PLANNING AND BUILDING (JERSEY) LAW 2002 (as amended)

Appeal under Article 109 against an Enforcement Notice

REPORT TO THE MINISTER FOR PLANNING AND ENVIRONMENT

By Mr Philip Staddon BSc, Dip, MBA, MRTPI

Appellant: Northern Leaf Plc

Site address: 'The area of land forming part of the land known as field MY770', Retreat Farm, La Rue des Varvots, St. Lawrence, JE3 1GX

Alleged unauthorised development: 'that without planning permission, the construction of a walled compound containing climate control and air filtration/chilling plant machinery used in conjunction with the eastern glass house of Field MY770

Enforcement Notice reference number and description: ENF/2023/00004

Enforcement Notice issue date: 9 January 2024

Related planning application: P/2024/0464 *'RETROSPECTIVE: Construction of a mega block wall to North elevation of the existing Western glasshouse'*

Procedure: Hearing held on 16 July 2024

Inspector's site visits: 25 March 2024 and 24 June 2024

Inspector's report date: 9 August 2024

INTRODUCTION

1. The appeal is made by Northern Leaf Plc (the appellant) against an Enforcement Notice (EN) served by the department for Infrastructure and the Environment (the planning authority).

2. The appellant company is a cultivator and processor of pharmaceutical-grade medical cannabis, based at premises at Retreat Farm in St Lawrence. The alleged unauthorised development has been carried out in connection with those commercial operations. This report sets out my assessment of the appellant's appeal against the EN.

The appeal site and its surroundings

3. The EN contains a plan which identifies the wider site with a red line. It is drawn to include a now largely demolished commercial glasshouse (the 'western glasshouse'), and some peripheral land, including a former car park associated with a previous tourist/leisure use (Tamba Park), containing some trees and vegetation, which has a frontage to Rue de la Frontière. Whilst there are some peripheral elements of the glasshouse structure still standing in the western part of the building's original footprint, most of the

site is now open, with extensive areas of concrete floor now exposed. The eastern part of the former building's footprint is now becoming vegetated, although some hard surface paths from the earlier growing operations remain visible.

4. Within the red lined area, the EN plan identifies with a blue line, a smaller rectangular parcel within the north-east corner of the larger site. This is intended to identify the unauthorised development alleged in the EN. Within this area, I observed a plant room and 4 large industrial style chiller units, which all sit on a concrete base which appears to be the original glasshouse floor[1].

5. To the north and south of the chiller units are walls constructed in 'mega-blocks'; the southern wall has gaps and openings within it. To the east of the blue lined alleged unauthorised development, is an existing water tank and a boiler room complex, which are within the wider red lined area.

6. Running south from the blue lined area is a set of above ground metal pipes, which connect to a plant room in the south-eastern part of the site. Immediately to the east of this plant room, and beyond the red lined site, is an external plant area containing air handling units in association with the eastern glass house, which has, in recent times, been refitted and repurposed into the appellant's cannabis cultivation operation.

7. The surrounding area is predominantly rural in character and within the Green Zone, as defined on the proposal map of the Bridging Island Plan (BIP) (adopted March 2022). St Mary's village is about 1.5 kilometres away (roughly to the east) and Carrefour Selous is about 0.7 kilometres to the south-east.

8. Despite the prevailing rural character and agricultural land uses, there is a number of dwellings in the area. The most notable cluster being to the south of the site's south-east corner, and immediately adjacent to the eastern glass house. Here there is a terrace of dwellings, known as Retreat Farm Cottages, which appear to be relatively recently converted from farm buildings.

9. There are further residential properties to the south clustered around La Rue des Varvots, which include the mid-late C19 Listed farmhouse[2].There is also a cluster of dwellings further south on the east side of Les Chanolles des Six Rues. There are other, typically larger detached, residences dispersed through the countryside to the west (Rue de la Frontière), north (Rue de la Prairie) and east (La Rue des Varvots and La Rue du Douet de Rue).

[1] On my site inspection, I noted that what appeared to be elements of the glass house metal structures were still embedded in the concrete floor in the vicinity of the chiller units.

[2] HER Reference LA0083 - Retreat Farm, La Rue des Varvots, St. Lawrence (Grade 3).

Background and planning history

10. The Retreat Farm buildings, glasshouses and land have a fairly complex planning history and the planning authority's submissions include resumes[3] of the main planning applications since 1995. It is not necessary to repeat all of that detailed history here, but some of the salient points relevant to the appeals are set out below.

    - There have been large glasshouses at Retreat Farm for many years, seemingly dating back to the 1960s, and originally used for growing crops and flowers.

    - Parts of the wider site became a tourist/leisure use, known as Tamba Park, which operated from about 2014 and closed in 2019.

    - It is accepted by the planning authority that the subsequent reversion of the site to agricultural use is lawful.

    - The planning authority accepts that the use of the site for cannabis cultivation is an agricultural activity and therefore lawful, and does not require permission for a change of use.

    - Since 2019, there have been a number of planning applications for developments related to the use of the site for cannabis growing. Some of these have been retrospective applications.

    - The use of the site for cannabis cultivation, and the developments associated with it, have been the source of concern and objections from local residents.

    - Planning permission (P/2021/1705) has been granted for a replacement glasshouse on the western glasshouse site. The old glasshouse has been largely demolished, although extensive concrete flooring remains over much of the site. There is no evidence on site of any imminent construction of the permitted replacement glasshouse.

    - In the course of this appeal, an application reference P/2024/0464 has been submitted with the development description *'RETROSPECTIVE: Construction of a mega block wall to North elevation of the existing Western glasshouse'*. The application is undetermined and falls to be determined through this appeal process.

