

JERSEY / JUDGMENT

Manning v Min for Planning and Environment [2012]

JRC 086A (26 April 2012)

[2012] JRC 086A

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judgment

the deputy bailiff: 1. The Appellant is the owner of field 1007, St John. On 6 th October 2011, the Planning Applications Panel, on delegated authority from the Minister refused him permission for a change of use of the existing hard standing area situate at that field from its existing agricultural use to domestic/horticultural use attached to the property Mandorey Villa, also belonging to the Appellant and constructed on field 1007. In this judgment, we shall largely refer to the "Minister" as that expression includes the Panel, except where it would cause confusion to do so. The Appellant appeals against that decision on a number of different grounds. He alleges that the Minister: (i) Failed to apply policies NE7 and GD1 of the Island Plan appropriately; (ii) Failed to give sufficient weight to a permission given previously by the Director of Planning for servicing of the application site and its use for storage; (iii) Failed to give sufficient weight to the indication previously given by the Minister that the conversion to domestic horticultural use would be permitted in the event that the Appellant agreed to clearing the area north of the shed situate adjacent to the application site; (iv) Failed to follow due process in receiving submissions from the then Deputy of St John prior to the hearing before the Planning Applications Panel, which submissions were not disclosed to the Appellant; (v) Took into account irrelevant considerations; (vi) Reached a decision which was in all the circumstances unreasonable. 2. The person interested in the appeal owns a property immediately to the north of the application site. She supports the Minister's refusal of a change of use albeit she had some criticisms to make of the Minister's process. She appeared at the hearing of the appeal pursuant to Article 107 of the Planning and Building (Jersey) Law 2002 ("the Planning Law"). 3. The formal reason given by the Minister for refusal of the application for a change of use was: "The proposed change of use of land for domestic storage would, by virtue of its encroachment into an area of open, undeveloped land, be detrimental to the landscape character and scenic quality of this area of green zone, contrary to the provisions of policies NE7 and GD1 of the Jersey Island Plan 2011." Planning History 4. There is a long planning history to field 1007. The Appellant sought permission for development in this field for many years. In January 1996, the States agreed to support a private member's proposition to request the then Island Development Committee to support the

construction of a house and storage shed to enable the Appellant to build his home there and relocate his haulage/removal contracting business from premises in Cannon Street, St Helier. At that time the site was governed by the 1987 Island Plan, which provided that this was an area falling in the agricultural priority zone with a policy presumption against development.

Following that States decision, the Island Development Committee granted permission as an exception to the agricultural priority zone policies and the Appellant constructed the house Mandorey Villa and an adjacent shed from which he ran his business. In 2006, the Appellant sold his "Fetch and Karrie" business, which relocated to a site in Trinity, and he subsequently leased out approximately two thirds of the main part of the shed to a window manufacturing business.

5. It is pertinent to note that the approved site curtilage of the existing house and storage shed is well defined in the permissions which have been given to date. The hard standing area which forms the subject of this appeal lies outside and to the east of this site curtilage boundary. It is also right to note that the field was acquired by the Appellant prior to the coming into force of the Agricultural Land (Control of Sales and Leases) (Jersey) Law 1974, which means that there are no agricultural occupancy or use conditions pursuant to that legislation affecting it. As a result the Appellant is able to plant trees or an orchard on the land without any obligation to obtain consent under that legislation. Nonetheless, under the Planning Law, that part of field 1007 which lies outside the approved site curtilage of the house and shed is still classed as agricultural/horticultural use, and that continues until such time as any change of use in respect of that part of the field is granted. 6. The Appellant has since 1996 made a number of different applications in respect of field 1007. Some have been approved and others have been refused. Those which have been refused include an application in December 2006 to construct an industrial style storage building where the application site now is, the stated use being for domestic storage, which was refused on the grounds that the site lay in the countryside zone and there was inadequate justification for a shed of the size and siting proposed to serve the domestic needs of the property; in December 2008 the Appellant applied for a five bedroomed house on the same site with a large part of the remainder of field 1007 to be used as an associated garden and orchard, and permission was refused on the grounds that the proposal would be contrary to the countryside zone policy, and detrimental to the rural character of the area; and in December 2009 the Appellant applied to construct a building for the storage of agricultural and horticultural equipment and machinery on this part of the site, permission being refused on the grounds that the proposal was contrary to the countryside zone policy and detrimental to the character and amenity of the area and on the grounds of insufficient essential agricultural need. 7. It is to be noted that when the detailed development permits were first granted, a number of planning conditions were attached including one which stated that:- "No storage of goods, materials or plant shall occur outside the storage building and that all commercial vehicles shall be parked and located within the storage building." 8. This condition was subsequently amended to permit vehicles to be parked outside the storage building, but the part of the condition which required there should be no storage or sale of goods anywhere outside the shed remained. 9.

