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

Presented to the States on 19th November 2013
by the Privileges and Procedures Committee

STATES GREFFE

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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 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.

Deputy J.M. Maçon of St. Saviour
Chairman, Privileges and Procedures Committee

STATES OF JERSEY COMPLAINTS BOARD

23rd October 2013

Findings of the Complaints Board constituted under the Administrative Decisions (Review) (Jersey) Law 1982 to consider a complaint by Mr. D.R. Manning against 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

1. The Review Board was composed as follows -

Ms. C. Vibert, Chairman
Mr. J.F. Mills, C.B.E.
Mr. G.G. Crill

The parties were heard in public at St. John's Parish Hall on 23rd October 2013.

The complainant Mr. D.R. Manning represented himself, with Deputy J.H. Young in attendance.

The Minister for Planning and Environment was represented by Mr. A. Townsend, Principal Planner.

The parties visited the site in question at Mandorey Villa, St. John after the opening of the hearing, and viewed Areas 'A' and 'B' (as more fully described in paragraph 3.1 of these findings) and their relationship to the rest of the property.

2. Summary of the complainant's case

2.1 In his written submission, Mr. Manning had contended that the Minister had issued an unlawful Enforcement Notice and had not taken any action to rectify the matter. The Enforcement Notice had been issued on 30th June 2010 under Article 40 (re. breach of development controls) of the Planning and Building (Jersey) Law 2002 in respect of the unauthorised external storage of items "on land to the east of the existing storage building which lies outside and beyond the approved site curtilage to this building" at Field No. 1007, La Grande Route de St. Jean, St. John. Mr. Manning had subsequently appealed under the Law but the appeal had not been allowed. Mr. Manning considered that, as the storage which was the subject of the Enforcement Notice had been undertaken for a period in excess of 8 years, Article 40(1) of the Law rendered him immune from enforcement action. The Law states: The "***Minister may serve an enforcement notice in respect of breach of development controls*** *(1) This Article applies where it appears to the Minister – (a) that there has been a breach of development controls during the previous 8 years; and (b) that it is expedient that action should be taken to remedy the breach.").*

2.2 At the hearing, Mr. Manning questioned the appropriateness of the inclusion in the papers of "Interested Party" submissions dated 8th September and 9th

October 2013. He was concerned that an officer of the Planning and Environment Department had – on 17th June 2010 – written to Mr. M. Stein, who represented Mrs. V. Whitworth, a next-door neighbour, outlining the department's position regarding its consideration of whether or not to pursue enforcement action against Mr. Manning and referring to the existence of an "8-year rule" under Article 40(1) of the Planning and Building (Jersey) Law 2002 (as amended). Mr. Manning questioned whether Mr. Stein's previous employment by the department had not been a factor in such correspondence having been sent to him.

2.3 Mr. Manning was concerned that the amendment to Article 40 of the Planning and Building (Jersey) Law 2002 which came into force in August 2007 and which introduced the '8-year rule' had not been notified to him and that, consequently, he had not been able to take that aspect into account in his appeal against the 2010 Enforcement Notice. The Board noted that Mr. Manning had only become aware of the '8-year rule' when he visited the department in September 2012 to review his case file and saw the letter, written on 17th June 2010, to his neighbour's representative. This letter had not been copied to Mr. Manning nor was it disclosed during the Royal Court Appeal. As a result of this discovery, Mr. Manning's lawyer wrote to the Minister on 21st September 2012 requesting information. A response to this enquiry (from a Law Officer) was not received until 17th April 2013 in spite of more than one reminder.

2.4 Mr. Manning emphasised that it was the Enforcement Notice dated 30th June 2010 which was of relevance to the present hearing, contending that had he known about the '8-year rule' at the time he had contested the Enforcement Notice the outcome might have been different. He indicated that such research as he had been able to undertake regarding the Planning and Building (Jersey) Law 2002 had not revealed that there had been subsequent amendments to that legislation. He argued that the Planning and Environment Department had acted improperly in withholding from him the existence of the subsequent amendment to the Law (Amendment No. 4) which had introduced the '8-year rule' and he suggested that at the relevant time there appeared not to have been a proper process in place to deal with the issuing of Enforcement Notices (although it was recognised that this had since begun to be addressed through the publication of Supplementary Planning Guidance (SPG), dated 3rd December 2010). In the absence of such SPG, Mr. Manning questioned whether the Planning Enforcement Officer – Mr. C.K. Bray – who, it was confirmed, had been appointed in May 2008, would have been adequately familiar with the department's enforcement procedures.

