

PLANNING AND BUILDING (JERSEY) LAW 2002

Appeals under Article 109 against an enforcement notice served under Article 40(2)

REPORT TO THE MINISTER FOR THE ENVIRONMENT

made under Article 115(5)
by D A Hainsworth LL.B(Hons) FRSA Solicitor
the inspector nominated under Article 113(2) from the list of persons appointed
under Article 107

Appellants:

1. Jean Augre
2. Ricardo Perestrelo, Rico Contractors Ltd.

Enforcement notice reference number and date of issue:

ENF/2024/00003 issued on 16 February 2024

The land to which the enforcement notice relates:

Part of Field No. L587, Le Chemin des Montagnes, St. Lawrence

The alleged breach of development controls:

- “3.1 Without the necessary planning permission, a material change of use of the land for storage
3.2 Without the necessary planning permission, the removal of a hedgerow or banque or other physical feature defining a boundary of the land or of any part of it.
3.3 Without the necessary planning permission placing unauthorised structures on the land
3.4 Without the necessary planning permission, excavation and levelling out of the land undertaking an engineering operation on the land
3.5 Without the necessary planning permission laying of hardstanding on the land
3.6 Without the necessary planning permission, unauthorised development involving the dumping of waste on the land”

The steps required by the enforcement notice:

- “5.1 Cease the use of the land for storage.
5.2 Cease the use of the land for vehicle parking and removal [*sic*] all non-agricultural vehicles.
5.3 Demolish and remove all structures and remove all plant and other stored items.
5.4 Remove all dumped waste from the land.
5.5 Break up the hardstanding and remove all resulting debris from the land.
5.6 Return the land to its previous contours of 1:3.5 meters, using any previously excavated material and sow the meadow with a suitable grass mix.
5.7 Reinstate the part of the banque removed, using materials matching that of the remaining banque.”

Time for compliance with the notice:

Two months.

Grounds of appeal:

Both appeals are proceeding on grounds (a), (e), (f) and (g) in Article 109(2), namely:

- (a) that the matters alleged in the notice are not subject to control by this Law;
- (e) that the matters alleged in the notice have not in fact occurred;
- (f) 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; and
- (g) 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.

Inspector's site visit date:

28 May 2024

Hearing dates:

29 May 2024 & 13 September 2024

Procedural matters

1. There has been no appeal under Article 109(2)(h) (that in all the circumstances planning permission should be granted in respect of the alleged development). The planning merits of the alleged development therefore do not fall to be considered in these appeals and there is no planning application associated with the appeals.
2. There is an error in paragraph 5.2 of the enforcement notice: "removal" should be "remove". The error can be corrected by the Minister, as recommended below.

Ground (e) (that the matters alleged in the notice have not in fact occurred)

3. Ground (e) is concerned with whether the matters alleged have *in fact* occurred, regardless of whether or not they are subject to planning controls. Ground (a) deals with the application of planning controls to the matters found under ground (e) to have occurred.
4. I have assessed ground (e) by reference to the information supplied by the appellants and the Infrastructure and Environment Department in writing and at the hearing and by imagery, and from what I saw at my inspection of the land and its surroundings.
5. The Department's 2003 aerial images show that the land was then an apparently uncultivated strip of land between the adjoining ploughed fields to

the west and the south and the adjoining woodland to the east and the north. There are no signs on the images of anything having been placed on the land or of any activities taking place on the land at this time. A 2003 image overlaid with contours shows that the land then sloped gradually by about 4m between the field on its western boundary and the woodland on its eastern boundary.

6. Images taken at various times since 2003 at first show a growth of vegetation on the land, which is then followed by the gradual clearance of vegetation and the bringing on to the land of vehicles and other paraphernalia. The images show that work has been carried out progressively to increase the amount of space available for this purpose, principally by cutting away some of the higher ground on the western boundary of the land in order to provide a more level surface from west to east and by removing part of a banque in order to widen the vehicular access to the land. It was clear to me on my inspection of the land that all this work had been carried out.
7. The available evidence clearly shows that the land has been used for storage (3.1), boundary features have been removed (3.2), structures have been placed on the land (3.3) and excavation and levelling operations have been carried out (3.4).
8. With regard to the laying of hardstanding (3.5), the appellants maintain that this has not occurred. It appears from my inspection that the hard surface that exists is compacted stoney sub-soil formed after the removal of the top soil from the land by carrying out levelling work involving the spreading out of material excavated from the western side of the land. I consider that this constitutes the laying of hardstanding as alleged.
9. Turning to the remaining allegation (3.6), that waste has been dumped on the land, an issue has arisen as to whether certain items which the evidence shows as having been placed on the land are or are not 'waste'. Waste is defined in the Waste Management (Jersey) Law 2005 as meaning any substance or object that is discarded and any substance or object in a person's possession or control that they intend to discard or are required by law to discard. There are several items on the land that look as if they have been discarded, and are therefore waste, since they have been there a long time and there is no apparent further use for them. These include the accumulations of cut vegetation dumped on the northern and eastern boundaries of the land, some of which is spilling over into the woodland.
10. I have therefore concluded on ground (e) that all the matters alleged in the notice to have occurred have *in fact* occurred. The appeal on ground (e) should fail.
11. I turn now to assess under ground (a) whether the matters that have occurred are subject to planning controls.

