

ROYAL COURT
(Samedi Division)

38.

26th February, 1997

Before: F.C. Hamon, Esq., Deputy Bailiff
and Jurats Rumfitt and de Veulle

Between: Malcolm J. McEwen Appellant
And: Planning & Environment Committee Respondent

P. Matthews Esq., Crown Advocate for the Respondent.
The Appellant on his own behalf.

JUDGMENT

5 THE DEPUTY BAILIFF: Field 313 is agricultural land located off La Rue des
Platons, Trinity. It borders a road on the other side of which is virgin
côtil stretching to the sea. It lies within the Green Zone and while
there is a transmitting station and pylon within that côtil area it is
still described by the respondent Committee as "extremely unusually
sensitive".

10 The tenant of Field 313 is Mr. Malcolm J. McEwen and on 31st July,
1995 the Committee received an application on Form IDC DP1 to develop
land and/or buildings. The existing use of the land was described as
agricultural and the proposed use of the land was stated to be
agricultural.

15 The form was signed by the agent of the applicant and by the owner
of Field 313. The proposed development was signified to be "to erect a
treated timber tool shed on Field 313, Trinity". There was in the form a
provision for six car parking spaces.

20 Later, the form was altered by the officers so that the proposed
development was "to construct timber tool shed to south-east of field +
"beds" to contain compost material". The form was also altered by the
officers so that in the question on car parking spaces there is added
these words: - "16/8/95 Car parking revised - 2 spaces. S.T."

25 There was a site plan taken from the ordnance survey map, a drawing
of the prefabricated tool shed and a more detailed location plan, which
showed five rectangular "beds" (not to scale and indeed not numerically
correct) running nearly the whole length of the field with a reference

to access paths for "tending beds". The more detailed location plan was later altered to re-site the tool shed and to form a soakaway adjacent to it. This new plan was submitted (it is believed after consultation with the agent and the Building Control Section). Apparently, the original siting breached a building bye-law.

The drawings showed five beds with an access path between each and these were measured from the plan by the officers as being each two metres in width and eighteen metres in length. The drawings did not accurately reflect what was on the ground but the action of the officers is understandable.

On 7th August, 1995, the Assistant Enforcement Officer visited the site and took photographs.

We have a file note with some photographs. The photographs have this comment attached to them:

"Site visit by A/EO. Two photographs show what appears to be horse manure stacked in "unauthorised structures". Eleven cubicles, made of old interior doors do not make a pretty sight. Can be seen from main road running through Les Platons. Referred to Area Planner for further investigation in relation to application received 31/07/95."

That note is dated 7th August.

This may be the moment to explain the purpose of these "eleven cubicles". The appellant leases Field 313 and lives in St. Saviour. He has established a business name called "Jersey Worm Farm" which holds itself out as a business dealing in "biological composts, extracts and agents for organic horticulture".

The beds that we saw, and this is a changing scene, were made of old doors and similar material, hinged together and with corrugated iron fitted to the top and bolted to the frame. They were just above knee height and the beds were filled with waste materials. Specialist earthworms work at this material once it has cooled. As Mr. McEwen said in his letter to Advocate Matthews of 30th July, 1996:

"Hopefully it will not be necessary for me to explain to the Court the rôle of earthworms in maintaining balanced populations of micro-flora and fauna and their rôle in aiding the distribution of endo and ecto mycorrhiza throughout the rhizosphere nor the use of complex aqueous extracts of aerobic saprophytes over the phylosphere in order to control plant pathogens".

It was never necessary to explain that because the point that this Court has to decide is a narrow one.

The events that followed should be read in the light of the fact that the Agricultural and Fisheries Land Sub-Committee agreed in March, 1995 to support Mr. McEwen's wish to set up a vermiculture farm. As the Technical and Development Officer wrote in his memorandum of 18th August, 1995 to the Applications Supervisor:-

5 *"As the land has not been used in agriculture for many years due to the shallowness of the soil, I believe that this site is well suited for the production of worms and would be fully supportive of Mr. McEwen's wish to erect a tool shed in the south-east corner of the field."*

10 Indeed, there seemed to be some suggestion that the officers of the respondent were thinking of conditions that might be imposed when consent was granted. They consulted with the Department of Health and Social Services and then, as they were required by law to do, advertised the application in the "Jersey Evening Post" on 3rd August, 1995.

