

ISLE OF MAN
DRAFT AREA PLAN FOR THE EAST

**THE PROPOSED HOUSING PROVISION AND THE ISSUE OF
GENERAL CONFORMITY OF THE AREA PLAN WITH THE STRATEGIC PLAN**

**COMMENTS ON THE ISSUE OF GENERAL CONFORMITY
OF THE HOUSING PROVISION IN THE DRAFT AREA PLAN FOR THE EAST
WITH THE STRATEGIC PLAN 2016**

1. This Note is provided in response to the opportunity given by the Inspector on 10th September 2019 when the Advice dated 5 September 2019 provided by the Attorney General ('the AG') on the issue of the general conformity of the Draft Area Plan with the Strategic Plan in terms of its housing provision was being considered.
2. Following that, I was asked by Hartford Homes whether I would wish to make any comment on the AG's Advice. In providing this Note my intention is to try to ensure that the Inspector has as full a picture as possible to assist his consideration of the issue of general conformity in this context.
3. In his Question for the Attorney General's Chambers of 26 July 2019, the Inspector stated:
 8. *My preliminary view is that, for the purposes of section 2(4) of the Act, the Strategic Plan must be considered as a whole; that Housing Policy 3 is qualified by paragraph 8.4.9; that the Strategic Plan therefore provides for the allocation of land for residential development in the Area Plan to be tailored to reflect changing demographic circumstances; and that provision in the Area Plan for significantly fewer than 2,440 additional dwellings (in line with the Cabinet Office's current projection of housing need) would not contravene section 2(4) of the Act.*

4. The AG advises (in paragraph 4 of his Advice) that the interpretation, application and ultimate determination of the question of general conformity between the Area Plan and the Strategic Plan is a matter of planning judgment. I respectfully agree with that view. However, the context of that judgment is highly important both in legal and planning judgment terms.

5. The AG summarises his view in paragraph 5 of his Advice. I would comment on the views expressed in that paragraph as follows:

(a) I respectfully agree that the interpretation of “general conformity” is broad and permits flexibility. However, there are limits to that flexibility, as the AG acknowledges.

In paragraph 12(d) it is stated that English cases give the term “general conformity” a flexibility which would permit “considerable room for manoeuvre” and also that the matter of judgment “rests firmly in the hands of the statutory policy-makers themselves”. One of the cases relied upon for these propositions is the Court of Appeal’s decision in *Persimmon Homes (Thames Valley) Ltd v Stevenage BC* [2006] 1 WLR (see footnotes 2 and 3 on page 7 of the Appendix to the AG’s Advice). In my view it is important to consider those particular comments on the flexibility that might be allowed, in their full context. LJ Laws held (with my emphasis):

“28. [...] I agree with the judge (at [53]) that to read ‘general conformity’ as simply meaning that the proposals of the local plan should be ‘in character’ with the structure plan would be to accept too broad a construction. On the other hand, there are the features to which I have earlier referred – the long lead-times involved, the fact that the exigencies of planning policy may present a changing picture, and the statutory words themselves. In construing the general conformity requirement the court should in my judgment favour a balanced approach by which these different factors may be accommodated. I consider that on its true construction the requirement may allow considerable room for manoeuvre within the local plan in the measures taken to reflect structure plan policy, so as to meet the various and changing contingencies that can arise. In particular (for it is relevant here) measures may properly be introduced into a local plan to reflect the fact, where it arises, that some aspect of the structure plan is itself to be subject to review. This flexibility is not unlimited. Thus measures of this kind may not pre-judge the outcome of such a review. They must respect the structure plan policies as they are, while

allowing for the possibility that they may be changed. I doubt whether it is possible to derive any more focussed conclusion on the construction of the general conformity requirement. [...]

29. [...] But if the right interpretation of 'general conformity' is, as in agreement with the judge I would hold, a balanced one, it will as I have said allow what may be a considerable degree of movement within the local plan to meet the various and changing contingencies that can arise. In that case the question whether the local plan is in general conformity with the structure plan is likely to admit of more than one reasonable answer, all of them consistent with the proper construction of the statute and of the relevant documents. In those circumstances the answer at length arrived at will be a matter of planning judgment and not of legal reasoning."

In his judgment, Lloyd LJ added the following observations:

"71. The use of the phrase 'general conformity' leaves some scope for flexibility and even, as noted above, for some conflict. The context is that of the structure plan authority setting a general policy, which could no doubt be regarded as a strategy, for its area, leaving it to the local plan authorities within the area to implement those policies and that strategy by detailed policies. It cannot be open to a local plan authority to subvert the general policies, or to resolve that it will not give effect to a general policy within its area. It is open to such an authority to exercise some flexibility as to how the general policy is implemented, though the degree of flexibility may depend on the nature of the general policy. [...]

[...]

