

PART D

11. THE PLANNING APPLICATIONS: JANUARY – OCTOBER 1991

i) General

- 11.1 We turn now to consider in more detail the main planning applications from the point of submission of the outline application of the 16th January 1991 to the grant of the second initial permission for 150 houses given on the 4th October 1991. It was during this period that the initial permission for a resort village, treated by the planning office of the department as a wholly tourism based scheme became progressively altered to the point where a permission was given for any or all of the proposed 150 houses to be used for permanent residential purposes.
- 11.2 During this period the department also received and processed a number of planning applications relating to the hotel and its associated facilities including the golf club house and the fitness and health centre. However, these were not a part of the scheme about which any undue concerns were expressed either in evidence to the Commission or earlier to Professor Crow. The focus of the Commission's investigation has been on the steps that have led to permanent residential development on the site. Reference is nevertheless made in section 12 to later local concerns regarding the construction of part of the golf course and associated buildings, and in section 13 to infrastructure concerns including sewerage and drainage.
- 11.3 A further general but important point also needs to be considered. A recurring feature of the evidence given to the Commission about events during this period is that the members of the Planning Committee at the time, virtually without exception, claimed not to have been aware of the nature of the uses which they were permitting, and to have remained unaware for many years. The same Committee members have also accepted, again virtually without exception, that they had a duty to understand what it was they were making decisions about; but they failed to do this. A main issue for the Commission therefore has been to judge whether the members of the Committee truly did fail to understand or be aware of the implications of their decisions, and if they did so, whether that can be ascribed to their being knowingly misled, or to ignorance and lack of comprehension on the part of the Planning Officers responsible for advice and recommendations. This section of the report seeks to address that question together with others and looks first at the initial outline application.

ii) The Proper Understanding of the Outline Application: PA 90/1842

- 11.4 Paragraphs 3.27 to 3.32 in section 3 of this report have already described the scope of the intended development as set out in the planning application and need not be repeated. It is worth noting however that the list amplifying the "Description of the proposed development" (question 5 of the application form) refers to "150 villas and patio homes" whilst the "Notes of Presentation" (one of nine documents forming "part of the application") refers to 120/140 units¹ which appears to be the figure accepted by Professor Crow in his report. Mr Sinden in his report on PA 90/1842 refers to the former which he justified to the Commission on the basis that it was the figure on the actual application form.² That is not unreasonable but what is surprising is that the existence of two quite different figures in what purported to be

¹ PA 90/1842 Document I, Notes of Presentation, page 6

² Annex 4

the same application does not seem to have been picked up or in any way questioned by planning officers at the time. That may have been because the application was in outline but it reflects a rather casual attitude to the handling of the main Mount Murray applications which was to persist through 1991 and 1992. The Commission in this report has taken the figure to be 150 units as this was the figure which appears to have been known to and considered by the Committee.

11.5 There is no doubt that the application was unusual both in what it sought to achieve and in terms of its documentation. The concept of a resort village originated from the United States in the early 1960s³ and that part of the documentation which aimed to describe it made extensive use of American terminology and idiom. This was particularly the case with the Buyer's Guide and the related Villa Rental Agreement (document G in the list accompanying the application)⁴ and with the Notes of Presentation.⁵ It was necessary to examine these documents to understand the intent of the application to secure permission for (at that stage) a mix of rental and permanently occupied housing as part of the overall proposed use of the site as a resort village. As we indicate below, we do not consider it to have been unduly difficult to discern that intent from the initial application and we are not in doubt that it was also made clear at Chief Minister and at departmental level even before the application was submitted.

11.6 The critical supporting documents to the application were the Notes of Presentation and the Buyer's Guide. The former which, by its name, indicates that it is a guide to looking at the application, explains in five pages not just what a resort village is, but indicates that it contains permanent residences, and specifies the page in the Buyer's Guide where this is identified. The Buyer's Guide itself was a lengthy document containing a good deal of general information as well as specific references to types of tenure including permanent residential. We have made references to this in general terms in section 3 at paragraphs 3.31 and 3.32. But it is important here to be specific about the basis on which that judgement is made. Pages 15 and 16 of the Buyer's Guide so far as is relevant read as follows:

"RESORT VS. RESIDENTIAL

What is Holiday's philosophy toward residential and resort growth, and how are the two linked?

