



ADVICE ON GENERAL CONFORMITY RELATING TO THE AREA PLAN FOR THE EAST WITH THE STRATEGIC PLAN

Introduction

1. I am asked by Mr Michael Hurley, the Inspector appointed to conduct a statutory Inquiry into the draft Area Plan for the East ("the Area Plan"), to advise in relation to the requirement as contained in section 2(4) of the Town and Country Planning Act 1999 ("the 1999 Act") for "general conformity" between the Area Plan and the Isle of Man Strategic Plan (2016) ("the Strategic Plan")

Background

2. The background to the issue which the Inspector has explained when referring this matter to me is as follows:
 - (a) Housing Policy 1 of the Strategic Plan indicates a need for 5,100 additional dwellings to be provided on the Island between 2011 and 2026. This figure was derived from a population projection, based on the 2011 Census, which assumed that there would be a net inward migration of 500 people per annum throughout the fifteen year period covered by the Strategic Plan. That projection showed an increase in the Island's resident population from about 84,500 in 2011, to about 87,600 in 2016, and to about 91,900 in 2026. Housing Policy 3 of the Strategic Plan indicates that 2,440 of the 5,100 additional dwellings required should be provided in the East.
 - (b) The results of the 2016 Census became available after the adoption of the Strategic Plan and showed that the Island's resident population had fallen from about 84,500 in 2011, to about 83,300 in 2016; so that net inward migration during this period was substantially below the anticipated 500 people per annum. In February 2018, the Cabinet Office published fresh population projections based on the results of the 2016 Census, in a document entitled 'Meeting Our Population Challenges'. These projections suggested that, by 2026, the Island's resident population could increase to about 87,400, assuming mean net inward migration of 500 people per annum from 2016 onwards.

- (c) The Cabinet Office has produced an evidence paper on household size and population projections (DP EP5) in support of the draft Area Plan. This was updated in June 2019. The updated paper estimates that, on the basis of the latest projection, the need for additional housing in the East between 2011 and 2026 would be 1,378 residential units (Updated DP EP5, Section 8.0 vii).
- (d) Paragraph 8.4.9 of the Strategic Plan indicates that the planning authority is committed to an approach of 'Plan, Monitor and Manage'. This approach accepts that the 'monitoring of housing and population statistics over time may require corresponding changes to be made in the provision of new housing land'. 'Plan, Monitor and Manage' is defined in Appendix 1 of the Strategic Plan. The definition indicates that it is 'a broad approach....to determining the amount of land needed to be allocated for housing in Area Plans'; and involves 'managing....the release of land for development....to avoid either under or over provision'.
- (e) The draft Area Plan makes provision for there to be a net increase of more than 2,400 dwellings in the East between 2011 and 2016, in accordance with Housing Policy 3 of the Strategic Plan. However, a number of people object to this, seeking a reduction in the provision of new housing, commensurate with the latest projection of need.

3. Against the Background as above the Inspector puts to me the following question:-

"If the Area Plan for the East were to make provision for substantially fewer than the 2,400 additional dwellings specified in Housing Policy 3 of the Strategic Plan, could it be held to be out of general conformity with the Strategic Plan, in contravention of section 2(4) of the 1999 Act."

Advice

- 4. The interpretation, application and ultimate determination of the question of general conformity between the Area Plan and the Strategic Plan is in my opinion a matter of planning judgment as I explain below. As such the determination of this issue lies with the decision maker, namely the Inspector in the first instance, and then with the Cabinet Office as the body responsible for planning policy and for advancing the Area Plan. This Advice Note sets out my legal guidance for the Inspector in his Interpretation and application of the general conformity requirement.
- 5. In summary:
 - (a) The interpretation of 'general conformity' is broad and permits flexibility. Strict conformity is not an absolute requirement. Such flexibility could justifiably include the Inspector recommending a decrease (even a significant one) in the housing

allocation where there is cogent and reliable evidence accepted by him in the Area Plan process as reasoned justification for the departure. This flexibility enables the Inspector to consider the question of housing allocation unfettered in the context of the whole of the 1999 Act, and the whole of the Strategic Plan and the Area Plan.