2.5 Referring to the Judgment of the Royal Court dated 2nd February 2011, Mr. Manning contended that the inclusion of a new condition in the development permission granted in November 1996 (and carried forward in the amended permissions in May 1997 and December 1997) which required the inclusion of landscaping detail as part of the plan submitted for the redesign of the storage shed and the remainder of Field No. 1007, meant in practice that that area of land could not have been used for agriculture.

2.6 Mr. Manning indicated that he was not aware that the department's allowing Jersey Telecom (JT) in 2004 to store telegraph poles on his land was only a temporary arrangement, he not having received anything in writing from

either the company or from the department. Mr. Manning confirmed that the newly-created area of hard standing had initially been shared between JT and himself, which had been particularly helpful to him as the storage of telegraph poles had been a useful source of income, although he also stated that he gave JT notice to remove the poles upon noticing that problems (leaching) had occurred with the storage of the telegraph poles. Mr. Manning stated that he was unsure why he had approached the Planning and Environment Department rather than JT when the leaching of creosote was noticed. He considered that possibly he would have made such an approach because he would have recognised that the permission he ultimately obtained would have been needed from the department. This enabled him to remove the contaminated topsoil and replace it with hardcore (to form a hard standing area) in advance of his subsequent application for the construction of a shed (which was refused). The Board noted that an exchange of correspondence/e-mails in April 2004 between the Environment Department and JT had discussed the recommended storage methodology for the telegraph poles (i.e. a 'sand trap') in accordance with the manufacturer's instructions, although it was apparent that this advice had not been adequately implemented.

2.7 Mr. Manning contended that photographs showing Area 'A' should not have been provided to the Royal Court during the proceedings relating to his appeal against the 2010 Enforcement Notice as these were irrelevant to the matter then under consideration, as that Enforcement Notice related only to Area 'B.' Mr. Manning confirmed that he would not subsequently have applied for a change of use in respect of Area 'B' (which was subsequently refused) had the Court not suggested it as a way forward. The Board's attention was drawn to the statement in the Royal Court judgment which stated that: *"It is right to emphasise that in relation to the storage of telegraph poles over an approximate two year period and the laying of hard standing in the appeal site area, the Appellant has done absolutely nothing wrong."*

2.8 The Board noted Mr. Manning's contention that, as evidenced by a photograph representing a "location plan" of his property and adjacent properties, the use of Area 'B' for agricultural storage in the form of tractors and/or other large pieces of machinery would be entirely inappropriate because such use would have introduced more noise and disturbance nuisance than the current minimal 'domestic' operations. Photographs taken between 1997 and 2012 were viewed, and the Board referred to an e-mail dated 11th February 2012 from Deputy Young (to the Deputy of St. John) which outlined his recollection of when he was Chief Officer at the time when consent had been granted to allow Mr. Manning to develop his storage shed under strict conditions to ensure that the area was maintained in a tidy state.

2.9 The Board also noted an undated "Statement", purported to have been made by Mr. A. Coates, Senior Planner (but unsigned), which said that *"the evidence garnered from the series of aerial photographs does not suggest that a continuous breach of planning control had occurred, in respect of a material change of use of the land to storage use, for a period of, or in excess of, 8 (eight) years."* Mr. Manning suggested that the contention by the department, referred to in a letter dated 1st March 2001, that the storage at that time was associated with the need for the development of the approved shed and house which remained to be finished, was erroneous, as it was unlikely

that a builder's 'compound' would still have been required some 6 years after the development had commenced.

2.10 Mr. Manning questioned why it was that, given that storage on the site had started in 1999, a complaint had not been made until 2009, by which time the amount of material stored had substantially reduced. [It was confirmed at the hearing that enforcement action usually followed an investigation by the enforcement team of the subject of a complaint received from a member of the public – often a neighbour]. As regards his complaint regarding the correspondence which had been sent to a neighbour's representative shortly before the issue of the Enforcement Notice dated 30th June 2010, Mr. Manning was aggrieved that no substantive response had been received from the department to the letter dated 21st September 2012 from his legal representative to the Minister for Planning and Environment concerning that correspondence and the fact that he was never advised himself about the '8-year rule.'