Unfortunately there have been two developments in the planning history which have occurred outside the normal procedures of the Planning Law. The first arose when Jersey Telecom wrote to the Planning Department in April 2004 to ask whether they could temporarily store telegraph

poles at field 1007 while they were undertaking a project to replace 400 telegraph poles on the Island. It was expected that this storage facility would be required for approximately 20 months, and a total of 20 to 30 poles might be stored at any one time. The area designated for this storage was the existing appeal site, that area of land lying outside and beyond the approved site curtilage boundary. The Minister contends that the Department agreed to temporary storage use, and it is to be noted that no formal application for a change of use was made, none was advertised and therefore none of the neighbours or other persons interested would have had the opportunity to object. The proposed storage was informally approved on the basis of the letter from Jersey Telecom in April 2004. 10. The second development which is relevant in terms of the planning history is that at some point there was a telephone discussion between the Director of Planning and the Appellant, the result of which was that the Appellant received permission to lay hard standing on the present appeal site area. This was necessary according to the Appellant because there was a leakage of creosote from the telegraph poles being stored. The then Director of Planning accepted in 2009 that when discussing the matter of potential contamination with the Appellant over the telephone he had agreed that hard standing could be laid where it now has been laid. The Director was unclear as to when he had given this oral permission. Once again however, the laying of hard standing was something which in the ordinary course might have been regarded as a matter requiring planning permission which would have resulted in the application being advertised and the neighbours having an opportunity to make representations in respect of that application. This never happened. 11. The final material factor to which we should refer is the judgment of this Court on 2 nd February 2011 on an appeal brought by the Appellant against an enforcement notice dated 30 th June 2010 which the Minister for Planning and Environment had issued to him. The notice required the immediate cessation of unauthorised storage of goods, materials, equipment and plant including vehicles, boats, pallets, skips and oil tanks in the area to the east of the storage building lying beyond the approved site curtilage/boundary to this building - in other words, the appeal site in the present proceedings. The Court dismissed the appeal, reaching the conclusion that there was an established agricultural use for this part of field 1007, that there had been no authorised change of use, and that in the circumstances, it could not be said that the enforcement notice was inappropriate. It is clear however that the proceedings troubled the Court on a number of grounds: (i) When the Director of Planning made a representation to a member of the public, that member of the public ought to be able to rely upon it. If the Planning Authority were to receive an application for a change of use, this would be one of the material considerations. (ii) The aerial photographs appeared to show as much commercial use as domestic use in the immediate environs of the hard standing in question, with what appeared to be good screening from neighbouring properties. (iii) It did not seem reasonable to require the removal of the hard standing itself, given the confirmation provided by the Director of Planning, although that hard standing did not prevent the land being used for other agricultural purposes such as the parking of tractors or other agricultural machinery, ancillary to another agricultural use. However at that time, it did not seem to the Court likely that that would be an appropriate way forward, and for those reasons it might well be that an application for a change of use for the hard standing area to storage and the removal of some of the existing conditions prohibiting such a user might be reasonable. The

Court however was careful to add that it had seen only part of the picture and the Minister would have to consider carefully all the factual circumstances and all the relevant planning considerations before reaching his conclusion. 12. The Court concluded that the issue of the potential use of the appeal site was clearly one which merited an attempt at discussion and agreement with a formal application for a change of use to be made and handled by the Minister in the appropriate way, giving the opportunity for public consultation and the imposition of appropriate conditions. 13. 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. The Law 14. All the parties agreed that the legal test for the purposes of the present appeal is that set out in *Token Limited -v- Planning and Environment Committee*