Holiday is committed to the philosophy that on the isle of Man, resort activity within residential areas is essential to maintaining community health and vitality. Resort activities provide residents with recreational facilities which might not otherwise be financially self supporting. These add to the attractiveness of the community by creating substantial open space in the form of golf courses, nature conservancies and green belts.....

WHAT DO WE MEAN BY RESIDENT, INVESTOR, TOURIST;

RESIDENT

Resident is a person who lives in the village for more than half the year. They could be an investor or a tenant.

INVESTOR

There are three categories of Investor:

1. Institutional Investor:
Is [definition not relevant to Commission of Inquiry]
2. Individual Investor:

³ File C page 111

⁴ File A page 9

⁵ PA 90/1842, question 12

Is a person (or couple) who purchase a single unit, usually as a second home. They may be a Resident or a Tourist. It is usual that when the Investor is away from Holiday, their unit will join the Rental program.

3. Fractional Investor:

Investors in half, or quarter ownership. (Not Time Share)

TOURIST

Is a person/s who occupies a unit short term e.g. a long weekend to enjoy the facilities any time of the year, or perhaps a longer stay during the school holidays.

Is a person/s staying in their second home, or simply a holiday maker on vacation.

TYPES OF PROPERTIES

What kinds of properties are currently available or planned within Holiday?

- Sites for custom-designed homes

- Villas (condominium dwelling; which may be apartments, town-houses, Patio villas, or pool villas)."

From these extracts we cannot see how it can be concluded otherwise than that the Buyer's Guide quite clearly contemplates units for both residential use as well as for tourism. This position is doubly clear when the Notes of Presentation, as indicated in paragraph 3.30 above, are taken into account.

11.7 Professor Crow nevertheless maintains with regard to the Buyer's Guide that "even if any one of those concerned had taken the trouble to read the document from end to end, which nobody appears to have done, the one page on which permanent residential occupancy was far from directly stated could easily be missed."⁶ The Commission finds itself unable to agree with this conclusion. For reasons we refer to later in this section and in subsection 17 (iv) below, the Commission believe that Mr Watson and, through him, Mr Vannan well knew before the first application was received that the proposal envisaged an element of permanent housing, a point of which Professor Crow does not seem to have been aware. As we shall also see, concerned members of the public and other objectors⁷ affected by the scheme were able to discern without undue difficulty that the Buyer's Guide allowed for owner occupancy and, in one case, advised the minister of that fact in writing. In addition, the junior Planning Officers and the Committee Secretary at the time, Mr Magee, all agreed, when asked to look at the Guide, that it clearly contemplated permanent residential use in addition to tourism. The members of the Planning Committee of February 1991, who generally claimed to have heard of the Buyer's Guide but never actually to have seen it, were equally clear about what it said when it was presented to them during the hearing of evidence by the Commission.

11.8 With regard to the senior planning officers, Mr Watson, despite being Chief Architect and Planner, and despite having had a pre-application meeting with the developer, appears not to have been fully involved in progressing the application or taking it to the Committee. He indicated when asked if he had read the Buyer's Guide, "I will probably have scanned it at least" and agreed that the Buyer's Guide told him that it was "a mixed development".⁸ He accepted that finding out the intended use was "no problem at all. All one had to do was read the Buyer's Guide". Mr Vannan, who was to take on the lead role in progressing the scheme, was asked whether there was a distinction in the Buyer's Guide "between people who live there and people who are tourists?" He indicated: "Yes. There are two separate categories." He agreed that houses could be used for permanent homes, but curiously maintained that this "wasn't [clear] at the time because I don't think

⁶ Document C6 Crow Report paragraph 1.43

⁷ See paragraph 11.12 to 11.17 below

⁸ Evidence of Mr Watson Q3 Transcript Day 7 pages 101 - 103

that any of us fully appreciated that that was the intention.”⁹ However, for reasons we indicate below, the Commission do not accept that Mr Watson or Mr Vannan were unaware of that intent. Irrespective of the extent to which they had or had not read the Buyer’s Guide, we are satisfied that Mr Watson was advised at pre-application stage of the mix of uses intended, and we do not find it credible that Mr Vannan would not have been appraised of the position.