15 There was a strong reaction from neighbours. All of their letters were sent to Mr. McEwen and he replied in detail to the objections in a letter sent to the Senior Planning Officer on 21st August, 1995.

20 On 12th October, 1995 the Committee visited the site and at the visit *"noted that some bins were already constructed on the field"*. That would not have come as any surprise to the Committee because, not only was the information that we have noted before them, (they had received a complaint from a neighbour as early as 3rd May, 1995 about compost boxes *"made out of old wardrobes"* but had not advanced the matter) but on 5th October, 1995, they received Senator R.J.Shenton who was concerned about the impact of the development. The minute of that meeting notes:

25 *"The compost bins were already on the site, despite not having received consent from the Committee and were most untidy and unattractive. The site was in the Green Zone and, in Senator Shenton's view, the development was not in keeping with the area"*.

30 According to its minute of 19th October the Committee noted that it *"was concerned that a commercial business might develop in the Green Zone"* and rejected the application on the following grounds:

35 *"..that it was an unacceptable development in the green zone, contrary to policy CO1 of the approved Island Plan"*.

40 Policy CO1 reads as follows:-

45 *"The following areas of importance are to be protected from development by designation as Green Zone - all cliffs, coastal heathlands, dunes, woodlands, prominent coastal areas which are generally undeveloped including skylines and escarpments, those parts of the inland valleys which are generally uncultivated and undeveloped, and sites of importance for nature conservation (defined as Sites of Special Interest). In the Green Zone there will be a presumption against all forms of new development for whatever purpose."*

50 There is commentary on the Policy. The Committee can pass minor applications. It can refer an application to the States. This application, in the opinion of the Committee at that time, fell within neither of these parameters. The Committee instructed its officers to

55 inform Mr. McEwen of its decision.

Accordingly, on 20th October, 1995, a formal letter was sent to Mr. McEwen in regard to an application to "construct timber tool shed to south east of field and bins to make compost". The application was refused for one reason only which was that "The proposal is contrary to the approved Island Plan policy for the Green Zone in which there is a presumption against all forms of new development for whatever purpose."

With that refusal notice came a letter requesting that Mr. McEwen cease the use and remove the equipment and bins within 28 days of 27th October.

The appellant requested a review and received support from Deputies Cabot and Rondel. The objectors strenuously reinforced their objections. On 7th December the Committee met again. Apparently the Committee were told by a member who was also a member of the Agriculture and Fisheries Committee that the appellant had been offered assistance from that Committee to locate at the States Howard Davis Farm. That is not correct. There was apparently some discussion but any offer to relocate the wormery to the States Farm would have had to be on the basis that the enterprise was not in any way commercial. (The Agricultural and Fisheries Committee had met on 3rd June, 1996, but decided that it could not agree to the request to use land at the Howard Davis Farm to establish a wormery).

When it met on 7th December and having heard from Deputy Cabot (as he then was) of Trinity, the Committee noted as follows:

"The Committee agreed that it was not against the principle of what Mr. McEwen was doing but the fact that he was operating a commercial business in a particularly prominent part of the Green Zone. If it considered the use appropriate, the Committee would have to take the matter to the States for approval. To place conditions on the business would be difficult to police. It must also take into account the surrounding properties and the disturbance this operation might cause. It noted that assistance had been offered to Mr. McEwan [sic] from the Agriculture and Fisheries Committee and that he had refused to take it until he had confirmation of the result of this appeal.

Deputy Cabot thanked the Committee for allowing him to discuss this matter and departed from the meeting.

The Committee decided to maintain its refusal of this application on the grounds that it was contrary to its policy for commercial development in the Green Zone, and was particularly prominent on the landscape.

The Committee agreed that an enforcement order be served on Mr. McEwan [sic] to vacate the field by 31st January 1996 and to seek assistance from the Chief Officer of the Agriculture and Fisheries Department in finding an alternative site for his business."

Having maintained its refusal and having written to the appellant on 8th December, the final stroke came on 13th December, when the Committee served a notice on the appellant, giving him notice to:-

"Remove all the bins, structures and associated equipment which is connected with your composting business from Field 313 before 31st January, 1996."

5 That is the background and this is an appeal against the enforcement notice. We must now consider the law in some detail because the appellant essentially contends that he does not require consent for his "bins structures and associated equipment" other than for the tool shed.