[2001] JLR 698 at paragraph 9 where the Court said:- "The Court might think that a Committee's decision is mistaken but that does not of itself entitle the Court to substitute its own decision. The Court must form its own view of the merits but it might reach the conclusion that the Committee's decision is not only mistaken but also unreasonable before it can intervene. There is an element of semantics here but there is nonetheless a quality of difference between finding that a decision is unreasonable, rather than simply mistaken. To put it another way, there is a margin of appreciation before a decision which the Court thinks to be mistaken become so wrong that it is, in the view of the Court, unreasonable." 15. There are some nuances around the legal test on appeal, many of which are discussed in the judgment of the Court in *Stenson -v- Minister for Planning and Environment*

[2009] JLR 427 at paragraphs 19 to 30, and there is no need to repeat them here. In particular however, it is right to remember the words of the Court of Appeal in *Island Development Committee -v- Fairview Farm Limited*

[1996] JLR 306 at page 317 where it was said that the Court "cannot escape the responsibility of forming its own view" about the application. Discussion 16. We mention that quotation from the judgment of the Court of Appeal in *Fairview Farm* because the Court considered on retirement what it would have done had it had been the Minister - in other words it wanted to form its own view about the application of the Appellant. It is right to record that the Court found this to be an extremely difficult exercise. On the one hand, the arguments of the Minister and the third party interested in the appeal that it was necessary to avoid creeping development in the green zone, that the screening between the land of the third party and that the appeal site was only partially useful in attenuating noise nor indeed did it provide cover against all things stored there, if they were particularly tall pieces of equipment, were powerful arguments. The point that there had been a gradual reduction in the amenities of the area since 1996 seemed to be a fair one, and we particularly noted that some of the reduction in amenity had taken place without proper process being followed, thereby preventing the third party from having her voice heard. On the other hand, the Appellant has, as we have indicated, done nothing wrong in

seeking a development permission for his land in the past, nor in temporarily storing the telegraph poles between 2004 and 2006, nor in laying the hard standing on the appeal site. It is not the Appellant's fault that he obtained a variation in the planning conditions affecting the area to the north of the storage shed, which now result in mutually inconsistent conditions being applied to an existing permit, a matter which, we are told, lies outside the powers of the Minister to correct. In other words there was much to be said on both sides of the argument. 17. The fact that that was the Court's conclusion when considering what it would have done, had it been the Minister, was very nearly determinative of the appeal. If there is much to be said on both sides, then, absent illegality or impropriety, it will follow that the Court, allowing a proper margin of appreciation to the Minister, should not intervene and should therefore dismiss the appeal. 18. In deference to the arguments eloquently advanced by all parties, we do however wish to address the grounds of appeal more directly. Failure to apply policies NE7 and GD1 19. Policy NE7 is as follows:- "Green Zone The areas designated as green zone on the proposals map will be given a high level of protection and there will be a general presumption against all forms of new development for whatever purpose. The Minister for Planning and Environment recognises, however, that within this zone there are many buildings and established uses and that to preclude all forms of development would be unreasonable. Thus, the following types of development will be permitted only where the scale, location and design would not detract from, or unreasonably harm, the character of the area...". 20. There then follows a list of types of development which might lead, in the exercise of the Minister's discretion, to the setting aside of the general presumption against all forms of development. 21. Advocate Benest submitted that the application was put to the Minister in March 2011, but was not adjudicated upon until October 2011, and in the meantime the new plan had come into force. That may be so, but it is against the new plan that the application had to be considered. That is clear from Article 19 of the Planning Law. 22. It was said that the Minister should not have taken the domestic curtilage in such an absolute way as he has. We cannot say that that approach of the Minister was unreasonable. The emphasis on maintaining the domestic curtilage as designated is one which comes out in the planning history time and again. 23. It was said that the purpose of the green zone policy was to keep the Island green, but the result of refusing the application was the perverse result that would be a new brown area for domestic storage within the existing domestic curtilage, and the existing brown area outside the domestic curtilage in the green zone (the appeal site) would remain brown. The Minister, it was said, should have had regard to how perverse this was. In our view there is no certainty that the domestic curtilage will be burdened with a new brown area. There is no reason in principle why the Appellant cannot store his equipment in that part of the shed which he does not lease to the window manufacturers. Even if he does not do this, he may decide not to encroach upon the domestic curtilage of his property in the way that suggested by Advocate Benest. It is certainly not unreasonable for the Minister to take these possibilities into account in considering the decision which needs to be made. 24. Reference was then made to the minutes of the Panel meeting on 6 th October 2011 which