11.9 So far as the Committee members were concerned, the chairman, Hon Mr D C Cretney MHK, indicated to the Commission that he had first seen the Buyer’s Guide “at the time of Professor Crow coming to the Island” (that is some nine years after application PA 90/1842 was first considered by the Committee). This is despite chairing meetings of the Planning Committee on 24th May 1991 when the wording of an Agreement for Sale which related occupancy to the principles in the Buyer’s Guide was approved, and on 4th October 1991 when the Buyer’s Guide was specifically incorporated into a condition attached to an approval for 150 dwellings. He agreed that it was “clear from the Buyer’s Guide that it contemplates use of the houses as permanent homes”.¹⁰ Mr C Guard (who was present for the review meeting on the 12th April 1991 but not the initial meeting on PA 90/1842) accepted in evidence that “the Buyer’s Guide enables use of the houses for permanent homes.”¹¹ Mr Cretney, in written representation to the Commission,¹² has stated that he believed that he did understand the condition, based on Mr Vannan’s explanation. The fact is that he did not understand it correctly but could easily have done so by requesting sight of this unique document, which formed part of the application and was to replace the condition which was fundamental, Mr Cretney told us, to the Committee’s approval of the development. Mr C H Faragher and Dr D L Moore, who were also members of the Planning Committee in early 1991 could not recall ever having seen the Buyer’s Guide but did not dispute that the documentation indicated some long term occupation.¹³ This is consistent with the fact that, for reasons which we set out in our conclusions, at paragraphs 17.47 to 17.51 below, neither Mr Watson nor Mr Vannan made plain to the Committee the intent of the applications at Mount Murray either through the supporting documents or otherwise, and that such understanding as the members had was drawn from their own consideration of the proposal.

11.10 A further point should be made concerning the Buyer’s Guide. A report was prepared by Mr Sinden in preparation for his oral presentation to the Committee meeting on the 22nd February 1991 when the initial (outline) application was considered. This was a hand written document and a copy is attached to his statement together with the conditions which were recommended.¹⁴ This report made no reference to the Buyer’s Guide and, when asked about this, Mr Sinden stated that “I appear to have read it superficially”.¹⁵ Later in evidence, he stated that “I appear to have formed a suspicion about the use but I don’t wish to pretend that I read the Buyer’s Guide.”¹⁶ He did however include a condition number 5 that “The proposed buildings must be occupied by bona fide tourists; permanent occupation of the buildings is not permitted” and explained this on the basis that

⁹ Evidence of Mr Vannan Q32 Transcript Day 20 pages 20 & 21

¹⁰ Evidence of Mr Cretney Q22 Transcript Day 17, page 22

¹¹ Evidence of Mr Guard Q4 Transcript Day 8 pages 26 & 27

¹² Annex 4

¹³ Evidence of Mr Faragher Q8 Transcript Day 8 page 114 and Dr Moore Q35 Transcript Day 22 page

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¹⁴ Mr Sinden Document Q12 Appendix 1

¹⁵ Evidence of Mr Sinden Q12 Transcript Day 10 page 75

¹⁶ Evidence of Mr Sinden Q12 Transcript Day 10 page 95

“However poorly I read these documents [the Buyer’s Guide and the Notes of Presentation] I think I picked up sufficient to be unsure as to whether there was not an intention to use the buildings other than for tourists”.