2.11 Deputy Young, on Mr. Manning's behalf, outlined his rationale for considering that he was not conflicted in assisting Mr. Manning as a consequence of his previous association with the Planning and Environment Department, even though he had been Chief Officer at the time of the original development proposal in 1996. Deputy Young confirmed that, in his former capacity as Chief Officer of the department, he had had no involvement in the consideration or determination of any of Mr. Manning's applications, although he was aware that there had been concern at the time that the site at Field No. 1007 could become a *"despoiled area."* The Board noted that a letter dated 22nd October 2013 from Mrs. Whitworth's legal representative had been handed to the Clerk at the hearing contending that Deputy Young's support of Mr. Manning's complaint raised an issue of "conflict of interest" and potentially a breach of confidentiality given that the Deputy – in his capacity as a member of the States – had met Mrs. Whitworth earlier in 2013 to discuss related matters such as *"why the Planning Department had not dealt with breaches of the Planning Legislation on Field 1007 with appropriate speed and diligence."* The Board confirmed after due consideration that it was content with Deputy Young's explanation and for him to continue to assist Mr. Manning at the hearing.

2.12 Deputy Young outlined the circumstances which had led to his meeting with Mrs. Whitworth to discuss her concerns regarding disturbance arising from Mr. Manning's operations next door to her. The Deputy emphasised that he was not present at the hearing to argue against the interests of any third party, but simply to support Mr. Manning. Deputy Young commented that he had been pleasantly surprised upon his first visit to Mr. Manning's property (about 3 months after the issue of the Enforcement Notice) to see just how tidy the area was and how little was stored there. In looking through Mr. Manning's papers relevant to the present complaint, the Deputy considered that there was clear evidence of *"sloppy"* administration on the part of the department, with correspondence not being responded to in a timely fashion and other delays in dealing with matters being apparent.

2.13 Deputy Young confirmed that Mr. Manning had not been involved in an application from Mr. Gurd relating to Advanced Glass Limited for the proposed use of part of the storage shed for the purpose of the manufacture of

windows, other than to sign Mr. Gurd's application as landowner, and could not therefore have been aware of any conditions imposed as part of the permit subsequently granted to Mr. Gurd. Deputy Young considered that the department's handling of the various applications associated with Field No. 1007 had been *"a bit of an administrative mess"* and that there appeared to be similarities with matters identified in the Reports emanating from the Reg's Skips Committee of Inquiry (R.118/2010 and R.38/2011). Also of concern was that the department had corresponded with Mr. M. Stein in 2010 without having provided Mr. Manning with a copy at the time. Deputy Young considered that it was of importance to establish a firm boundary as between the area of hard standing and the remainder of Field No. 1007 to the east and that the suggestion that the area of hard standing should only be permitted to be used for "agriculture" did not appear to be appropriate given the potential for increasing noise/disturbance that this could engender.

2.14 In summary, Deputy Young expressed the view that the 'discovery' of the '8-year rule' was a substantial factor in the case and that complaints of this nature were more properly dealt with under Noise and Nuisance laws rather than by the Planning Department. He hoped that an accommodation could be reached between the two neighbours to enable them to co-exist peaceably.

3 Summary of the Minister's case

3.1 The written response on behalf of the Minister clarified that the area of land to which Mr. Manning's complaint referred was that designated as Area 'B' shown on an aerial photograph dated 12th June 2013. It was noted that this area of land lay immediately to the east of another, smaller, area of land, designated as Area 'A' on that same aerial photograph, located immediately to the east of a shed and extending out a distance of 6.7 metres or 22 feet from the eastern gable end of that building. It was emphasised that the planning history associated with Field No. 1007, St. John was relatively complex and care was needed in order not to confuse the two areas of land and the separate planning issues which related to them.

3.2 It was recalled that Area 'B' had previously been the subject of applications relating to the construction of a dwelling and then later a storage shed on the land. However, it was recognised that the present complaint related to the issue of an Enforcement Notice over use of the external area (Area 'B') for storage, and a judgment of the Royal Court dated 2nd February 2011 specifically dealt with Mr. Manning's appeal against the above-cited Enforcement Notice. That judgment concluded that the authorised use of Area 'B' was for agriculture and that therefore the use of Area 'B' for non-agricultural storage was unauthorised and that consequently the serving of the Enforcement Notice in 2010 was not unreasonable. The department had thereafter expected that the unauthorised use of Area 'B' would cease.

3.3 However, it was further recalled that the above-cited Royal Court judgment had also explained the circumstances surrounding the authorisation in 2004 of the temporary use of Area 'B' for the storage of between 30 and 40 telegraph poles for a period of 18 months (up to 400 in total). A planning application for this proposal had not been submitted but it was agreed 'administratively' by the department. Discussions had subsequently ensued because heavy rainfall had caused creosote to leach from the telegraph poles into the ground below,

with Mr. P. Thorne, then Director of Planning, subsequently agreeing verbally to the removal of the contaminated soil and its replacement with hardcore. Regardless of some uncertainty regarding the timing of this latter event, the Royal Court had concluded that it would now be unreasonable to require Mr. Manning to remove the hardcore surface. The department accepted that Mr. Manning could continue to use Area 'B' for agricultural use including storage (which might be for the parking of tractors or other agricultural machinery, ancillary to another agricultural use) given that the authorised use of the site was for agriculture.