    - A further planning application reference P/2024/0391 has recently been submitted with the development description: *'RETROSPECTIVE: Construction of pipework along the eastern edge of the western glasshouse now external (due to the demolition of the existing glasshouse), ductwork over roof and construction of plant housing within existing glasshouse to the Northwest corner of the eastern glasshouse, prefabricated detached single storey storeroom to the East of the Eastern glasshouse, lean to access porch to the North East corner of the eastern glasshouse. Installation of an air source heat*

[3] Consolidated Regulation Report – Retreat Farm St Lawrence – pages 47 – 51

pump to the eastern face of the eastern glasshouse, four number air extract ducts to terminate at roof level to the Southwestern corner of the eastern glasshouse.' This application is pending consideration at the date of this report.

The Enforcement Notice

11. The EN was issued on 9 January 2024. The EN relates to the alleged unauthorised construction of *'a walled compound containing climate control and air filtration/chilling plant machinery used in conjunction with the eastern glass house of Field MY770'*.

12. Section 4 of the EN sets out the planning authority's reasons for issuing the EN. These are:

    4.1 It appears that the Breach of Development Controls has occurred within the last 8 years and that it is expedient to take action to remedy the Breach.

    4.2 The unauthorised development, due to its design and location, harms the visual amenity of the Green Zone, contrary to Policies SP5, PL5 and NE3 of the Bridging Island Plan 2022.

    4.3 The operation of the unauthorised development results in unacceptable levels of noise, causing harm to the amenity of the location and nearby residential properties, contrary to Policy GD1 of the Bridging Island Plan 2022.

    4.4 In the absence of reports or information the Planning Authority is unable to confirm that the unauthorised development does not cause harm to protected wildlife, contrary to Policy NE1 of the Bridging Island Plan 2022 and the obligations which exist under the Wildlife (Jersey) Law 2019

13. Section 5 of the EN specifies the steps required to remedy the alleged breach. These are:

    5.1 Demolish the block work walls.

    5.2 Remove all resulting debris and materials from the land.

    5.3 Deconstruct the plant machinery.

    5.4 Remove all resulting debris and materials from the land.

14. Section 6 sets out the time for compliance, which is two calendar months. For the avoidance of doubt, the lodging of an appeal under Article 109 has the effect of freezing the EN, and the compliance period, pending the Minister's decision.

PROCEDURAL MATTERS

15. This appeal has highlighted certain weaknesses regarding existing procedures and guidance concerning EN appeals. A matter that I am aware has been previously raised by one of my colleague Inspectors, relates to publicity, or rather the lack of publicity arrangements, concerning EN appeals.

16. On the face of it, there seems to be no sound reason for a differential treatment of 'normal' planning appeals made under Article 108 and EN appeals made under Article 109. An appeal under Article 108 has all of its details and documentation published on the planning website records for the corresponding planning application. However, details of appeals under Article 109 are not similarly published, and this creates transparency and potential fairness issues, given that appeal proceedings are conducted in public and in the public interest.

17. A related matter concerns the lodging of an appeal under ground (h), which is intended to be the 'deemed' planning application avenue, i.e., the ground that pleads that planning permission should be granted for the development alleged in the EN. The legislative requirements for such an appeal are set out in Article 109(4) and simply require the payment of the prescribed fee (double the normal fee) and, where the appellant is not the owner of the land in question, the appropriate ownership certification. However, in practice, a procedure appears to have evolved which requires the submission of a completed planning application form and I am aware that, in some cases, plans and supporting documents have also been submitted. This is a 'requirement' beyond that set out in the Law, and it is not set out in any published guidance. The informal procedure does perhaps serve the purpose of creating a public record, to which appeal documentation can be published. However, where an EN appeal is being pursued on grounds not including ground (h), there is a real risk that the process could be perceived to be, in effect, 'behind closed doors', with perhaps some, potentially deeply affected, parties being unaware of the proceedings, and their ability to participate in them.

18. In this particular case, the confusion over whether a ground h) appeal was being made, and what was required to enable it to proceed, resulted in some delays and the intervention of the Judicial Greffier, who ruled that the appellant should be afforded the opportunity to amend the appeal forms and lodge an application, along with a set of plans. The application was registered under reference P/2024/0464. A further complication here is that the application does not fully capture 'the development in question'[4], but merely one part of it (the northern wall), a matter I discuss later in this report.

19. I raised these procedural matters at the Hearing and there appeared to be a consensus that the current procedural situation regarding Article 109 appeals, including publicity and deemed application requirements, was in need of some attention and review. Mr Marx, for the planning authority,

[4] The terminology used in Article 109(2)(h)

helpfully confirmed that he was alert to these issues, and I agreed to include a short summary in this report to record the matters that would benefit from some review and procedural update, along with some published guidance. These are matters that I trust Mr Marx, and his colleagues, will pursue in liaison with the Tribunals service.

SUMMARY OF CASE FOR THE APPELLANT

20. The appellant's case is set out in the appeal form (updated version 26 February 2024), with the appended EN, along with a letter dated 27 March relating to the retrospective application, a Statement of Case produced by Ms Clover, with a set of appendices comprising planning permissions, application documents, drawings and emails. It is further supported by a Supplementary Statement of Case with appendices.

21. The stated grounds of appeal are:

Ground A

The enforcement notice is technically flawed and legally invalid. The alleged breach of development control pertains specifically to the construction of a walled compound. The Reasons allege, for example, that the "Operation" of the unauthorised development results in noise. The notice purports to enforce against impact (harm to wildlife) of which the Planning Authority confirms they have no evidence. The Steps required to remedy the breach do not relate to the alleged breach of development control. The notice is unclear and unenforceable.