10 The appellant in his notice of appeal claims that the compost bins are a prerequisite for the keeping of livestock and the use of the land as a market garden is in accordance with the definition of "agriculture" contained in the law. He further contends that the use of land for the purpose of agriculture does not involve "development". The law does not prohibit the use of removable structures and in his view those compost bins are not, in any event buildings, but "plant". There was, he further contends, no consultation between the Committee and the Committee of Agriculture as required by law. We can deal with that last point by referring to a similar objection raised on the apparently mandatory requirement to consult. In Guillard v. The Island Development Committee (1969) JJ 1225 at 1230 the Court said:

25 *"We think that the main purpose of that provision is to give a highway authority an opportunity to make representations in regard to the effect of the proposed access on the safety of those using the road in question. The grounds of the Committee's rejection related to commercial development in a residential area and to a detraction of the amenities of the locality, and not to safety. In our view, therefore, the Committee was under no obligation to consult the highway authority".*

35 It is to us quite extraordinary and somewhat disturbing that in the words of the Senior Planner: *"The Planning Committee and Department do not consider the enterprise as agricultural"* when the Chief Officer of the Agricultural and Fisheries Committee wrote to the appellant on 4th June, 1996, to say *"the Committee confirmed its view that a wormery was an agricultural pursuit"*. Indeed in that letter the Chief Officer wrote to the appellant to say *"... when you are able to find potential areas of land perhaps you would contact directly Mr. Le Maistre at this department to discuss the proposition"*.

45 Essentially the Committee had to be concerned with the purposes of the law which, *inter alia*, were to protect the natural beauty of the landscape or the countryside, to preserve and improve the general amenities of any part of the island and to keep the coasts of the island in their natural state. This field lies fairly and squarely in the Green Zone. The question is, did the Committee have jurisdiction to interfere?

50 We need to examine the arguments with reference to the law. It has not proved to be an altogether simple exercise.

55 Article 8(1) of the Island Planning (Jersey) Law 1964 ("the law") so far as material to the present case, provides that:

5 *"If any person develops, or causes or permits to be developed, any land without the grant of permission required in that behalf under the Law ... the Committee may serve a notice on him requiring such steps as may be specified in the notice to be taken within such period as may be so specified (being a period of not less than twenty-eight days) for restoring the land to its condition before the development took place ... and in particular any such notice may, for the purpose aforesaid, require the demolition or alteration of any buildings or works or the discontinuance of any use of land."*

10 The "permission ... required under the Law" is the permission of the Committee that is referred to in Article 5 of the Law. Article 5(1) of the Law provides that:-

15 *"Subject to the provisions of this Law, the permission of the Committee shall be required in respect of the development of any land."*

20 In Article 1(1) of the Law the word "development" is stated to have the meaning assigned to it by Article 5.

 "Development" is defined in Article 5(2) of the Law to mean:

25 *(a) the carrying out of building ... or other operations ... in, on, over or under land;*

(c) the making of any material change of use of any building or other land."

30 "Building" is defined in Article 1(1) of the Law to include *"any structure or erection of whatsoever material or in whatsoever manner constructed.."*

35 "Building operations" are defined to include rebuilding operations, structural alterations etc. to a building. Both of the above definitions are "include" type definitions rather than "means" type definitions.

40 There is then a proviso in Article 5 which stipulates that certain operations or uses of land shall not be deemed to include the development of land. The proviso deals with two types of exemptions. Firstly "operations" and secondly "uses". The exempted operations must, as a matter of construction, refer to the building, engineering, mining or other operations mentioned in Article 5(2)(a) which would otherwise require the consent of the Committee. "Operations" are not defined in Article 1(1) of the Law. Similarly, the exempted "uses" must, as a matter of construction, represent material changes in the use of land which would otherwise require consent under Article 5(2)(c) of the Law.

50 The proviso then lists seven different types of exempted operations and uses. Paragraphs (i) to (iv) all refer to the carrying out of works of various types. These are the exempted building or other operations. Paragraphs (v) to (vii) all refer to the use of land. These are the exempted uses.

55 The basis of the Appellant's challenge to the Enforcement Notice is that a Notice under Article (1) of the Law can only be issued where a

person develops land without the grant of permission required under the Law.

5 The appellant argues that the Notice is invalid because he has done nothing on the land which requires the consent of the Committee under the Planning Law.