3.4 As regards Area 'A' (described as part of the curtilage of the original shed/storage building on-site which was immediately to the west of Area 'B'), it was noted that it had been included in the original planning applications for the shed/storage building, whereas Area 'B' had not been so included. The planning permits for the area which included Area 'A' and the shed had consistently included conditions to prevent external storage around the building. However, these areas had nevertheless been used for unauthorised storage which had led to the service of an Enforcement Notice in November 2009. Upon receipt of a subsequent Royal Court Appeal case the department had withdrawn that Enforcement Notice on the basis of an unintentional ambiguity in the conditions included in the then most recent (2006) planning permit.

3.5 In September 2010, an application was submitted for use of part of the storage shed by Mr. R. Gurd (Advanced Glass Limited) for the purpose of the manufacture of windows. That application was approved in October 2011 subject to a number of conditions, one of which was a prohibition of external storage on Area 'A'; however, that area had continued to be used by Mr. Manning for storage and the parking of a mobile crane. This had led to the service of an Enforcement Notice on 31st January 2012, in response to which Mr. Manning had lodged a further Appeal to the Royal Court. This Appeal had subsequently been deferred by the Royal Court and currently remained outstanding.

3.6 With regard to the so-called "8-year rule" under Article 40(1) of the Law, this had come into force in August 2007 and effectively allowed for development which had been ongoing for more than 8 years to continue without the threat of enforcement action being taken. Article 40 did not grant planning permission to unauthorised uses; rather it offered immunity from enforcement action for that specific breach of planning control. However, such immunity could only last for as long as the breach lasted. In cases of a 'change of use' this could occur over a period of time, or even cease and then recommence subsequently. The department contended that, in order to be immune from enforcement action any unauthorised change of use had to be 'material', and 'continuous' for a period of more than 8 years. Consequently, the materiality and therefore the enforceability of a use could change over time. Mr. Manning's contention, on the other hand, was that the site had been used for storage since at least 2001 and that storage had continued in the form of the storage of telegraph poles between 2004–2006 and thereafter up to (and beyond) the 2009 complaint and the service of the Enforcement Notice in June 2010. However, the view of the department was that to start with, broadly up to when the poles arrived, the storage was associated with the need for the development of the approved shed and house. Thus, the department

considered that the area was then being used effectively as part of the building site in the manner of a compound, something against which enforcement action would not normally be taken provided such use was for a temporary period (as provided for in the Island Planning (Exempted Development) (Jersey) Regulations 1965).

3.7 As regards Mr. Manning's contention that the department had kept from him the existence of the '8-year rule', singling him out not to be notified, this was considered by the department to be incorrect. It was accepted that details of the amending legislation which introduced the change to Article 40(1) from August 2007 had not been specified in the Jersey Gazette notice, but this was confirmed as being normal practice, as was the fact that individuals were not personally notified of such changes when they occurred. Mr. Townsend made the point that the department did not actually announce the existence of the '8-year rule' to Mr. Stein, thereby informing him of its existence for the first time, whilst at the same time not mentioning it to Mr. Manning. A Principal Planner had simply referred to the '8-year rule' when writing to the agent of an interested third party.

3.8 As previously noted, storage of telegraph poles had commenced in 2004 and it was intended that this would cease in or around 2006. Aerial photographs taken in 2007 showed that most materials had been removed from the site but that some poles remained. By 2008 the materials which had been evident in 2007 appeared to the department to have been removed and the level and extent of storage had reduced significantly from that which had been evident previously, to a point where the level of storage was such that the department considered that it could be regarded as *de minimis* or non-material. However, it was evident that in subsequent years the extent of storage on the site had increased again and it could be seen from the later photographs how the proportion of the area, now put down to hardcore, had changed, with some use for agricultural storage – which use was authorised. The department considered that examination of photographs from 2009 onwards indicated that even in the event that all of the material visible was not agricultural, then the proportion of the hardcore area being used for unauthorised storage was less than 50%, representing a material change in the extent of the use from previous years. Consequently, it was the department's view that if the level of storage had reduced to a point, according to its view of the '8-year rule', there had been no breach of planning control in 2008, then the latest breach had only commenced after that date and thus certainly within 8 years of the date of service of the Enforcement Notice in 2010.