- (b) The fact that the Area Plan may be in conflict with one strategic policy in the Strategic Plan does not necessarily mean that the Area Plan is not in general conformity with the strategic policies as a whole.
 - (c) It follows that if the preliminary views of the Inspector relating to Housing Policy 3 (qualified by paragraph 8.4.9 of the Strategic Plan) are that there should be a change in the extent of residential development as supported by cogent and reliable evidence reasonably justifying the departure from the Strategic Plan housing allocation figures, then the provision for decreased housing allocation would not contravene section 2(4) of the 1999 Act;
 - (d) whilst there are case law authorities which may assist in the interpretation of the term 'general conformity' in the context of section 2(4) of the 1999 Act, ultimately the decision on whether there is 'general conformity' or not as between the Strategic Plan and the Area Plan is a matter of planning judgment.
6. The addition of the word 'general' as a qualifying condition to 'conformity' in my view plainly permits a considerable degree of movement between the documents to be compared or contrasted. This is supported by the UK case law precedents which I identify and refer to which would in the absence of any decisions from the Manx Courts on point would be persuasive authority in the Isle of Man. In my view, the intention of the legislation, in providing a statutory framework comprising a two tier approach and providing primacy for the later was intended to enable responsive planning policy over differing time periods.
7. A fulsome review of the legal and other guidance referred to in preparation of this advice is appended hereto for further information.
8. Finally, I am aware that the Inspector wishes to publish this Advice and I am content to hereby give my permission for such publication as part of his Inquiry.



John L M Quinn, QC MLC
H.M. Attorney General
5th September 2019

Appendix

Legislative Provisions

1. Section 2(4) of the Town and Country Planning Act 1999 ("the 1999 Act") provides:-

"(4) The proposals in an area plan shall be in general conformity with the strategic plan; but in case of any inconsistency between the provisions of the strategic plan and the provisions of an area plan, whichever came into force later shall prevail."

2. Section 2 of the 1999 Act derives from section 12 of the Town and Country Planning Act 1990 of the UK ('the 1990 UK Act'). Section 12 fell within Part II of the 1990 UK Act which concerned development plans. The 1990 UK Act was repealed by the Planning Compulsory Purchase Act 2004 of the UK ('the 2004 UK Act') which replaced the old system of structured plans, local plans and unitary development plans with the Local development Framework system in the UK. Although there are small differences in the wording and terminology used between section 12 of the 1990 UK Act and section 2 of the 1999 Act, which are not material, the key point is that both sections envisaged a two-tier planning system. Under both provisions there is to be a 'strategic plan' setting out the 'general policies in respect of the development and other use of land': see section 2(2) of the 1999 Act and section 12(3) of the 1990 UK Act.
3. Guidance as to the role of strategic Plans is described in 'A practical approach to Planning Law' (10th edn) at para. 4.12 as follows:

' The purpose of the structure plan tier of the development plan was that it should sketch general lines of development in an area with a broad brush. Basically, structure plans were concerned with land use, but dealt with it in terms of policies applicable to the major land uses such as employment, housing, education and recreation...Structured plans set out policies and proposals of structural or strategic importance for an area. They also provided important links between national economic and social planning and land use planning. Because structure plans dealt with policies and proposals for a wide area in very general terms, they did not deal with individual properties or show the precise boundaries of areas where particular policies apply'

I consider that our Strategic Plan fulfils the same "general policies" purpose as that of Structure Plans referred to above, a view supported by our courts in the decision Baccarat and the Department of Local Government and Environment, 28th May 2009, 2DS 2008/27 at paragraph 6.

4. Guidance as to the "detailed policies" role of an Area Plan can again be found in 'A practical approach to Planning Law' referred to above at para.4.13 where it refers to Local Plans.

'Local Plans, on the other hand, were very much more detailed than their parent structure plan. They dealt with local issues, but within the context of the policies set out in the structure plan. They developed and applied the policies of the structure plan in force for the area, and showed how these policies related to precisely defined areas of land. Local plans also provided the basis for the exercise of a local authority's development control functions. In addition, by allocating sites for particular purposes, they formed the basis on which the development or redevelopment of an area could proceed'

Again, this guidance reflects the purpose of the Area Plan. See also Baccarat at paragraph 6.

5. I return to the similarities between section 2 of the 1999 Act and section 12 of the 1990 UK Act. Both section 2(4) and section 12(7) address the degree of consistency required between these two plans. In both the requirement is for 'general conformity'.
6. The statutory provision within section 2(4) of the 1999 Act actually provides for and anticipates the possibility of inconsistency in providing for the later of the plans being afforded primacy over the earlier. This provision at the very least would mean that the Area Plan if the later of the two plans should not, therefore, be necessarily unduly constrained and so could take account of objective evidence to which I refer below to differ from the former plan.