Ground B

The development to which the notice purports to relate already has permission; either granted permission or permitted development or both. The Planning Authority has made clear representations to the Appellant in the past confirming that permission has been granted and/or is not required, and is estopped from arguing to the contrary in this appeal for reasons of legitimate expectation and other.

Ground C

For the reasons given in (A) above, the Planning Authority cannot take action against the "operation" of a wall, for noise or any other reason. If the Authority intended to enforce against the chilling plant machinery, this notice as drafted fails to achieve that intention. There is no breach of any planning policy, including but not limited to any impact on amenity, arising from anything identified within the breach of development control section in the notice. The Authority cannot enforce against speculative harm to protected wildlife that they cannot identify exists.

Ground E

That the matters alleged in the notice have not in fact occurred.

Ground F

The requirements of the notice manifestly exceed anything that could be described as reasonably necessary to remedy any breach of control. Purely by example, the notice requires the complete demolition of the wall and plant machinery in order to protect wildlife that has not been demonstrated to exist. There is no visual or noise impact, even if the Authority had correctly described the breach of development control to cover elements that were capable of causing visual or noise impact, which they have not.

Ground G

This is a delicate crop growing operation. Demolition as described by the notice would bring the operation to a halt. The impact would be disastrous. The time frame identified is far too short to mitigate the loss. The time frame identified is far too short to implement any or all of the steps required, for various reasons.

Ground H and application Ref P/2024/0464

In addition to or in the alternative to all foregoing arguments, in all the circumstances, planning and any other requisite permission should be granted in full for anything identified in the notice that requires it.

22. At the Hearing, the appellant's case was led by Ms Sarah Clover (Counsel), with contributions from Mr Mark Dennis (architect and agent for the appellant), Mr Campbell Dunlop (Chief Operations Officer – Northern Leaf Plc) and Mr Andrew Dunlop (Head of Engineering – Northern Leaf Plc).

SUMMARY OF THE PLANNING AUTHORITY'S CASE

23. The planning authority's case is, in essence, that set out in section 4 of the EN, along with 2 response documents addressing the appellant's appeal submissions. The first document is a 4-page Statement of Case with 2 appendices: a letter dated 18 October 2023 from Mr Clarke (Compliance Officer) to Mr Benton at Northern Leaf, and a 78-page Consolidated Regulation Report. The second response is a 2-page document with appendices which include: details of a possible installation and a contract document (appendix A); a letter dated 3 November 2023 from the planning authority to Northern Leaf concerning the lawfulness of chillers; and a statement from the Environmental Health Service (2 pages, with an attached letter and a copy of the abatement notice dated 6 April 2023).

24. All of these submissions seek to demonstrate that the service of the EN was justified and expedient for the reasons set out within it, and it rebuts the appellant's grounds of appeal and maintains that the appeal should be dismissed.

25. At the Hearing, the planning authority was represented by Mr Andrew Marx, (Head of Development and Land), Mr Chris Jones (Senior Planning Officer) and Mr Jonathan Gladwin (Senior Planning Officer – Appeals). They were supported by Ms Ruth Briggs (Senior Regulation Standards Officer – Housing and Nuisance), who addressed statutory nuisance matters.

SUMMARY OF THE VIEWS OF INTERESTED PARTIES

26. I have noted and considered submissions from the following interested parties: Penelope Bromley, Andrew and Kathryn Fowler, Interserco, Ginette Kitchen, Charlotte Linney, Roger Nightingale, June Roberts, Willin Ltd/Jane Butlin and a party with the surname McGinley.

27. All of these interested parties oppose the appellant's current operation, notably in terms of their impact on their daily lives with regard to noise impacts and odours. Some of the key viewpoints of residents are:

- Since spring 2022, there has been excessive unpleasant noise 24/7.
- Noise is unacceptable and increases in the summer months.
- Unpleasant smells.
- Residents cannot use and enjoy their gardens, due to the noise and smell from the Northern Leaf operations.
- Northern Leaf has a history of undertaking developments and then applying retrospectively for planning permission. None of these applications have been rejected.
- Other companies and business operate chillers without complaint.
- That the appellant has a complete disregard for living conditions of neighbours, particularly with regard to noise and smells.
- That government agencies have been incompetent in dealing with complaints and issues at the site, and Northern Leaf usually gets its way.
- There are rumours of senior states members having invested in Northern Leaf and a blind eye being turned to their actions.
- Noise and smells are toned down whenever an official visit is scheduled.
- Trees have been removed without good reason.
- Light pollution.
- There should be an investigation into the physical and mental health impacts of the Norther Leaf operations on the neighbourhood.
- Alleged bullying and threatening behaviour by Northern Leaf towards a resident.

INSPECTOR'S ASSESSMENT

28. I will examine each of the appellant's grounds of appeal in turn. There is a degree of overlap and interconnectivity between the appellant's case under different grounds, but it is important to assess and address each in turn.

Ground A appeal: 'that the matters alleged in the notice are not subject to control by this Law'

29. The relevant article of the Law[5] establishes that development means the undertaking of a *'building, engineering, mining or other operation in, on, over or under the land'*.

30. Notwithstanding the appellant's other grounds of appeal, including that the matters alleged are covered by existing permissions and/or are 'permitted development' under the Order, I observed on my site inspection that the blue lined area included 4 large industrial chiller units mounted on the seemingly pre-existing concrete base, a plant room, and 2 substantial walls constructed in large concrete blocks, 1 to the north of the chillers, the other to the south. These are 'engineering' and 'building' works and constitute development as defined in the Law. Therefore, on the facts of the matter, the ground (a) appeal should fail.