10 The challenge is made on the basis that the Committee did not have the jurisdiction or the power to issue the Notice.

15 The Appellant contends that the establishment of the compost bins is an agricultural use of the land and is thus exempted by virtue of the provisions contained in Article 5(2)(c)(vi) of the Law. That falls within the proviso that "*the following operations or uses of land shall not be deemed for the purposes of the law to involve development of the land*". Paragraph vi reads "*the use of any land for the purposes of agriculture or forestry (including afforestation) and the use for any of these purposes of any building occupied together with the land so used.*" The argument there is that as the law allows, as it must, for the "*keeping of livestock for the purpose of its use in the farming of land*" that the use of worms for the purpose of breaking down compost falls within the definition of "agriculture" because worms are livestock.

25 "Livestock" is defined in the Agriculture (Guaranteed Prices and Financial Assistance) (Jersey) Law 1965. It "*includes any creature kept for the production of food, wool, hides or fur, or for the purpose of its use in the farming of land*". It does seem to us that the worms (which like the snail in the bottle in Donoghue v. Stephenson we have not seen) were fulfilling their ordained function within the compost bins are livestock within the definition of the law.

30 That really does not advance the matter. If the actions of a species of red worm turn the compost into a friable odourless compost, that is not, in itself, at issue. It is clear that, while the appellant can put back into his own land a large amount of compost, his letter to the President in November, 1995, and the establishment of the business name leave one in little doubt but that this is an embryonic commercial activity. The relevant part of the letter reads:

35 "I would also like to clarify the potential output from the station. The figure quoted of 500 tonnes is based on maximum output in perfect conditions; and also takes into consideration that the same product can be used twice (once to produce a water based extract for foliar spraying and again after further processing as a solid extract for use as an inoculant). As demand for both products will vary depending on market requirements it is possibly better to express the volume as input products rather than output; a figure of around 300 tonnes per annum or 6 tonnes per week, which translates, in terms of load, as one delivery day per week in and one out. In addition the collection and delivery of products is done by myself."

The word "use" in relation to land is so defined as to exclude the use of land by the carrying out of any building or other operations thereon. The Appellant contends that the establishment of the compost bins on the land does not constitute the carrying out of any building or other operations.

For the purposes of argument let us assume that the vermiculture activities do constitute an agricultural activity. On the proper construction of Article 5 alone the exemption provided for sub-paragraph (vi) or paragraph (2)(c) is an exemption which relates only to use rather than operations. That must be so otherwise the growth of packing sheds on agricultural land if they did not require consent would grow at an even faster rate than they are at present.

That this is the case is made pellucid by the definition of the word "use" in Article 1. The definition states that use in relation to land does not include the carrying out of building or other operations on land.

The question for the court to determine is therefore a very narrow one. The question is whether the bins or structures which appear on Field 313 constitute a "building" for the purposes of the Planning Law. This is a matter of mixed law and fact.

We were supplied for the purposes of this trial with a number of photographs amongst which were photographs of large piles of the black canvas silage rolls that disfigure the countryside and also of the wooden feeding rings and old baths which accompany the grazing of cattle. Mrs. Wagstaffe, the Senior Planner of the Committee, in her helpful evidence before us also mentioned haystacks and stooks of corn. She might have added drying stacks of vrac. These examples do not concern us. They are distractions. We need to concentrate on the wording of the Statute and whether it encompasses compost bins of this nature. In a letter dated 3rd February 1997 the Senior Planner wrote:-

"The placing of water troughs and cattle feeding rings upon agricultural land is not considered to constitute "operational development" as defined by Article 5 2(a) of the "Island Planning (Jersey) law, 1966". Nor does the placing of these chattels result in a material change of use of land; consent is therefore not required."

"Baling of grass and its storage within black polythene is regarded as an agricultural activity and does not constitute development. Baled hay and hay stacks may be stored within a field and indeed within an agricultural building without planning consent, recognised as an agricultural activity."

In the context of this judgment, we do not understand what "operational development" is.

We have already seen that in the principal law "building" is defined to include "any structure or erection of whatever material or in whatsoever manner constructed, and any part of a building."

In the Island Planning (Exempted Development) (Jersey) Regulations 1965 (promulgated under Article 5 of the law):

"building" does not include any plant or machinery or a structure or erection of the nature of plant or machinery but includes any other structure or erection and any part of a building as so defined".

Under Class 4 of these regulations we find the description of works as being:-

"The erection or construction on land, in, on, over or under, which operations are being or are about to be carried out in pursuance of permission granted under Articles 6 and 7 of the Law, or on adjoining land, of buildings, works, plant or machinery needed temporarily in connexion with those operations for the period of such operations."