- 11.11 Professor Crow regarded this “lapse” i.e. failure to read the documents, on the part of Mr Vannan and Mr Sinden as slipshod. However, that failure meant that Mr Sinden was not properly aware of what he was doing and that is very much more than merely slipshod. Mr Vannan, on the other hand, may or may not have chosen to read the Buyer’s Guide and Notes of Presentation but could not have been unaware of what they contained and his contention that the applicant’s intent was not clear is simply not supported by the evidence. We should add here that Mr Willers in written representations¹⁷ to the Commission noted that the Buyer’s Guide was sent to the Secretary of the Planning Committee and the Clerks to the Santon and Braddan Parish Commissioners (as part of the first application). He said that plainly each of these parties should have read the Buyer’s Guide and taken it into account, and in that, the Commission entirely agrees with him.
- 11.12 The Commission’s view that the intent of the Buyer’s Guide and other documents was not difficult to discern, had clearly been reached by others as is evidenced by the ease with which they and the accompanying plans were quickly understood. We have already referred in section 3 at paragraph 3.41 to the letter written to the department on 28th February 1991 by Mr Midgley making the observation that the dwellings on the Douglas side of the illustrative estate layout “are houses with garages which makes me wonder if it is going to end up a housing estate rather than a holiday complex”.
- 11.13 Mr Midgley does not appear to have had access to nor to have been able to read the Buyer’s Guide and other documents, and formed his view on the submitted plans. His observation did not apparently prompt either the officers or the Committee to look again at the proposal and there is no evidence that the applicant’s agent, Mr Spence, was questioned on this point.
- 11.14 At a later stage in the sequence of events examination of the Buyer’s Guide was made by other local residents, Mr and Mrs Reeves, who live at Santon in immediate proximity to the now constructed golf course at Mount Murray. This is referred to later but one particular aspect of their experiences with the Mount Murray applications is relevant to an understanding of the initial application.
- 11.15 Mr and Mrs Reeves did not object to the initial application (PA 90/1842) but placed comments on record with the Planning Committee stressing the need to safeguard the local environment and questioned the status of the 150 houses proposed under PA 91/0953.¹⁸ They later received a copy of a (revised) approval notice in respect of this application which, in their view, “had the effect of materially changing the planning application from tourist accommodation to residential housing by amendment to clause [condition number] 5.”¹⁹ Condition number 5 stated that “The proposed buildings must be used in accordance with the principles set down in the Buyer’s Guide”. The circumstances leading up to the imposition of this condition are considered later but the Commission sought to understand from Mr and Mrs Reeves the basis on which they had been able to arrive at the view above.

¹⁷ Annex 4

¹⁸ Mr & Mrs Reeves Document Q29 Appendix I

¹⁹ Mr & Mrs Reeves Document Q29 Appendix I

- 11.16 In evidence on this point²⁰ Mr and Mrs Reeves stated that, on receipt of the notice of approval and its conditions, they inspected a copy of the Buyer's Guide at the planning office on the basis that "unless we know what the Buyer's Guide is, we can't know what this number 5 condition means". That the Planning Committee failed to address the same commonsense question at their meeting on the 4th October is a matter of some incredulity. Had they done so, their continued and incorrect presumption, despite the issue of a second notice, that housing occupancy was restricted to tourism would have readily been revealed as quite incorrect. Either way, Mr and Mrs Reeves concluded from their inspection that it "would allow them [the applicant] to use the houses for timeshare and... ultimately for permanent residences if they wanted to". When asked how long it took to work this out from the Buyer's Guide, the answer was "ten minutes".
- 11.17 The Commission found the evidence from Mr and Mrs Reeves to be clear and wholly consistent. It served to reinforce the Commission's opinion that the failure in early 1991 by Planning Officers to take proper note of the Buyer's Guide had little to do with its readability and rather more to do with careless attitudes and a lack of professionalism. In the case of Mr Watson and Mr Vannan, whilst they professed limited knowledge of its contents, in fact they did not even need to read it given their prior awareness of its intent. For reasons we consider later, they did not choose to make that intent clear to the Committee.