3.9 Overall, the position of the department was that the site lay within the Green Zone wherein there was a presumption against development and, as demonstrated by the subsequent application which was the subject of the 2012 Royal Court Judgment, the Minister's Planning Applications Panel at the time had considered that an external storage use of that piece of land was unacceptable. Consequently, the department considered it to be reasonable to pursue enforcement action in order to ensure the cessation of the unauthorised use. Throughout this period complaints had been received which, under Policy GD1, necessitated the amenities of adjacent properties being taken into account when addressing a planning application and therefore in assessing the acceptability of an unauthorised use. It was emphasised that the result of not taking action would be that the use and its impact would continue.

4 The Hearing

4.1 At the hearing, Mr. Townsend for the Minister confirmed that the key issues for the department were (i) the '8-year rule' and (ii) the absence of a substantive response to correspondence. As regards the '8-year rule', Mr. Townsend said that the department's view was that immunity from enforcement action could only be achieved in relation to a single breach of development controls, which must be "material" and "unauthorised" across the whole site. In Mr. Manning's case, it was considered that the use had at times reduced to being non-material (or *'de minimis'*) and had then subsequently recommenced, particularly after 2008. The department considered that the temporary storage of telegraph poles between 2004 and 2006 had been authorised 'administratively' and therefore that use would not in any event have been 'enforceable' against. Thus, it was evident to the department that the whole of the site had not been used for an unauthorised purpose for more than 8 years.

4.2 As regards the delays on the part of the department in responding to correspondence, the criticism of this was accepted by the department. Reviews of the relevant processes had been undertaken, and were ongoing, with a view to improving existing methods for 'reminders' in relation to correspondence outstanding and enforcement processes generally. In summary, Mr. Townsend argued that the department, whilst aware of lapses in administration, including its failure to reply to letters – in which areas it was working hard to improve upon – did not consider that it had been unreasonable, in fact, quite the reverse: the department considered that it had made every effort not to place undue pressure upon Mr. Manning whilst the matter awaited resolution and that in any event this had not disadvantaged Mr. Manning as the use had continued in the meantime.

4.3 Mr. Townsend responded to a number of points which had been raised by Mr. Manning and/or Deputy Young in their oral submissions and, in relation to allegations regarding the "withholding" of information specifically from Mr. Manning he categorically denied this. It was confirmed that the publication of information relating to the adoption by the States of amendments to the Planning and Building (Jersey) Law 2002 and their subsequent coming into force had been undertaken in exactly the same routine way as applied to any such legislative changes. With regard to the potential for confusion arising from the juxtaposition of and cross-referral in correspondence and documentation to Areas 'A' and 'B', Mr. Townsend suggested that this was regrettable but nevertheless understandable, and it was evident that a number of correspondents had referred to both areas together. Nevertheless, the department considered that any such confusion which may have arisen therefrom had not in any way disadvantaged Mr. Manning.

4.4 Mr. Townsend also refuted the suggestion that Mrs. Whitworth, through her representative Mr. Stein, had been given information about the '8-year rule' that was intentionally withheld from the Complainant. Mr. Townsend asserted that the purpose of the letter written to Mr. Stein was to say that the '8-year rule' had been considered, and discarded, and it was not intended to withhold that notice from Mr. Manning. The temporary nature of the storage by JT of telegraph poles between 2004 and 2006 had been clearly set out in

correspondence with the company, although the Planning and Environment Department was surprised that JT had not shared this information with its landlord, Mr. Manning. With regard to the agreement by the department that the remaining area of Field No. 1007 to the east put to grass could be mown, the department considered that this did not represent acceptance in any way that its use had changed to "domestic."