31. However, the appellant's case under ground (a) actually strays outside the binary judgement of whether or not the works constitute 'development' under the Law. The appellant claims that the EN is 'technically flawed and legally invalid' and 'unclear and unenforceable' because it refers specifically to the construction of a 'walled compound'. The appellant says that the EN is not clear and it does not specify the plant, or allege that the plant is in breach of development control.

32. The appellant further contends that a 'walled compound' does not give rise to any noise. It further states that the EN purports to enforce against harm to wildlife for which the planning authority has no evidence. The appellant also claims that the steps required by the EN do not relate to the alleged breach of development control. At the Hearing, Ms Clover advanced the view that the only matter that the EN could enforce against was the walls and amending it to include the siting of the plant would be significantly prejudicial to the appellant.

33. Whilst carefully considering and noting the submissions of Ms Clover alleging the invalidity of the EN, I disagree. There are a number of points to make.

34. First, it is a long-established principle, confirmed by UK case law[6], that an EN should be drafted to enable its recipient to know and understand the alleged breach of planning control, i.e., what they are claimed to have done wrong, and what they are being required to do to remedy that breach. There is no need for over-elaborate wording or legalistic terminology.

35. Second, and related to the first point, the EN does <u>not</u> narrowly define the breach as a 'walled compound', as the appellant suggests. The EN actually

[5] Article 5 Planning and Building (Jersey) Law 2002

[6] Miller Mead v MHLG [1963] 1 A11 ER 459

refers to a '*walled compound containing climate control and air filtration/chilling plant machinery*' and further adds '*used in conjunction with the eastern glasshouse of field MY770'.* Whilst noting Ms Clover's view that terms such as 'siting' or 'locating' should have been used to capture the plant element, if that was the planning authority's intention, the EN wording, and in particular its use of the terms 'compound' and 'containing' could not, in my mind, be misinterpreted as relating solely to the walls.

36. Third, the steps required to remedy the breach are clear, and are not confined to the blockwork walls. Step 5.3 specifies *'Deconstruct the plant machinery'*.

37. Fourth, section 4 of the EN sets out the planning authority's reasons why it considers it expedient to issue the EN. The reasons are clearly and succinctly stated, and include harm to visual amenity, harm to the amenities of nearby residential properties as a result of noise, and uncertainty over protected wildlife.

38. On the latter point, whilst the appellant may disagree, the planning authority is entitled to include policy-based objections where there is an absence of evidence about environmental impacts, such as ecology, which would normally fall under scrutiny and assessment in the context of a planning application for a proposed development.

39. Fifth, the section 5 'steps required' part of the EN, is similarly clear and succinctly stated, and the specified steps link directly to the expediency reasons set out by the planning authority (in section 4). Notably, step 5.1 (demolish the blockwork walls) addresses the visual impact reason (section 4.2 of the EN), and step 5.3 addresses the noise impact and harm to amenity reason (section 4.3 of the EN).

40. Bringing together the above 5 points, I am satisfied that the EN is sufficiently precise and clear in terms of setting out the alleged breach of planning control and what steps the recipient of the notice is required to undertake to remedy that alleged breach. I do not agree with the appellant that the EN is either flawed or invalid.

41. Accordingly, I conclude that the ground A appeal should fail.

Ground B appeal: 'that permission has already been granted under this Law in respect of the matters alleged in the notice'

42. The appellant contends that the development alleged in the EN is already permitted, either by the grant of planning permission in respect of planning applications, or through the 'permitted development' provisions contained in the Planning and Building (General Development) (Jersey) Order 2011(hereafter the Order)[7].

43. There are 2 cited permissions to explore, along with the 'permitted development' provisions contained in the Order.

[7] Planning and Building (General Development) (Jersey) Order 2011

Planning permission – P/2021/1399: RETROSPECTIVE: Reinstatement of existing bay of western glasshouse plantroom bay to East elevation including brickwork plinth and metal profiled cladding to match existing. Replace existing external water storage tank with new. AMENDED PLAN RECEIVED: Demolish two redundant chimneys and replace with two flues to boiler room.

44. Retrospective planning permission was granted for this development on 9 March 2022. It relates to a rectangular site area in the north-eastern part of the footprint of the former western glasshouse. The reinstated plantroom bay has been completed, and houses boilers associated with the operation of the eastern glasshouse for cannabis growing.

45. The appellant claims[8] that 'Permission P/2021/1399, drawing 151 Rev 01 identifies the plant the subject of the EN and approves it.' However, this is simply not the case. The referred to drawing simply notates 'existing plant area' in the approximate location of the EN's blue lined land.

46. Moreover, this was a retrospective planning application which made no mention of chillers (the term 'boilers' does appear on the approved drawings) and the EN alleged development is, essentially, built and sited beyond the red lined application area for P/2021/1399.

47. There is a small degree of confusion here, as the approved site location plan[9], which I would normally regard as determinative of the application area, applies a more limited red lined area to that which appears on the scheme drawing, which shows a broader red line, with some localised incursion into the EN's blue lined area. This anomaly has no direct bearing on my findings.

48. The permission granted under P/2021/1399 does not permit the development which is the subject of the EN.

Planning permission – P/2021/1705: Demolish existing glasshouse and construct new glasshouse with 2.4m high security fence. AMENDED PLANS RECEIVED: To show glasshouse internal mechanical plant areas, growing area, administration area and storage area.

49. This permission was also granted on 9 March 2022. It relates to the demolition and replacement of the western greenhouse, effectively on the same footprint (18,182 square metres[10]), but with some design changes, including the reorientation of the roof form.