86. As I said at paragraph 68 above, it is not sensible to attempt to define the statutory phrase 'in general conformity with' a structure plan, and I do not propose to try. However, it seems to me that, at least, in order to be in general conformity with a structure plan, the local plan must give effect to the main policies set out in the structure plan, and must do so in a way which does not contradict or subvert their achievement. There is room for flexibility, subject to the terms in which the general policies are stated. There may be scope for variations of detail as regards timing, for example. But the local plan must not put obstacles in the way of the fulfilment of the strategic policies in the structure plan such that they will not, or may well not, be achieved as provided for in the structure plan. Otherwise the purpose of the structure plan, and the basis of the relationship between one structure plan and a series of local plans would be altogether undermined, with the purpose behind an overall strategic policy being implemented differently and in conflicting ways in different parts of the area governed by the structure plan, and in some of those parts possibly not implemented at all."

- (b) I agree that there may be some flexibility for conflict with one strategic policy. However, it is important to take into account that Housing Policy 1, as well as Housing Policies 2 and 3, of the Strategic Plan are key policies. The amount of

housing provision in a plan is one of the most fundamental elements of any strategic plan.

The amount of housing provision will influence the nature and extent of many other policies balancing infrastructure and environmental implications for example. On the Isle of Man the amount of housing provision is also particularly fundamental in terms of the future prosperity and direction of the Island. For example, the Inspector considering the amendment to the Strategic Plan recognised that although the net-migration had been well below what had been projected, migration levels are not “policy” neutral but responsive to a much greater degree than is natural change (at least over the medium term) in particular to economic performance and job creation (Inspector’s Report [‘IR’] at paragraph [3.39]). Hence, although the results of the 2016 Census became available after the adoption of the 2016 Strategic Plan, the underlying issue was certainly fully aired during the consideration of that Plan. Indeed, I am aware that many parties have made representations at the ongoing Inquiry into the Area Plan for the East, explaining why the housing provision should not be reduced, notwithstanding the latest census information indicating current existing trends.

The Strategic Plan Inspector went on to say (with my emphasis):

“3.41 A number of responses to the Initial Consultation, and subsequently, pressed or this review of the Strategic Plan to be more wide ranging, especially with regard to its Business Policies. In the event, the Island’s future economy has been subject to separate, though essentially contemporaneous, consideration at the Court of Tynwald and in the Vision 2020 document. It would be unsound for the Draft Strategic Plan not to have regard to that and to be aligned with it; the advice from Mr Hawker provides a key linkage, at least as regards population aspects. I find no reason to amend my initial decision to view the EAD population projections – over the intended plan period – as a pre-determined input to the Draft Strategic Plan, and I proceed accordingly.”

The Inspector also supported the Department's extrapolation of the number of additional houses needed to accommodate the projected population and households (IR[3.42]-[3.55]). The Inspector accordingly concluded that the additional housing in the Draft Plan was sound (IR[3.56]).

- (c) I would therefore express some caution with regard to the ability to depart in any significant way from the Strategic Housing provisions and therefore the 2,440 units provided for the Eastern Area in the Strategic Plan. As LJ Laws held in the *Persimmon Homes* case, the plan must respect the policies of the strategic plan. Although they may recognise a potential change in strategic policies through a review, they cannot prejudge any such review. Any significant change to the provision in the Strategic Plan housing provision for the Area Plan should, in accordance with the legislative provisions take place through a review of the Strategic Plan or the provision of a new such plan.

Caution should therefore be applied to in effect re-writing such provision on the basis of applying any flexibility available under the concept of "general conformity". It is with respect essential in my view not to subvert the legislative regime or the policies in the Strategic Plan. That was recognised clearly by LJ Lloyd in the *Persimmon Homes* case as set out above (at paragraph 4(a) of this Note). A very recent English case also provides some further indication of the need for a cautious approach. The issue in *Dylon2 v London Borough of Bromley and Secretary of State for Housing, Communities and Local Government* [2019] EWHC 2366 (Admin) was the general conformity of the housing provisions of the Bromley Local Plan with the London Plan, given the merging increasing in housing provision in London. It was stated by Sir Duncan Ouseley in the context of that case (with my emphasis):

36. There are duties on the local authority, an important role for the Mayor of London and a specific task for the Inspector in relation to the general conformity of the BLP with the London Plan. By s20(5)(a), it was a specific task for the Inspector to consider whether the BLP was in general conformity with the London Plan. This is separate from its soundness, and is the specific point at which the Inspector would consider whether policies in the two parts of the development plan were in conflict with each other and, if so, whether the local

plan remained in general conformity. A mere textual conflict, lacuna, or inadequacy in the reflection of a strategic policy would not necessarily prevent the local plan being in general conformity with the strategic plan.