iii) **The Intention of the Applicant**

- 11.18 At the outset, it is important to note that the applicant, whatever its corporate appellation at any particular time, had connection with individuals who were very experienced developers as we detail in sub-section 17 (ii) below, and so was well able to take a strategic view and not averse to using the planning system and its procedures to the full to achieve its objectives. We therefore consider here what were those objectives in terms of a planning permission at the beginning of 1991, and what evidence has been put to the Commission on this matter over and above what may be derived from the submitted documents.
- 11.19 The outline application was submitted by Radcon Village Resorts Limited which was to change its name to Mount Murray Country Club Limited in June 1993. At the date of the submission of this application, 16th January 1991, the true name of the applicant appears to have been Conrad Hotels (IOM) Limited, the name change to Radcon Village Resorts Limited being formally made on 28th January 1991,²¹ but nothing appears to turn on this. Mr P Moore gave evidence to the Commission in his capacity as a former director of both these companies (and others associated with Mount Murray).²² He agreed that Radcon considered its strategy for the development at Mount Murray during 1990 and that the permission as achieved allowed houses to be used as permanent homes as well as for tourism. Importantly, in relation to the question as to whether the development "as it has turned out, was the development that the company wanted to get in the first place", and as to whether it was a fair conclusion that "at the outset, the objective was to get a development similar to that which has occurred", Mr Moore, on both points, stated "I believe so, yes."
- 11.20 This position was reinforced by the evidence of Mr Willers, Managing Director of Mount Murray Country Club and who is or has been a director of several companies

²⁰ Evidence of Mr & Mrs Reeves Q29 Transcript Day 14 pages 70 & 71

²¹ Financial Supervision Commission: Companies Registry

²² Evidence of Mr P Moore Q6 Transcript Day 8 pages 45-47

which are connected or grouped with Mount Murray Country Club (formerly Radcon). Mr Willers said that “the planning permissions at Mount Murray have achieved exactly what they were intended to”.²³ In amplification of this, during the giving of evidence, he was asked whether “the developer’s intention was to negotiate and obtain a planning permission, or planning permissions, which, in relation to the houses, would enable those houses to be used either for tourist purposes or as permanent homes”. Mr Willers accepted this point indicating “that follows, otherwise it wouldn’t have been permitted because you don’t permit something that’s not asked for.”²⁴ Later in evidence, on the same point, Mr Willers stated that “if the Buyer’s Guide was with the first application, as it appears it was, then they [the developer] obviously had that [use for permanent homes or tourism] in mind.”

11.21 Further evidence as to the developer’s intent is revealed by the discussions which took place before the application was submitted.²⁵ These are indicated as having been with Mr Mitchell, consultant to the Department of Tourism (who the Commission was unable to interview), Sir Miles Walker who was Chief Minister at the time, and Mr Watson. The meeting with the Chief Minister was later referred to in a letter to Sir Miles Walker dated 19th October 1994 from Mr Spence as agent to the developer. The letter on page 3 says: “You will recall that when I first came to see you on 14th November 1990, I read out to you (and left with you) Notes of Presentation which explained all this (the provision of a significant number of bedrooms by investors in residential housing).” The letter goes on to state that “just as you personally were aware of the importance of the residential phase for the development of the Hotel and Resort Village to its full potential, so were your interested Departments.” In a written statement to the Commission Sir Miles Walker himself refers to this meeting with Mr Spence at which he indicates that the availability of sites was discussed (including Mount Murray) and at which he suggested “that permanent residential accommodation would be unlikely to get approval”.²⁶ Sir Miles also gave oral evidence about the meeting.²⁷ There is a slight but insignificant discrepancy on dates. Although he obviously had a good memory of that meeting he could not recall whether Mr Spence had left any documentation with him,²⁸ nor could he recall whether the Notes of Presentation had been brought to his attention by Mr Spence.²⁹ Sir Miles then explained in some detail what he had been told by Mr Spence. That explanation was not inconsistent with the contents of the Notes of Presentation and Buyer’s Guide, and is indeed similar. There was reference to housing development which would be individually owned, and was not timeshare as such. Sir Miles recalled that he had advised that the developer was unlikely to get permanent residential accommodation on the site to which the response had been that that was not what they were looking for but for private investors to build residential type houses available for tourist occupation. The owners would spend some time in them but for the majority of the time they would be let to bona fide tourists.