50. At the application stage, the planning authority requested details of the internal arrangements[11], and plans were submitted that showed 2 generators, each with a fuel feed and each within blockwork enclosures, which the notation says would be '*…extended to full height and terminated in the profile of the saw tooth glazed roof over constructed in line with acoustician recommendations to provide required equipment sound*

[8] Supplementary Statement of Case – paragraph 8

[9] Drawing 19020-150 Rev 01

[10] As noted in the Officer assessment report for planning application P/2021/1705

[11] Notably drawing number 19020-162 Rev 02

attenuation'. The plan setting out these details is listed as an approved plan on the decision notice. No chiller units are shown on the plan.

51. The permission includes a number of conditions. Standard condition B requires the development to be carried out 'entirely in accordance' with the approved plans and documents. Condition 1 requires the full enclosure of the generators and the submission and approval of 'sound baffling and noise insulation measures'; it further requires these works to commence within 4 weeks from the decision date, and to be completed within 3 months from commencement. Condition 2 requires the use of the 2 generators to be limited to 'emergency purposes only', with the stated reason being 'to protect the amenities of occupiers of neighbouring properties'. Condition 3 requires approval of landscaping details.

52. There is no dispute between the main parties that the demolition works have been largely completed, i.e. the old glasshouse has, to all intents and purposes, gone. It is a fact that the pre-commencement landscaping condition has been discharged[12]. It is also a fact that details were seemingly submitted pursuant to condition 1, although not within the period prescribed, concerning 'sound baffling and noise insulation measures' in respect of the generators, and these subsequently approved[13], albeit the approval document made plain that it relates to the generators only, and not the chillers, which had been shown on the submitted drawing.

53. At the Hearing, the planning authority and the appellant were in agreement that the P/2021/1705 permission, having been part implemented, was now extant and capable of implementation in full without a time limit.

54. What has unfolded on the ground is a muddle of some considerable complexity, which raises questions not only about P/2021/1705, but also about permitted development provisions, which I discuss in the following subsection.

55. From my review, there are a number of findings to record.

56. First, there is no dispute that the now demolished western glasshouse contained a plant area in the broad location of EN's blue lined area.

57. Second, the planning authority was alert to concerns about noise emanating from any plant to be contained within the replacement glasshouse building.

58. Third, whilst internal arrangements within a constructed building may often fall outside formal development controls under the (planning) Law, the planning authority was quite justified in seeking an understanding of the plant that would be installed, and the nature of its operation.

59. Fourth, based on its enquiries and the appellant's responses, the planning authority made its assessment and decision on the basis of that information, i.e., 2 generators surrounded by blockwork enclosures within a replacement glasshouse.

60. Fifth, at no point do any industrial chillers appear on any of the drawings listed as approved on the P/2021/1705 decision notice.

[12] Mr. Gladwin's email dated 10 June 2022

[13] Mr. Gladwin's email dated 23 September 2022

61. Sixth, the wording of condition 1 attached to the permission, and the subsequent exchanges concerning it, appears, for want of a more elegant description, a bit of a dog's breakfast. The main issue here is that the condition sought to impose immediate actions on the applicant, irrespective of the permission's 3-year time limit, and without any reference to the completion of the permitted new glasshouse building, within which the plant was shown to be located. Whilst the intent may have been to address an existing noise complaint issue (from the generators), a planning condition simply cannot do this, and it would not, in my view, pass the necessary tests, notably in terms of precision and reasonableness. These are matters outside the direct scope of this current appeal, but they are important factors to record, as they have some bearing on what has unfolded.

62. Based on what I have been able to glean from the evidence, what appears to have happened is that the old glasshouse building had been almost entirely removed, as were the generators that were contained within it, that had been sited within the longstanding internal plant area. Then, on a cleared and open site, the 4 large chiller plant units and related paraphernalia, were craned into place and installed and, a little later, part constructed mega block compound walls were built. In terms of the timing, I have no reason to doubt the account of Mr Marx for the planning authority who submits that, based on the States' aerial mapping records, in July 2021 there was no (eastern) glasshouse building and no chillers and, by July 2022, the chillers were installed on an open cleared site. This timing does align with residents' accounts that the noise problems from the chillers began in spring 2022.

63. There has been, and there remains, no sign of the consented new glasshouse, within which the 'plant' and walls were to sit, being constructed. At the Hearing, I queried the appellant's intended purpose of the new glasshouse for cannabis growing cultivation, given that, on my site tour, its representative explained that crop cultivation is currently confined to one of four bays within the eastern glasshouse, suggesting significant existing capacity before capital investment in a new glasshouse would be necessary; the appellant's response was somewhat vague, but suggested that future contracts may require the upscaling of crop production.

64. I asked the appellant if there was a contract in place to construct the new glasshouse, and was advised that quotes had been secured, but no contract was in place. I also asked the appellant if it had the ability to fund and deliver the new glasshouse, and, if so, when it would be built, but its Counsel advised against answering these questions on the grounds of commercial sensitivity. Whilst not determinative in my assessment, I have further noted submissions made by representors concerning the appellant company's seemingly precarious financial standing, and the view of one individual that the company has not got the money to build the consented glasshouse. Taking these matters in the round indicates that there is scant evidence that the consented but unbuilt glasshouse will be constructed in the foreseeable future, and perhaps not at all.

65. I also noted the appellant's answer (from Mr Dunlop) to my question, which confirmed that the chiller units do work more efficiently in an outdoor environment, and Ms Briggs' (Housing and Nuisance) response that she was

unaware of any similar chiller plant being contained within glasshouses elsewhere in Jersey.