it is clear referred to a number of matters in connection with this application and which do not in terms appear as the reasons for the Panel's decision. We will return to these shortly in the context of the criticisms as to process, but we regard this summary in the Panel minutes as the context setting for the decision which is to be taken. We are satisfied that the decision was indeed taken on the grounds that to permit the change of use would be contrary to policies NE7 and GD1. 25. There was criticism that the Panel had not taken sufficiently into account the Court's findings in the judgment of 2 nd February 2011. We think there is no merit in that submission. The Court was at pains to emphasise in that judgment that it had not received all the relevant material and accordingly any views which the Court then had could be no more than provisional. 26. In the circumstances, it seems to us that these criticisms of the Minister's decision are not persuasive. The Court does not find it possible to say that the decision was an unreasonable one, because the plan policies are clear, and because this application, although raising difficulties in relation to the planning history as described, was undoubtedly outside those plan policies. 27. We now turn to the allegations of procedural irregularity. These were said to be two-fold. First of all it is clear that the Minister, who rightly took no part in the decision taking process, leaving that to the Planning Applications Panel, had previously sought to broker a compromise between the third party and the Appellant. The nature of the compromise would appear to be that the Appellant might receive a permission for change of use in relation to the area of hard standing if he agreed to the modification of the conditions covering the area of land to the north of the shed towards the property of the third party interested in this appeal. It was said that this was irrelevant to the application which the Minister had to consider, and therefore the attempts to broker a deal between neighbours was inappropriate. It was also submitted that the Planning Law was not concerned with deals between neighbours, but was concerned with the public interest as to whether or not a planning application should be granted. 28. In our judgment, this attempt to reach a compromise solution was theoretically near the margins of what is proper, but, if conducted with transparency and propriety - and there is no evidence before us to suggest it was conducted in any other way - was legitimate in this case. First of all, the Court in its judgment of 2 nd February 2011 at paragraph 33 said that "the issue merits some attempts at discussion and agreement between the Appellant and the Respondent, and of course a formal application by the Appellant for any change of use would have to be made and handled by the Respondent in the appropriate way. This would give the opportunity for public consultation...". The Minister would be entitled to consider therefore that an attempt at discussion and at finding a compromise was not intrinsically improper. 29. As importantly however, this application was for a change of use which was inconsistent with the Island Plan. Article 19(3) of the Planning Law allows the Minister to grant a planning permission that is inconsistent with the Island Plan if he is satisfied that there is sufficient justification for doing so. The justification contemplated by Article 19(3) seems to us to be an adequate planning justification. What the Minister was faced with here was an existing mistake by the then Director of Planning the result of which had been confusion as to the conditions which affected the area of land to the north of the shed belonging to the