4.5 Responding to comments made by Deputy Young, Mr. Townsend acknowledged that the department accepted that, as noted by the Royal Court in relation to the past history of the site, there had been a degree of "sloppy administration" on its part and that this was regretted. The reference in the Minister's case to Area 'A' when the complaint related solely to Area 'B' was, he said, considered to be reasonable in the circumstances. He argued that reference to Area 'A' was necessary in order to clarify the situation to the Board. With regard to the suggestion that the inference to be drawn from the letter, dated 17th June 2010, from a Principal Planner to Mr. Stein was that the department's case against Mr. Manning was flawed, Mr. Townsend confirmed that the department's interpretation of the '8-year rule' was just that – an interpretation – and was thus entirely contestable. It was, he argued, based on the wording of the Law, but the Law was open to interpretation. He added that there was no case law on this in Jersey and in such a situation it was common to refer to U.K. cases. Mr. Townsend indicated that he was not aware that legal advice had been sought. The Board noted that the concepts of 'continuousness' and 'materiality' of the use in the interpretation emerged for the first time only in the undated "statement" purported to have been made by Mr. A. Coates, Principal Planner *[the date of which Mr. Townsend undertook to confirm to the Clerk in due course – it being subsequently confirmed that Mr. Coates had then been a Senior Planner with management responsibility for the Enforcement and Technical Services teams and that the note had followed a meeting held on 10th April 2013 – which had also been attended by inter alia a member of the Law Officers' Department – and had been given to the Enforcement Officer on 25th April 2013]*. The Board recognised that the apparent first use of the words "continuous" and "materiality" in April 2013 post-dated the Enforcement Notice issued in 2010, and were thus *post hoc* constructs. Mr. Townsend contended that it was possible to distinguish as between "buildings" and "changes of use" in terms of breaches of development controls as, generally, buildings and/or additions to them were completed on a certain date, whereas changes of use could vary in extent. However, he conceded that storage of the telegraph poles had represented an unauthorised use because no planning application had been made and therefore no formal planning permit issued. The use had not therefore been permitted by the issue of a permit. Mr. Townsend did not dissent when it was put to him by a Board member that it therefore followed that the storage of the poles between 2004–2006 fell to be counted as part of the quantum of unauthorised use for the purposes of the '8-year rule.'

4.6 Board members asked Mr. Townsend for clarification on a number of points. With regard to the signature on the Enforcement Notice dated 30th June 2010, which was indecipherable and had no name printed underneath it, Mr. Townsend was unable at the hearing to confirm whose signature it was, but agreed to confirm this to the Clerk subsequently. *[It was later confirmed that the signature was that of the then Director of Planning, Mr. P. Thorne]*. The Board noted that the "Delegation of Functions" in respect of Article 40 of

the Planning and Building (Jersey) Law 2002 in force when the Enforcement Notice was issued (30th June 2010) appeared to have been only to the Planning Applications Panel [R.40/2010 refers]. Mr. Townsend undertook to confirm the position to the Clerk. *[It was subsequently ascertained that R.40 enabled officers to do things which the Panel declined to do, or which were not put to the Panel, such officers, however, having to abide by the 'code of practice' set out by the Minister in R.40; in relation to the serving of an enforcement notice this required the officer responsible for the decision first to obtain the authorisation of her or his senior. It follows in the Board's view that an exercise of 'delegation' not in accordance with the code was not properly done and therefore of no effect. It has been confirmed to the Board by the current Chief Executive Officer of the Planning and Environment Department, Mr. A. Scate, that Mr. Thorne did not seek his authorisation as the senior officer, although he, Mr. Scate, considered that Mr. Thorne had acted within his delegated powers]*. The Board takes this to mean that in Mr. Scate's view, and indeed reflecting perhaps what was, and maybe still is, the practice of the department generally, the 'decision' to serve the enforcement notice on Mr. Manning was taken lower down the line and then put to Mr. Thorne for 'authorisation.' The Board did not agree with the department's 'view' on this. The delegation authority in R.40/2010 says: "provided in all cases the authorised officer's decision is endorsed by a more senior authorised officer." Mr. Thorne signed the notice so his was the 'decision.' Mr. Bray's file notes, indeed, make it clear that he put the matter to Mr. Thorne for decision. The context is the significance of the taking of important decisions having been delegated from their formal home, the Minister. Decisions are by definition important where an action under public law impacts directly upon the interests of a citizen. This is why the due process in the delegation of powers documents was so thoroughly drawn (and remains so). Authorised officers are required to "observe and abide by" the Code of Practice that was set out for the States and the rest of the citizenry plainly to see. If the department's normal practice on enforcement decisions since 2007 has in fact been as happened in this particular case, then the Board considers that all decisions taken in that way will have been improperly made.

4.7 It was ascertained that the concept of a use being "continuous" did not appear in the Planning and Building (Jersey) Law 2002 and that, therefore, the utilisation of such a notion by officers was no more than by way of interpretation of the Law. Mr. Townsend confirmed that such was indeed the case, although the concept was, he suggested, in line with similar provisions in relevant United Kingdom legislation and that Planning Officers, sometimes on an individual basis, obtained information and/or guidance from other jurisdictions.

4.8 It was therefore evident to the Board that the department could not offer legal certainty regarding the position submitted on the Minister's behalf that in relation to any unauthorised use this had to be "material", and "continuous" for a period in excess of 8 years. That was simply the department's view on the matter. It was noted, moreover, by the Board that, on the basis of the department's interpretation of the requirements of the Law, the Enforcement Notice of 30th June 2010 was worded in a way that hardly supported the department's position insofar as it required the unauthorised storage to "cease forthwith", not that it should or might be reduced in degree to at least a *'de minimis'* amount in respect of which the department, pursuant to the

policy it was seeking to justify, might well choose not to pursue enforcement action.