- (d) In my view it is important to take account of the assistance of the cases as to the approach to the meaning and application of “general conformity” for the reasons set out above. Although there is potentially wide scope for the making of the planning judgment, the legal requirement is nonetheless that the Area Plan be in general conformity with the Strategic Plan.
6. Against that overview of the correct approach, I now return to the Inspector’s preliminary view that provision in the Area Plan for significantly fewer than 2,440 additional dwellings (in line with the Cabinet Office’s current projection of housing need) would not contravene section 2(4) of the Act.
7. In reaching that preliminary view, I note that the Inspector (see paragraph 8 of his Question for the AG) has placed reliance on paragraph 8.4.9 of the Strategic Plan which refers to the Cabinet Office being committed to an approach of “Plan, Monitor and Manage” which indicates a broad approach to determining the amount of land needed to be allocated for housing in the Area Plan and involves managing the release of land for development to avoid either under provision or overprovisions.
8. Paragraph 8.4.9 is of course reasoned justification and not policy. In my respectful view caution is required not to use this in a way that would “undermine” the provision set out unequivocally in Housing Policies 1-3 themselves. In the English case of *R (oao of Cherkley Campaign Ltd.) v Mole Valley DC* [2014] EWCA Civ 567 it was held (see paragraph 16 of the Judgment) that supporting text consisted of descriptive and explanatory matter in respect of the policies and/or a reasoned justification of them. It was further held that the text was plainly relevant to the interpretation of a policy but it was not itself a policy or part of a policy: it did not have the force of a policy and could not trump it. In my view, as explained below, the interpretation of the

Housing Policies, which is a matter of law (see *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13) are clear on their face.

9. Further, reading paragraph 8.4.9 of the Strategic Plan as a whole and together with the relevant Housing Policies as a whole, the particular emphasis appears to be on ensuring there is sufficient housing to meet the identified provision in Housing Policies 1 and 3 the identification of Strategic Reserve Sites. In my view it is critical to note that Housing Policy 2 provides that (with my emphasis):

Housing

Policy 2: The Department will seek to ensure an adequate supply of housing land, based on the level of provision indicated in Housing Policies 1 and 3. The Department will keep under review land that is allocated for residential development in existing Local Plans and in the Area Plans to ensure that the land is available for development, to enable the number of dwellings to be built that are set out in Housing Policy 1. Where it appears to the Department that land that is allocated for development in a Local Plan or an Area Plan is not available for development, then it will consider, through a review of the Area Plan, making alternative land available and retaining the unavailable land in a land-bank for possible future development. In doing so, the Department will have regard to any phasing proposals for the development of land that are identified in the Area Plan.

The Housing policies of the Strategic Plan are, as I read them, absolutely clear as to the objective of meeting the level of provision in Housing Policies 1 and 3 and any reliance on the reference to plan, monitor and manage must, in my respectful view, be considered in that context.

10. I do therefore have concerns that provision of significantly fewer than 2,440 additional dwellings in the Area Plan could properly be considered to be in general conformity with the the Strategic Plan.

CONCLUSIONS

11. The decision on whether the Area Plan is in general conformity with the Strategic Plan involves a matter of planning judgment. However, that judgment has to be made within the framework of a correct approach to the meaning of the words "general conformity". It cannot be overlooked that, as the Inspector specifically and correctly identified, general conformity is required as a matter of law by section 2(4) of the Island's Town and Country Planning Act 1999.
12. Although there is considerable flexibility as to what "general conformity" means, it is clearly not a term without limits. It is important that the guidance provided by the Courts is considered as a whole and applied to the present circumstances. The AG has assisted the Inspector by referring to English Court decisions. I have sought to do likewise and highlighted references in those cases, which I hope will also assist the Inspector.
13. Whether a policy or proposal is in general conformity with a strategic plan will of course be fact sensitive. However, as said by LJ Lloyd in the Court of Appeal in the *Persimmon Homes* case, the local plan (as applied in that jurisdiction) must give effect to the main policies set out in the structure plan, and must do so in a way which does not contradict or subvert their achievement. In my respectful view it is critical to consider the relevant Housing Policies of the Strategic Plan as a whole. Paragraph 8.4.9 of the Strategic Plan (and the other references in the plan to plan, monitor and manage) cannot "trump" those policies. The thrust of the policies in terms of meeting the identified housing provision in those key Housing policies is in my view unambiguous as set out above.
14. Whilst there is flexibility to take into account to some degree relevant changes in circumstances, this cannot be at the expense of "subverting" the Strategic Plan policies. Moreover, it is important to note (see paragraph 4(b) of this Note above) the arguments over the changes in population were made to the Strategic Plan Inspector

and not in themselves a factor that was not considered when the Strategic Plan 2016 was adopted.

15. Accordingly, with great respect to the Inspector's preliminary view and the Advice of the AG, I have concerns about whether, on the basis of paragraph 8.4.9 of the Strategic Plan, provision in the Area Plan for significantly fewer than 2,440 additional dwellings would comply with section 2(4) of the Act.
16. I hope that my reasoning is clear but I would of course be happy to clarify any matter if that would assist the Inspector.

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