66. Bringing all of the above together leads me to the conclusion that, whilst P/2021/1705 is a part implemented and extant permission, it does not authorise the development that is alleged in the EN. The development is not within the glasshouse building as permitted under P/2021/1705, as that building has not been built, and there is no convincing evidence that it will be built as part of some unspecified phased building programme. What has happened here, whether inadvertently or otherwise, is a discrete and separate development, comprising the building of large block walls and the siting of industrial plant on an open outdoor site, entirely functionally required and linked to the existing growing operations in the eastern glasshouse (rather than the replacement consented, but unbuilt western glasshouse).

67. I therefore conclude that the development that has taken place is not permitted by P/2021/1705.

Permitted Development

68. 'Permitted development' rights are set out in the Order. In essence the Order is a Jersey-wide grant of planning permission, which allows certain types of development to be carried out without the need to make a formal planning application.

69. Part 3 of the Order addresses 'Repairs, Maintenance and Minor Works to Land and Buildings'. Class AA.1 defines permitted development for 'internal alterations or building operations that do not amount to an external change or create new floor space'. AA.2 excludes Listed Buildings and Places from this right, which does not apply in this particular case. Class AA.3 is a recently added exclusion that specifically relates to any building used for cannabis cultivation, but this was not in effect at the time the alleged development took place.

70. The crux of the matter here is whether the development subject to the EN can be regarded as 'internal alterations' within a building. Whilst I am satisfied that a glasshouse is capable of being treated as a 'building' for the purposes of interpreting the Order, there was no building in existence at the time the development was executed. It is therefore not possible to construe that the mega block walls and chiller units could be 'internal alterations'. The development is not therefore 'permitted development under the Order.

71. Although seemingly not included in her written submissions, Ms Clover cited a UK legal case[14] which, she claims, confirms that a permitted development right is crystalized on commencement of development. However, that case related to 'prior approval' provisions concerning telecommunications development in a London borough, whereby the planning authority had actually issued a prior approval, but subsequently designated a conservation area after the works had commenced, which it argued overrode the earlier approval. The court disagreed and concluded that[15] *'in a prior approval case the planning permission accrues or crystallises upon the developers' receipt*

[14] Orange Personal Communications Services Ltd & Others, R (on the application of) v London Borough of Islington [2006] EWCA Civ 157 (19 January 2006)

[15] Paragraph 28 of the judgement cited in footnote 13

of a favourable response from the planning authority to his application'. However, this is not directly comparable with the current appeal, as there is no 'prior approval' mechanism under the Jersey Order, no consequential issue of a 'prior approval' favourable response from the planning authority, and there has been no event, such as the equivalent of the designation of a conservation area, to arguably present some preclusion of the permitted development right. Moreover, the key point remains that, to fall under the AA.1 permitted development, the walls and plant would still need to be internal to a building, but there was no building in place at the time of the development being executed, and that remains the case at the time of my site inspection.

72. On this matter, there has been much documentation from the main parties concerning claimed 'permitted development' provisions and interpretations. I do not intend to rehearse the weft and weave of what was claimed, and what officer responses were made, and on what assumed understanding any advice was given, particularly as one of the key officers involved is no longer an employee of the planning authority. However, officers' advice did consistently refer to Class AA being applicable within a building, without perhaps grasping the nettle of whether the old building was actually in place or the new building was constructed. Whilst there may have been some mixed messages, naivete and ambiguity, I have found no evidence that would suggest that the planning authority has estopped itself from adopting the interpretation of the Order presented in this appeal. Moreover, the planning authority's more recent position on this matter has been consistent and clear, and confirmed in correspondence, including an invitation[16] to the appellant company to submit a retrospective application with appropriate noise mitigation and landscaping details, which was not actioned by the appellant at the time.

73. Put simply, the correct and unambiguous legal position is that Class AA.1 cannot possibly permit the EN development in the 'interregnum' period, i.e., after the old glasshouse building has gone and before the new glasshouse building is in place. A building must physically exist for Class AA.1 development to be carried out internally, as permitted development, within it.

74. I have noted some references to provisions under Part 5 of the Order. However, this relates to industrial land and is not applicable in this case.

75. I conclude that the EN alleged development is not permitted development under the Order.

Overall finding on ground B

76. The EN development is not permitted through planning permissions P/2021/1399 or P/2021/1705, and it is not permitted development under the Order. The ground B appeal should therefore fail.

[16] Letter from Mr Simon Clarke (Compliance Officer) to Northern Leaf plc dated 18 October 2023.

Ground C appeal: 'that at the date of service of the notice no or no expedient action could be taken to remedy the alleged breach'

77. The Law on planning enforcement in Jersey has close parallels with English planning law, particularly in terms of the construction of the legal grounds of appeal against an EN. The close equivalent to Jersey's ground (c) in English law[17] is almost exclusively confined to claims that the alleged unauthorised development has immunity from enforcement proceedings, typically because it has persisted for longer than the specified immunity period.

78. In Jersey, the immunity period is 8 years[18]. It is quite apparent that the development specified in the EN has occurred within the last 8 years. There is therefore no credible case to claim 'no' action could be taken by the planning authority. However, the framing of article 109(c) differs somewhat from its English proxy, by including the test of 'expediency' (rather than just whether action could technically be taken).

79. Under this ground the appellant repeats the ground A claim that the EN is defective as it only 'bites' in respect of the wall and not the chillers. I have rejected that claim, for reasons stated above. However, the appellant also claims that the EN fails the expediency test, as there is no breach of any planning policy, including but not limited to any impact on amenity, and that the planning authority cannot enforce against speculative harm to protected wildlife that they cannot identify exists.