4.9 Mr. Manning addressed a number of questions to Mr. Townsend regarding the process around the serving of an Enforcement Notice, which, it had been established, usually followed an investigation arising from a complaint made to the department. It was accepted that there was inevitably a period of time between the receipt of a complaint by the department and the issue of an Enforcement Notice if requisite. Mr. Townsend confirmed that the main aim of the amendment to the Law which had introduced the '8-year rule' was to assist local property searches so that purchasers could be assured that they would not subsequently be held to account for any transgressions by previous owners if such had occurred more than 8 years previously. Mr. Townsend added that the enforcement process set out in the Supplementary Planning Guidance (SPG) dated 3rd December 2010 (which, the Board understood, was issued shortly after strong criticism had been made of the enforcement process in the Reg's Skips Committee of Inquiry Report published in September 2010) was now under review once more. The Board took this to imply that the process was still regarded by the department as being less than wholly satisfactory. Deputy Young commented that whilst it was evident that there remained a number of issues around the interpretation by the department of Article 40(1) of the Law, Mr. Manning remained the most authoritative source of information on the history of the various uses to which the areas within Field No. 1007 had been put.

5. Examination of department's enforcement file

5.1 In addition to the hearing the Board examined the department's enforcement file. The Board commends Mr. Bray for keeping a good record but what was found has bolstered its criticism of the department's position revealed in the Board's findings below.

6. The Board's findings

6.1 It is clear to the Board that the Enforcement Notice dated 30th June 2010 was improperly issued. It was not issued in accordance with the procedure laid down in the department's scheme of delegation in force at the time, R.40/2010, which was presented to the States on 15th April 2010. No authorisation was sought from his senior by the officer responsible for the decision to serve the notice and who signed it as required by the Minister's code of practice. These particular failings lead the Board to conclude that the enforcement notice was *ultra vires*. Over and above these considerations of lawfulness, first, the notice was decided upon by officials, and duly signed and served, without any reference to, or analysis of, the notion of 'continuousness' and 'materiality' as factors in the interpretation of the '8-year rule' in Article 40(1) that the department brought into play afterwards in seeking to justify its actions, in response to requests for information from Mr. Manning's lawyer. It is clear from the file that these factors were developed only in 2013 as a device for seeking to justify the department's position in the face of legal challenge and when the failure to reply to Mr. Manning's lawyer was becoming a matter of embarrassment if not concern to officers. Secondly, it was maladministration on the part of the department that Mr. Manning's protagonists were informed about the enforcement notice before he received

it. Thirdly, it was unacceptable that a document of such material significance to the citizen concerned was signed with an illegible and unknown signature and not demonstrably executed in accordance with prevailing delegated powers. The Board is of the firm view from the evidence it has seen and heard that the '8-year rule' was not properly considered by senior officers at the time that the decision was made to issue the Enforcement Notice in 2010, and that attempts by the department to address the possible challenge to the Order under the '8-year rule' by creative interpretation of the same only arose after the "rule" came to the complainant's attention some 2 years after the Order had been issued.

6.2 The Board considers that it is totally unacceptable that it took almost eight months for the Planning and Environment Department to provide a substantive response to correspondence raising fundamental issues relating to the Enforcement Notice.

6.3 The Board considers that it was wholly inappropriate that the department had confided to an interested party's representative that the department was unsure about the '8-year rule' under Article 40(1) of the Planning and Building (Jersey) Law 2002. The Board also concludes that it was very wrong that substantive correspondence to a third party about the complainant's case, correspondence which, moreover, raised a question of doubt about the lawfulness of the department's case, had not been copied to the complainant at the time, nor apparently disclosed at the subsequent Royal Court appeal hearing.

6.4 The Board formed the clear view from the evidence before it that the department, under intense pressure to respond to the long unanswered correspondence and obviously uneasy about its stance in relation to the '8-year rule', set about constructing a line of argument which it thought would see it through, *viz*. invention of the concepts of "continuous use" and "materiality of unauthorised use", neither of which were in the Law, the enforcement notice itself or indeed the SPG, in any guise whatsoever. The Board was also satisfied that the line of argument developed had not been the subject of any formal legal advice to the department or indeed policy debate with the Minister.

6.5 It appears to the Board that the department had decided to rely upon a 'snapshot' of the site as it had been on a date in 2008 from which it had determined that the site had been cleared of everything other than *"a motor car, small trailer and unidentified box-like cabin"* and that, being of the opinion that "continuous" use of the site had not been proven to its satisfaction, it had then proceeded to issue an Enforcement Notice on that basis.