Appellant. As a result of the confusion, the Appellant was in fact able to store goods on that land even though the intention in all the earlier permits had been to prohibit that course of action. There was a planning gain to be made from clarifying that position and reinstating the original prohibition. In seeking to reach a compromise on that basis, it appears to us that the Minister was doing no more than identifying whether there was a good and sufficient planning justification for departing from the Island Plan for the purposes of Article 19(3) of the Planning Law. The fact that he was unsuccessful meant that he had to consider the matter in the context of the Plan alone. 30. It was said by Advocate Benest that the fact that the Minister took into account the Applicant's refusal to agree to the removal of items stored to the north of the shed adjacent to the application site meant that the Minister (the Panel) took into account irrelevant considerations. We do not see it in that way. The Appellant was not being punished for a refusal to agree to the removal of these items. However his refusal was relevant because it meant that there was no planning justification for a departure from the terms of the Island Plan. 31. Finally, it is said that the Minister and/or the Panel received submissions from the then Deputy of St John prior to the hearing before the Planning Application Panel, the detail of which were not disclosed to the Appellant. In effect it is said that the Minister entertained submissions in secret. 32. The evidence for this lies in the affidavit of the Appellant who referred to the minutes of the Planning Application Panel. We have read those minutes carefully but in our judgment they do not indicate that there had been any contact between the then Deputy of St John and the Panel. 33. The Person Interested complained that the Minister, when an Assistant Minister, had attended a Planning Applications Panel meeting in April 2010 and spoken in favour of the Appellant's application to build a second shed on his land. Subsequently in August 2011, the third party interested in this appeal indicated that she and her daughter had attended a private meeting with the Minister and two planning officers in August 2011 to discuss the planning issues. She had apparently told the Minister that she did not believe he should be involved at all with the applications of field 1007 and other planning issues concerning the Appellant's land. She said this in the context of the Minister trying to persuade her to agree to the application for storage on the hard standing that had previously been refused and later upheld at a Court appeal. 34. In his second affidavit, Mr Webster gave evidence of a meeting in April 2011 attended by the then Assistant Minister, now the Minister, by the Deputy of St John, by the third party interested in this appeal and by officers of the department. This meeting had been requested by the Deputy of St John in order to air complaints on behalf of a third party about the department's planning mistakes in respect of field 1007 and to ascertain what action, if any, could be undertaken to remedy them. 35. Putting all this together, the conclusion was that the process which had been adopted was flawed because those taking the decisions were receiving material which was unknown to the Applicant. 36. In *Ruette Pinel Farm Limited -v- Minister for Planning and Environment*

[2012] JRC 008 , at paragraphs 30 to 43 of the judgment, the Court made various criticisms of the process adopted in that case. We emphasise that there is nothing wrong in a politician making representations to the Planning Minister or the Applications Panel in connection with a particular application. What would be wrong would be for the Minister or the Panel to give an enhanced status to the representations of a politician, simply because they come from a politician. The decision taker has to take his or its decision using only material planning considerations as a basis for doing so. Politicians are as able as the rest of us to make representations which both are and are not material planning considerations, and it is the function of the decision taker to distinguish between the two. 37. In Ruette Pinel Farm , there was also criticism of the Minister for meeting the Applicant. The same criticism would apply where the Minister met the objector. In either case, the risk is that the Minister is unable to do justice to the application or to the objection when he comes to take the decision. In this instance, the Minister did not take the decision. There is no evidence before us to suggest that he participated in any way in the decision. All that he did was to seek to identify whether there was any possible justification for departing from the Island Plan. Accordingly, there is no basis here for any concern on the part of the Appellant that the process has been unfair. 38. Notwithstanding that conclusion, we are of the view that it would be desirable if minutes of any meetings of this kind were taken and formally disclosed to either the Applicant, if the meetings take place with objecting third parties, or to the objecting third parties if the meeting takes place with the Applicant. This would be a desirable step in the interests of transparency and to avoid there being scope for criticism of the kind that has been made here. Of course, the Minister would want to give careful consideration to whether he should attend any meetings of this kind in any event. Sometimes there will be legitimate political reasons for attending such a meeting. There will always be good political reasons for not doing so as well. The balancing of the reasons on both sides is of course a matter for the Minister, subject to review of that process by the Court if there is thereafter any suggestion that the Minister has participated in any way in the decision taking process. 39. For all these reasons we find that the Minister's decision was not unreasonable and we therefore dismiss the appeal. However, given that much of the difficulty arises out of mistakes within the Planning Department, we will hear the parties on any applications for costs of and incidental to this appeal. Authorities Planning and Building (Jersey) Law 2002. Token Limited -v- Planning and Environment Committee

[2001] JLR 698 . Steenson -v- Minister for Planning and Environment

[2009] JLR 427 . Island Development Committee -v- Fairview Farm Limited

[1996] JLR 306 . Ruette Pinel Farm Limited -v- Minister for Planning and Environment

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