House
St Helier

1382/2/2/1/2(316)

Complaint Ref: CMP/2009/00059
Enforcement Ref: ENF/2009/00032

Dear Mrs Hart

Administrative Decisions (Review) (Jersey) Law 1982
Decision of the Minister for Planning and Environment regarding the issue of an Enforcement Notice and failure to respond to the applicant:
Field 1007, La Grande Route de St. Jean, St. John

The Board's findings raise a number of points.

The complaint focussed on the "8 Year Rule" established in Article 40 of the Law. I have taken legal advice on this and indeed your findings as a whole. There is no local legal precedent upon which the Department could have relied, and in the absence of that the approach adopted was seen as logical and appropriate and not spurious nor creative as is suggested in your findings. The 8 Year Rule had clearly been considered prior to the service of the Notice as it is referred to in the correspondence of the time which alerted Mr Manning to its existence.

Although not expressly mentioned in Article 40, a change of use has to be "material" to be development in accordance with Article 5 of the Law. It also logically has to have been "continuous" or ongoing for over 8 years to enjoy the immunity offered by the 8 year rule. If the unauthorised development commenced within the last 8 years it is not immune from action. Therefore any use must have commenced more than 8 years ago and still be in place, for it to enjoy protection under the 8 Year Rule. It must therefore have been continuous.

Unlike building operations, which are very obvious, changes of use are not, and uses can change in various ways over time. In this case for example the Department considered that the unauthorised use diminished to a point in 2008 where it was immaterial. Therefore there was no breach of control at that time. Any breach had been resolved. The inference of the Board's findings is that the department should not have considered this period to be unworthy of enforcement action nor that period when telegraph poles were being stored by JT. I would argue that for the Department to have taken action against Mr Manning in 2008 when the use had effectively ceased, or when JT were using the site for storing telegraph poles with the Department's consent, would have been unreasonable.

Most importantly these findings highlight the difficulty in proving that a use has been ongoing for a continuous period of 8 years, especially as many changes of use are invisible outside the site. I note the Board's suggestion that I offer guidance on this issue but I cannot of course issue policy guidance upon it as it is a matter of Law and not policy. I will however consider the matter further and indeed whether Article 40 should be amended.

As you know, a review of our enforcement service is underway, and due to report imminently. The Board's conclusions including the suggested Code of Conduct for dealing with the various parties, will be considered as a part of that review as will the need to deal with correspondence in a more timely manner.

I would go further and note that the review will also reconsider the processes adopted when considering enforcement action. For example the Board has made assumptions about the lack of consideration of the 8 Year Rule in 2010 (addressed above), and the vires of the decision, (discussed below). I do not agree with the assumptions made nor therefore the resultant conclusions, but these matters would I suggest have been clearer had a report been required at the time. Such a report could explain the basis of the breach of control, why action was considered necessary and, (relevant in this case), if the 8 Year Rule applied. Such a report would be a relevant document at any subsequent appeal and therefore disclosed.

The criticism that the neighbour's agent appears to have been notified of the Notice before it was served upon Mr Manning is accepted, and as noted above, the suggestion that a Code of Conduct be developed has been taken on board. I shall be writing to Mr Manning about the case and to apologise for this. My own observation however is that there has not been any evidence of bias because of the identity of the neighbour's agent, but the case identifies that where the Department is contacted by email, it will usually respond more quickly than may be the case for a letter and this may be misconstrued as preferential treatment. This point too will be considered as part of the review.

The Board has reached different conclusions to the Royal Court as regards the legitimacy of the temporary storage of telegraph poles, and the question of whether it is nonsensical to allow agricultural use but not domestic use where the authorised use of the site is agricultural. Such a stance has potentially enormous ramifications if repeated across the island and would contradict the Island Plan which sets a presumption against such changes of use.

The Board has suggested that I invite Mr Manning to submit an application to give me the opportunity to grant consent for a non-agricultural storage use on the site. It is not clear whether this suggestion applies to the whole of the site discussed at the hearing or just that small part of it which is currently being actively used. I am very concerned however that this suggestion implies that such an application will undoubtedly be approved. It is certainly not for me to invite an application on that basis, or for me or the Board to pre-determine such an application. As you know an application for the whole of the area has been made previously. It was refused and importantly the Royal Court found that decision to be reasonable. Mr Manning is entitled to submit such an application, but it would be fundamentally wrong for me to actively invite such an application with the impression that permission would de undoubtedly forthcoming.