6.6 In any event, the Board considers it to be nonsensical for public policy to allow 'agricultural' use (and not just 'storage') on the land in question but not ordinary 'domestic' storage.

6.7 As for the application of the '8-year rule', the Board concluded that the department had no policy on what it meant or how it might be interpreted in practice at the time the Enforcement Notice was served in 2010. The Board's view is that the Planning and Environment Department sought after the event

to construct an argument based on spurious evidence in order to justify the issue of the Enforcement Notice, in the face especially of the considerable pressure to restrict the use of the site emanating from the neighbour and her representative, Mr. Stein and a seemingly collective view among officers (which the Board has discerned clearly from the files it has examined) that Mr. Manning was regarded by the department as a 'difficult' customer.

6.8 The Board does not consider the approach put forward by the Planning and Environment Department regarding the '8 year rule' to be valid. The department is urged to seek legal advice on its interpretation of the Law regarding the '8 year rule' and determine and, after public consultation, promulgate its policy accordingly.

6.9 The Board considers that the Planning and Environment Department should invite Mr. Manning to re-submit an application (on a 'fees waived' basis) for the change of use of Area 'B', thereby providing an opportunity for neighbours to make such representations as they consider to be appropriate, and giving the Minister or the Planning Applications Panel the opportunity to grant consent and thus regularise the kind of storage permissible on the land and address the question of agricultural use, subject to such conditions as may reasonably be appropriate, whilst ensuring that both Mr. Manning and any other entitled parties retain their rights of appeal in accordance with the law.

6.10 The Board considers that the absence in correspondence and documentation of the words "as amended" after references to the Planning and Building (Jersey) Law 2002 is not a matter of concern to it. Any reasonable person would understand "the Law" and Article 40 in particular in this instance, to mean "the Law in force at the relevant time."

6.11 In summary, the Board is of the view that the serving of the Enforcement Notice dated 30th June 2010 was –

(a) contrary to law, and also contrary to the generally accepted principles of natural justice, insofar as it related to the interpretation by the department of the relevant provisions of the Planning and Building (Jersey) Law 2002 (as amended);

(b) and that the department's subsequent handling of the case was contrary to the generally accepted principles of natural justice by virtue of the administrative failings and shortcomings, including maladministration, described in this report.

Consequently, the Board requests the Minister for Planning and Environment to reconsider the matter.

6.12 A feature of this case that has caused a degree of dismay on the part of the Board was the evident closeness to the department of the adviser to Mr. Manning's 'third party' adversary – his neighbour. (The adviser formerly worked in the department before leaving to found his own planning consultancy and obviously knew well, and was known by, his former colleagues.) The department was far too assiduous in responding to his many enquiries about Mr. Manning's case and, in the Board's considered view, can be seen to have put aside its neutrality in what was, in considerable part, a

dispute between neighbours. In so doing, it adversely affected Mr. Manning's interests in a manner that demands the most forthright apology to him by the Minister. Not only did the department confide its unsureness about the '8-year rule' to this adviser but not to Mr. Manning, but also informed him, the adviser, of crucial developments in Mr. Manning's case before he, the latter, was able to. From this lack of even-handedness in behaving, and being seen to behave, neutrally, it was not a large step for the officials concerned to be seen as showing a measure of favouritism to the neighbour's cause and dismissiveness towards Mr. Manning's. These were, we believe, sins of omission, not commission, but they nevertheless had, or had the potential to have, a marked impact upon the fairness with which Mr. Manning's case was treated.

6.13 We recommend that the Minister forthwith prepares a stringent code of practice governing his officials' dealings with third parties and their representatives and supporters, for public consultation, and ensures in his current, further, review of the enforcement process that these issues and factors are prominently brought to the fore and resolved. Those citizens potentially facing planning enforcement action must have the assurance that their cases are being dealt with fairly, and that facts and events pertaining to them are not being disclosed improperly or unfairly to neighbours or other protagonists.

6.14 The Board invites the Minister to consider the above comments, and to advise it within 28 days of the action he intends to take to address them.

6.15 Finally, the Board notes that it did not consider that the 'interested party' had any *locus* in these deliberations. While the Board has the power to hear any person in relation to a complaint (Article 8 of the Law refers) no-one other than the complainant and the Minister/department has a right to be heard.

Signed and dated by: .....
Ms. C. Vibert, Chairman

.....
Mr. J.F. Mills, C.B.E.

.....
Mr. G.G. Crill