Because the "buildings" are temporary buildings the condition precedent is that "such buildings, works, plant or machinery, shall be removed at the expiration of that period and where they are sited on any such adjoining land, that land shall be reinstated herewith".

In our view, the provisions of the exempted development regulations cannot apply to this case. No permission under Article 6 or 7 applies because no permission is claimed to be necessary. These compost bins are not put up in connection with authorised operations. They are the operations themselves.

Mr. McEwen appeared personally and, if we may so, conducted his case with great courtesy and with restrained argument. In relation to a definition of plant he referred us to certain revenue cases in England where the definition of "plant" became necessary under assessments for Schedule D and Capital Allowances. In our view the definition of "plant" does not arise because we are not within the field of exempted development as defined in the 1965 Regulations.

There is no doubt in our mind that the compost bins are constructed. They have four walls made of wood. Some of these are old doors. They are bolted together. On top of them is placed shaped sheets of corrugated iron. These again are fixed to the wood in order to stop them blowing away. The definition in the law

5 makes it clear that they must be buildings. They are structures;
they are constructed or built. They are technically moveable, but
not, in our view, in the way that a plastic silage bag is
moveable, for their whole purpose, if the worms are to fulfil
their function, is to remain *in situ* for some considerable time.
We believe it to be some eighteen months. We have looked at many
cases. The amount of research carried out by Crown Advocate
Matthews has been remarkable and useful. We are not going to
prolong this judgment by examining the cases in detail. The
10 compost bins were constructed. Once filled with compost, despite
the fact that they have no foundations, they would be impossible
to remove without dismantling.

15 We have come to the conclusion that the respondent Committee
was right in law to serve the notice and that the notice is valid.
The appeal must therefore be dismissed.

20 We would, however, say this. It does seem to us that, while
the development does lie within the Green Zone, had the Committee
dealt with this matter more sensitively and liaised more closely
with the Agricultural and Fisheries Committee then, by the
imposition of carefully considered restrictions, this case might
never have needed to come to Court.

Authorities

Island Planning (Jersey) Law, 1964 (as amended), Articles 1, 2, 3, 5, 6, 8, 20 and 21.

Island Planning (Movable Structures) (Jersey) Order, 1965 (R & O 4645).

Powell -v- Secretary of State for the Environment and Anor. [1992] EGCS 155.

Evans -v- Agriculture and Fisheries Committee (1983) JJ 89.

Agriculture Returns (Jersey) Law, 1947, Article 1(1), 2(1)(c).

Agricultural Marketing (Jersey) Law, 1953, Article 1.

Agricultural Poisonous Substances (Jersey) Law, 1961, Article 10(1).

Agricultural Guaranteed Prices and Financial Assistance (Jersey) Law, 1965, Article 1(1).

Agriculture (Loans and Guarantees) (Jersey) Law, 1974, Article 1.

Agricultural Land (Control of Sales and Leases) (Jersey) Law, 1974, (as amended) Article 1.

Protection of Agricultural Land (Jersey) Law, 1964, Article 1.

Words and Phrases legally defined (Butterworths 1988):

"Agriculture"

"Building"

"Structure".

Stroud's Judicial Dictionary of Words and Phrases (5th Ed'n):

"Agriculture".

"Livestock".

"Building".

"Structure".

Chambers Dictionary (p.980) and Oxford Shorter English Dictionary: definitions of "Livestock".

Peterborough Royal Foxhound Show Society -v- Commissioners of Inland Revenue [1936] 2 KB 497.

Finance Act, 1923, s.11.

4 Halsbury (1990 Re-issue): pp.577-581; 877-883.

Town and Country Planning Act, 1990, s.55 (meaning of "Development") s.336 (Interpretation section).

Cheshire County Council -v- Woodward [1962] 1 All ER 517.

Coleshill and District Investment Company Limited -v- Minister of Housing and Local Government and Anor. [1969] 2 All ER 525.

Parkes -v- Secretary of State for the Environment and Anor. [1979] 1 All ER 212.

Guildford RDC -v- Penny [1959] 2 QB 111.

Hobday -v- Nicol [1944] 1 All ER 302.

Wightman -v- IDC (1963) JJ 315.

Mirpuri -v- IDC (1967) JJ 825.

Herrick -v- IDC (1984) JJ 103.

Guillard -v- IDC (1969) JJ 1225.

Dowell -v- IDC (11th July, 1990) Jersey Unreported.