Ground (a) (that the matters alleged in the notice are not subject to control by the Planning and Building (Jersey) Law 2002)

12. The appellants' case on ground (a) is that there has been no change in the use of the land, because its use by Rico Contractors Ltd is an agricultural use, but, if it is decided otherwise, they maintain that this use is immune from enforcement action along with other matters alleged in the notice, because

Article 40(1)(a) restricts enforcement action to breaches of development controls occurring during the previous 8 years.

13. Rico Contractors Ltd are engaged in the business of landscape gardening and the appellants have produced evidence from official sources which indicates that for certain purposes the operation of a landscape gardening business may fall within the definition of horticulture and therefore be agriculture. The Planning and Building (Jersey) Law 2002 however is concerned with the use of land; the appellants have stated, and the evidence is clear, that Rico Contractors Ltd use the appeal land for the storage of materials, vehicles and equipment used in connection with their landscape gardening business and not for growing plants. This is a change of use from the previous use of the land for agriculture and it is a material change of use for planning purposes because of its potential effect on the character and appearance of the countryside. Since planning permission has not been obtained for the change of use the appeal on ground (a) should fail in this respect.
14. I turn now to the operation of the '8-year rule' in this instance. The notice was issued on 16 February 2024, so the crucial date is 16 February 2016. The available evidence consists of assertions by the parties and dated imagery.
15. The appellants believe that the use started between 30 July 2015 and 16 August 2016 and that it can also be argued that the removal of any banque or hedgerow and the levelling of land would have taken place at the time the use started. Images taken from the air on 1 September 2014 and at some time in 2015 show the land to be covered in vegetation, with no activity taking place there. An aerial image dated 16 August 2016 shows that a vehicular entrance has been created, that the eastern side of the land has been cleared and that there are various items in place throughout the eastern part of the site. One of these items appears to be a lorry, but the nature of the other items cannot be discerned from the image. A series of images taken both from the air and on site demonstrate that the area in use has expanded to the whole of the land over the years since 16 August 2016 and that other matters alleged in the notice have occurred during this period.
16. The burden of proof relating to the application of the '8-year rule' is on the appellants. The standard of proof is the balance of probabilities - whether something is more likely than not. The images show that the use began on part of the land after the undated 2015 image and before the image dated 16 August 2016, and that at some time during this period this part of the land was cleared of vegetation and part of a banque was removed to provide vehicular access. The appellants have not been able to establish whether these events took place before or after the crucial date of 16 February 2016. Their assertions are unsupported by any documentary evidence or any third-party substantiation. The work done to prepare the land for the use would have taken little time and could easily have been carried out at any time between 16 February and 16 August 2016. I do not consider that the appellants' evidence is precise and unambiguous enough to show on the balance of probabilities that it was too late to take enforcement action when the notice was issued on 16 February 2024.
17. For the reasons explained in paragraphs 11 to 15 above I have concluded that the appeal on ground (a) should fail.

Ground (f) (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)

18. The issues raised by the appellants under ground (f) are no longer outstanding following my conclusions on grounds (e) and (a), apart from the requirement in 5.6 to "sow the meadow with a suitable grass mix". The appellants maintain that there is no evidence that the land was ever managed as a meadow. The Department seek to justify the requirement by reference to the historical classification of the land as an "Overgrown meadow" in a 1985 document.
19. The steps that can be required by an enforcement notice are specified in Article 40(3)(b) and are limited to those required to remedy the breach or make good any injury to amenity caused by the breach. The requirement to restore the land to a condition existing in 1985 is therefore excessive. The requirement should be limited to the restoration of the land to its condition before the breach occurred, which was an overgrown and uncultivated strip of land. This can be achieved by spreading the land with top soil and leaving the vegetation to recover naturally.
20. I have therefore recommended a variation to paragraph 5.6 of the notice. The appeal should succeed on ground (f) to this extent.

Ground (g) (that the time period imposed by the notice for compliance with its requirements falls short of the time which should reasonably be allowed for such compliance)

21. The appellants maintain that the two-month compliance period is too short because there is a shortage of land available for employment uses and a search for potential alternative sites for the business has so far been unsuccessful. The Department have acknowledged that relocation could be a challenge, but state that the appellants have been aware of the possible outcome of the enforcement action for many months and should have initiated enquiries earlier.
22. The Department's stance is misplaced since appellants in enforcement cases are entitled to assume that their appeals may be successful and that the notice may be quashed. The compliance period should therefore allow a reasonable time for compliance starting with the date of the appeal decision. In this appeal, balancing the public interest in remedying the breach and the injury to amenity caused by it with the desirability of maintaining the continuity of the business and the employment it provides, I consider that 6 months would be a reasonable compliance period and that the appeal should succeed on ground (g) to this extent.

Inspector's recommendations

23. I recommend that the enforcement notice is corrected by replacing "removal" in paragraph 5.2 by "remove".
24. I recommend that the enforcement notice is varied by (i) replacing "sow the meadow with a suitable grass mix" in paragraph 5.6 by "spread the land with top soil to a suitable depth to allow the vegetation to recover naturally" and (ii) replacing "Two (2) calendar months" in paragraph 6.1 by "Six months".

25. Subject to the correction and variations, I recommend that the appeal is dismissed and that the enforcement notice is upheld.

Dated 5 November 2024

D.A.Hainsworth

Inspector