Expediency – amenity

80. On the issue of amenity, I do not agree with the appellant. The chiller units are large, industrial and noisy. They were operational when I visited and when standing in close proximity, conversation is difficult and there is a need to raise voices to be heard. They are sited some distance from residential properties, but the surrounding land is relatively flat and open, such that the chiller sound travels some distance.

81. Having familiarised myself with the mechanical sound of the chillers in operation, I was able to identify that they were audible at a variety of locations on the surrounding roads and land. The chillers were definitely audible in the vicinity of Retreat Cottages and most notably so from the northernmost dwelling (No 9), which is Mr Nightingale's home. I listened from his garden, which is about 120 metres south of the chillers, and found the noise to be intrusive and unpleasant, and Mr Nightingale informed me that the noise is an almost constant feature. Other residents in the vicinity gave similar accounts. I have noted submissions from a number of interested parties, alleging that noise is reduced for official visits (including my own), but I must make my assessment based on my own observations, along with considering other evidence that is placed before me.

82. In terms of other evidence, I attach weight to the submissions of Ms Briggs (Housing and Nuisance) who is clear in her professional view that the ongoing noise issues cross the threshold to be regarded as a statutory

[17] Ground (d) under Section 174(2) of the Town and Country Planning Act 1990

[18] Article 40 Planning and Building (Jersey) Law 2002

nuisance, which has warranted formal action and potential prosecution under other legislation[19].

83. In making my assessment on the amenity effects arising from the chiller noise, I have had regard to Jersey case law[20] which has informed how amenity assessments should be undertaken in planning decision making. Whilst these cases related to an earlier Island Plan era and the relevant policy (GD1) has evolved since that time, there is nothing to suggest a departure from the main principles that arise from those judgements. These include the recognition that assessments are contextual and relative to expectation, and that what amounts to unreasonable harm is a matter for the decision maker.

84. In that regard, the appeal site surroundings are distinctly rural and relatively tranquil, with little background traffic or other noise sources. The chiller noise, imposed in this context, is not only loud and audible across a wide area, but it is also uncharacteristic of a rural area, being more akin to the sounds associated with an industrial factory. This, along with its protracted operation, makes it particularly intrusive and unpleasant for its near neighbours.

85. Based on the evidence before me, I assess that the noise impact of the chillers crosses the BIP policy GD1 threshold of being unreasonable, by some margin. Consequently, the planning authority's expediency case for pursuing the EN in this regard is soundly based and supported by planning policy.

Expediency – wildlife

86. I addressed this matter under ground A and concluded that the planning authority is entitled to include policy-based reasons where there is an absence of evidence. I note Ms Clover's submissions that the planning authority is speculating harm to wildlife without any evidence, but I am more persuaded by Mr Marx submission that 'we don't know what we don't know'.

87. Indeed, it would be routine and entirely reasonable for an applicant for planning permission to be expected to provide proportionate evidence on biodiversity to support a planning application for a proposed development. In the case of this EN appeal, it was open to the appellant to submit evidence to confirm an absence of harm. It has not done so.

88. Whilst I do not regard the wildlife reason as the most significant matter in determining the outcome of this appeal, I am satisfied that the planning authority's expediency case is well founded.

Ground C findings

89. For the reasons stated above, the ground C appeal should not succeed.

[19] Statutory Nuisances (Jersey) Law 1999

[20] Notably Boyle and Kehoe -v- Minister for Planning [2012] JRC036; Winchester -v- Minister for Planning and Environment [2014] JRC118

Ground E appeal: 'that the matters alleged in the notice have not in fact occurred'

90. At the Hearing, the appellant explained that this ground had been included as a 'catch all' or 'backstop'. On the basis of the facts and evidence before me, the matters alleged in the EN have occurred, and this ground of appeal should fail.

Ground F appeal: 'that the requirements of or conditions in the notice exceed what is reasonably necessary to remedy any alleged breach of control or make good any injury to amenity'

91. This ground does overlap with other grounds but, essentially, the appellant argues that lesser steps could remedy any breach or injury to amenity. However, I have already assessed that each of the EN steps (section 5) has a direct relationship to the planning authority's reasons for issuing the EN (section 4).

92. Whilst the appellant uses unevidenced wildlife impact to illustrate this case, this is not the most relevant consideration. More relevant is that leaving the operational chiller plant in place would mean maintaining a noise source which has unreasonable amenity impacts on nearby residential properties, and, leaving the walls in place would mean that 2 extremely crude and unattractive wall structures would persist in conflict with policies SP5, PL5, and NE3, which, amongst other matters, require new developments to protect or improve the Island landscape character and distinctiveness and green infrastructure.

93. I conclude that the requirements of the notice are not excessive. Ground F should therefore not succeed.

Ground G appeal: 'without prejudice to the generality of sub-paragraph (f), that any time period imposed by the notice for compliance with its requirements falls short of the time which should reasonably be allowed for such compliance'

94. The compliance period stated in the EN is 2 months, within which the appellant would be expected to fulfil each of the 4 steps set out in its section 5. The appellant submits that such a tight timeframe is unworkable. At the Hearing, the appellant explained to me that the operation of the chillers is critical to the cannabis cultivation and, if they are turned off, the crop will perish and the business would cease to exist, along with its existing jobs. It was also explained that there would be practical difficulties in removing and disposing of the chiller units.

95. Ms Clover suggested that more time, perhaps a year, 18 months, or 2 years, would provide the opportunity for the appellant to put alternative options in place to address the issues and maintain the business. It was even suggested that this might include building the consented replacement glasshouse under reference P/2021/1705.