Preparation of the Strategic Plan and Planning Policy

7. The Strategic Plan like the structure plan in the UK is a document comprising general policies, with reasoned justifications as to the policies, and any other detail as appropriate explaining the policies it puts forward. The Area Plan is then a document which by its very nature will be developed at a later stage, containing detailed proposals for the Area for which it is proposed.
8. The Strategic Plan sets out proposals for housing allocation in the East. A significantly reduced housing allocation figure, based upon later census and other information is now proposed under the Area Plan. Is this significantly reduced figure still in 'general conformity' with the Strategic Plan figures?
9. Although I cannot and do not comment on planning policy, for the purposes of this advice I refer to certain provisions of the Strategic Plan: Paragraph 8.1.6 of the Strategic Plan refers to the flexibility to react to pressures relating to both supply and demand, and also the 'Plan Monitor and Manage' approach which is advocated and referred to in the background provided to me by the Inspector above. This provision intends to give an opportunity to be dynamic and reactive, and not only to monitor but also to manage any resulting situation. The Inspector must be satisfied, therefore, that there is cogent and reliable evidence justifying departure from absolute conformity. Further, the Inspector must be satisfied that in context of the Strategic Plan and the Area Plan, and the context of the 1999 Act, that

there is reasoned justification for departure from the Strategic Plan, and that the broad policies of the Strategic Plan is met.

10. The Area Plan may for example acknowledge a shortcoming in meeting aspirations for particular site allocation, or aspirations based upon projections on the supply and/or demand sides, which could be necessarily adjusted based upon evidence. There might accordingly be situations where a departure from 'general conformity' is justified.

Planning Guidance

11. In England and Wales, the Planning Practice Guidance¹ sets out some considerations for determination of the term 'general conformity' which includes:
 - (a) considering whether general principles of the strategic policy are upheld in the later document – in this case the Area Plan;
 - (b) the degree of conflict between the documents;
 - (c) whether a proposal provides an additional level of detail or distinct local approach without undermining the policy; and
 - (d) the rationale for the approach and the evidence to justify that approach.

Statutory Interpretation

12. In relation to the meaning of the term 'general conformity':
 - (a) it is not specifically defined in any of the legislative provisions in the Isle of Man nor in England and Wales;
 - (b) there is no case law on the Isle of Man which would provide specific guidance other than as indicated the statutory interplay as to primacy between the Strategic Plan and the Area Plan;
 - (c) English case law does provide some guidance, since UK legislative provisions are sufficiently similar so as not to affect the interpretation of the term 'general conformity' in the context of the planning system in the Isle of Man;
 - (d) English case law gives the term 'general conformity' a flexibility which would permit '*considerable room for manoeuvre*² and also that the matter of judgment '*rests*

¹ Paragraph: 074 Reference ID: 41-074-20140306 of the Planning Practice Guidance made under the National Planning Policy Framework and relevant planning practice guidance (<https://www.gov.uk/government/collections/planning-practice-guidance>)

firmly in the hands of the statutory policy-makers themselves.³ When considering whether or not the Area Plan and Strategic Plan are in “general conformity” a decision-maker does not, however, have a completely unfettered planning judgment and although there is undoubtedly a degree of flexibility, the flexibility is not unlimited⁴ and would require reasoned justification for such departure;

- (e) In terms of statutory interpretation, the term ‘general conformity’ should be given its ordinary and natural meaning and be construed in favour of the public interest;
- (f) The interpretation of the term ‘general conformity’ should be construed within the context of the 1999 Act which is a review of planning matters on the Island, the ability and desire to create a sequence of documents which are bound to be subsequent to others, and the ability to modify to take account of relevant factors when preparing the Area Plan;
- (g) The fact that a policy in an Area Plan may be in conflict, or not in general conformity, with one strategic policy in the Strategic Plan does not necessarily mean that the Area Plan itself may not be in conformity with the strategic policies of the Strategic Plan as a whole⁵;
- (h) In addition, section 5 of the 1999 Act sets out provisions for challenge, and I consider that in doing the 1999 Act did not intend to require slavish adherence of an Area Plan with the terms of a prior Strategic Plan.
- (i) The policies in the Strategic Plan need to be considered as a whole when addressing whether the Area Plan is in general conformity with them. As such, the key test is whether the Area Plan as a whole is in general conformity with the policies in the Strategic Plan taken as a whole⁶.

² Paragraph 30 of the Judgment of Laws, L.J. in *Persimmon Homes (Thames Valley) Ltd v Stevenage BC*, [2006] 1 WLR 334

³ Paragraph 30 of the Judgment of Laws, L.J. in *Persimmon Homes (Thames Valley) Ltd v Stevenage BC*, [2006] 1 WLR 334

⁴ Paragraphs 79-81 of the Judgment in *R (Hoare) v The Wale of White Horse District Council*, [2017] EWHC 1711 (Admin)

⁵ Paragraph 84 of the Judgment in *R (Hoare) v The Wale of White Horse District Council*, [2017] EWHC 1711 (Admin) and Paragraph 29 of the Judgment in *R (Swan Quay LLP) v Swale Borough Council*, [2017] EWHC 420 (Admin) per Dove J

⁶ Paragraphs 27-29 of the Judgment of Dove J in *R (Swan Quay LLP) v Swale Borough Council*, [2017] EWHC 420 (Admin) per Dove J