Finally and most importantly the Board has concluded that the service of the Notice was ultra vires. I cannot accept that is correct and indeed the Board had

already received the confirmation of the Chief Executive Officer that such a conclusion was incorrect. I have also taken legal advice. This matter is discussed in your paragraph 4.6 wherein you suggest that the Department's explanation is no more than a "view". With respect that is your "view". The scheme of delegation at the time requires a decision made under delegated powers to have 2 parts, a decision by a junior party and a countersignature by a senior party. Typically the junior party is the case officer who having worked on a case reaches a decision on what should be done. That however does not become a vires decision of the Department or Minister under the scheme of delegation until it is countersigned by the senior party. That is precisely what has happened here, the case officer has reached a decision on the case which is to serve a Notice. A Notice was therefore produced by that case officer who was an "authorised officer" listed in the scheme of delegation of the time. That decision only becomes the formal vires decision of the Department once the second, senior, party has signed it. In this case Mr Thorne, as the most senior planning officer, is the senior party. His signature did not require a further endorsement.

Conclusion

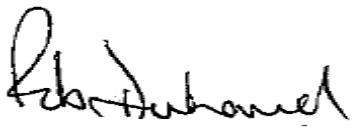
I have considered the Board's findings as I am required to do. As discussed above, some of these will certainly be considered as part of the ongoing review of the enforcement service and will help us improve the service. I am in a difficulty however as regards issues where the Board disagree with the highest authority of the island, the Royal Court, and with regard to the Board's view on the vires of the decision.

I also have a responsibility to consider all material planning factors including the impact upon and the views of the neighbour, and cannot simply refuse to consider these as the Board can.

As photographic evidence shows, Mr Manning has in recent years restricted the area of the site occupied by unauthorised, non-agricultural storage, and kept this relatively tidy. This is acknowledged and welcomed. Indeed if the level of such storage were reduced to the level evident in 2008, we have already stated that would be considered de minimis. If kept to that level thereafter, the matter would be closed. However, a greater level than that is not de minimis, and I cannot ignore the fact that Mr Manning has been using this piece of land without consent.

I appreciate the Board's comments and will act on these as stated above. I do not however agree that the Notice is ultra vires, or that my case to the Board in regard of the 8 Year Rule was invalid. The Notice therefore is still in place. Mr Manning may of course submit an application as you suggest if he wishes to seek a conditional approval, which if it were approved could also potentially resolve the matter. Alternatively he can reduce the level of storage to the 2008 de minimis level. If however the use continues at a level which is not de minimis then that would be vulnerable to further action.

Yours sincerely



Deputy R C Duhamel ”

APPENDIX

Minister for Planning & Environment
South Hill
St Helier, Jersey, JE2 4US
Telephone: 01534 445508
Facsimile: 01534 445528

States of Jersey

13 December 2013

Mr D Manning
Mandorey Villa
La Grande Route de St Jean
St John
JE3 4FN

Complaint Ref: CMP/2009/00059
Enforcement Ref: ENF/2009/00032

Dear Mr Manning

Administrative Decisions (Review) (Jersey) Law 1982
Decision of the Minister for Planning and Environment regarding the issue of an Enforcement Notice and failure to respond to the applicant:
Field 1007, La Grande Route de St. Jean, St. John

Please find attached a copy of my response to the Complaints Board's findings in regard of Field 1007.

I am required to consider the findings, and whilst some are accepted and will assist me, I do not agree with them all.

Most particularly I do not agree that the serving of the Notice was Ultra Vires, nor that the issues raised regarding the 8 year rule were invalid, and I have taken legal advice on these issues. The Enforcement Notice is therefore still active.

The Board suggested that I should invite an application. It is not appropriate for me to invite an application in the way suggested, but you are at liberty to submit an application or an alternative proposal if you wish.

I do however apologise for the fact that your neighbour was notified of the then forthcoming Enforcement Notice before it was served upon you. No disrespect was intended by this.

If you have any queries please let me know.

Yours sincerely

Rob Duhamel

Deputy R C Duhamel

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