96. There are no hard and fast rules, or published guidance, concerning EN compliance periods. It is a matter of judgement for the decision maker and

the central question is what is 'reasonable' in balancing the public interest in the EN being complied with expeditiously, against the private interests bound up in the development subject to the EN.

97. In this case, there is a weighty public interest case in securing the cessation of ongoing unreasonable harm to the living conditions of occupants of nearby properties as a result of noise impacts. There is also a less weighty and perhaps less urgent, but nonetheless important, case in respect of visual amenity impacts in this rural Green Zone location. Balanced against that is the continuity of the appellant's business and the jobs of the 27[21] individuals it employs.

98. Some residents may have little sympathy for the appellant company and consider that it should comply immediately with the EN and, in the words of one resident, 'we just want our lives back'. Others might also consider the pursuit of this appeal to be a delaying tactic, and that the period since the EN service should be taken into account. However, the circumstances that led up to the appeal, and previous actions by the appellant company, including a history of retrospective planning applications, are not a direct consideration under a ground (g) appeal. The exercise of an appeal is a legal right, and the appellant is entitled to assume potential success on other grounds, which should be factored in to any consideration of the EN compliance period.

99. Having considered these matters, I have reached the view that 2 months is too short a timescale to be reasonable to fulfil all 4 steps stated in the EN, without placing the appellant's business in peril to the point of its almost certain cessation. This is a consideration to which I attach some weight, particularly in terms of employment implications, which are matters that attract a high priority under BIP policy SP6.

100. I have been mindful here that, whilst the physical building and engineering works to 'undo' the walls and plant and remove arisings do not amount to a very major exercise, and could be completed in a matter of weeks, the step requiring the deconstruction of the plant machinery (step 5.3) is potentially the business destruction moment.

101. It was apparent from the appeal submissions and discussions at the Hearing that there may be possible alternative options that could address the evidenced problems, most notably concerning noise, although visual and other aspects would also need to be addressed. Indeed, a number of residents made plain that they did not want the appellant's business to fail, but simply for it to get its act together, and not behave in a manner that continuously harms their living conditions.

102. In recommending a longer compliance period, I consider that the onus should fall squarely on the appellant company to design, submit for planning approval and, should it be approved, implement an alternative scheme. Indeed, it seems to be a matter of existential importance. With specific regard to noise limits, the planning authority has already clearly expressed the criteria to be achieved, and the appellant would need to demonstrate compliance, through an expert acoustic report, on any future application. I assess that a period of 6 months strikes the right balance, and would

[21] This was the number of employees stated by the Appellant's representatives at the Hearing.

provide the appellant with a last chance opportunity to prepare and present an alternative scheme, and to implement it. Such a timescale should also ensure that residents are not subjected to another summer of noise disruption, which is the season when they can expect to enjoy their gardens and the time of year that they say the noise effects are worst. However, I make this recommendation with specific regard to Planning law and policies, and my findings do not prejudice or preclude statutory nuisance action, including potential prosecution, by the relevant regulatory authority, if it considers such action to be justified under that Law.

103. On ground G, I conclude that the appeal should succeed, to the extent that the EN compliance period should be extended from 2 to 6 months.

Ground H appeal: 'that in all the circumstances planning …permission should be granted in respect of the development in question;

104. Whilst I am satisfied that the appellant has fulfilled the statutory requirements under Article 109, for a ground H appeal to be heard, I noted earlier in this report that there were some issues with the application made and registered under reference P/2024/0464. The problem with the application is that it limits its description of the development to just the northern mega block wall, and therefore excludes the plant and the southern mega-block wall. The purpose of the ground H 'deemed' application appeal is to enable the appellant to seek planning permission for 'the development in question', which can only be interpreted as that specified in the EN, and not one selected part of it.

105. At the Hearing, Ms Clover did submit that the ground H appeal was intended to cover the entire development, but that is not how the application P/2024/0464, has been presented. In addition to the description, the submitted plans are somewhat contrived. For example, rather than 'true' existing elevations, the submitted drawing[22], which is dated March 2024, presents 'as pre-existing site elevations' and shows a glasshouse building structure which has long since been demolished.

106. Setting these inconsistencies and confusions aside, it will be apparent from my findings on other grounds that I assess that any deemed application should fail. The development is unacceptable for the clear policy based reasons set out in section 4 of the EN. For these reasons, the ground H appeal should fail.

OTHER MATTERS

107. I have noted representations concerning odour from the Northern Leaf operations. Whilst I did note cannabis odours on my site inspections, and found them to be strong and unpleasant in certain localised areas, notably around Retreat Cottages, the issue of smells falls outside the scope of the EN, and this appeal. It is a matter for Ms Briggs and her colleagues to assess and, if deemed appropriate, take action.

[22] Drawing No 19020-186 Rev 01 dated 24 March 2024

108. Similarly, I have noted submissions concerning alleged light pollution from the site, but, again, this is a matter outside the scope of this EN appeal.

RECOMMENDATION

109. For the reasons stated above, my formal recommendations are:

A. That the Minister dismisses the appeal under grounds A, B, C, E, F and H.

B. That the Minister allows the ground G appeal and varies the compliance period stated in section 6 of the Enforcement Notice reference ENF/2023/00004 to allow six (6) months [from the date of the Minister's decision] to comply with the Enforcement Notice (steps 5.1, 5.2, 5.3 and 5.4).

C. That the Enforcement Notice ENF/2023/00004, as varied by recommendation B, be upheld.

D. That the Minister notes the procedural matters highlighted in this report.

P. Staddon

Mr Philip Staddon BSc, Dip, MBA, MRTPI