11.22 This account is extremely close to the explanation of the proposals as set out in the planning documents but does not refer to the small percentage who would be permanent residents. Sir Miles was asked by us about this element and he said

²³ Mr P Willers Document Q2 Transcript Day 7 page 8

²⁴ Evidence of Mr Willers Q2 Transcript Day 7 page 9

²⁵ File A page 13 application question 12

²⁶ Sir Miles Walker Q16 page 1 4th paragraph

²⁷ Evidence of Sir Miles Walker Q16 Transcript Day 30

²⁸ Evidence of Sir Miles Walker Q16 Transcript Day 30 page 10

²⁹ Evidence of Sir Miles Walker Q16 Transcript Day 30 page 11

that he was not now in a position to say that Mr Spence had not explained this to him, which Mr Spence would have done had he, as he had claimed in his letter, read out the Notes of Presentation to the Chief Minister. We accept the claims made by Mr Spence in his letter of 19th October 1994, and it is not inconsistent with the evidence of the Chief Minister. We return to this matter in sub-section 17 (iv) below, but the position was, we find, that at this early stage the developer had made its intent clear, even if the Chief Minister was discouraging.

- 11.23 So far as Mr Watson is concerned, a meeting between him and Mr Spence took place on 20th November 1990 at which “various zoned sites (for tourism)” were evidently suggested and from which Mount Murray was to emerge.³⁰ It is not known, and Mr Watson could not recall, whether the Notes of Presentation were discussed, but in view of Mr Spence’s presentation to the Chief Minister only a few days earlier, it seems improbable in the extreme that they were not.
- 11.24 The Commission is satisfied in the light of the above that permanent residential use was indeed the applicant’s objective as part of the various planning applications which were to follow. We are also in no doubt that the outline application in January 1991 was a true indication of the planning permission which they wished to obtain in that it envisaged a large site (including unzoned land) as now developed, and a mix of uses which included permanent homes. It is not clear whether, at that stage, the applicant company envisaged all the houses being used in this way but it is not in question that it wished to have the option.
- 11.25 As a consequence, the Commission has considered the question of why the applicant was apparently predisposed in the first instance to accept something rather less than the Buyer’s Guide and other documents identified. There are two factors to be borne in mind. First, the location of a large, wholly or even partly, residential estate in a relatively isolated location on unzoned land would have been clearly seen as contrary to the Development Plan. The chairman of the Committee at the time, Mr Cretney, stated in evidence that “the Planning Committee only supported this on the basis that it was a tourist development, nothing else”,³¹ and all other Committee members, in evidence, took the same view. It is inconceivable that the applicant would have been unaware of prevailing policy and of the fact that an open approach would have risked refusal at the first hurdle.
- 11.26 The second factor which we consider later in this section is that the applicant took an approach to the securing of its ultimate objective which can be appropriately described as incremental. Mr Willers in evidence, whilst not referring in specific terms to the events at Mount Murray, agreed that an incremental approach was something which “happens all the time” and further agreed that “is what developers do”.³² In relation to Mount Murray itself, his presumption was that “if he [the developer] hadn’t got what he wanted, the development wouldn’t have taken place.”
- 11.27 The Commission’s conclusion is that it was the applicant company’s intent from the outset to secure an element of permanent housing as part of its proposal for a resort village and that it would have been well aware, in a location like that at Mount Murray, that such a use would have been regarded unfavourably by the Planning Committee. It did not disguise its intentions either in pre-application meetings or in documentation forming part of the initial application. However, the fact that, as we consider below, the applicant did not seek at review stage to alter the initial decision

³⁰ File A page 9

³¹ Evidence of Mr Cretney Q22 Transcript Day 17 page 15

³² Evidence of Mr Willers Q2 Transcript Day 7 pages 38 & 39

in respect of the restriction to tourism related uses indicates a wish to avoid drawing undue attention at that stage to any potential conflict with prevailing policy, together with the later pressure to secure Planning Committee acceptance for a draft Agreement for Sale, and in the process to have this modified to make it less transparent, helps demonstrate to the Commission that the applicant intended to pursue its objectives in a covert or incremental way rather than in a clear or open way.

iv) The Initial and Review Decisions of February and April 1991

- 11.28 Details of the initial (outline) application (PA 90/1842) and the circumstances surrounding it and the events leading to its approval in principle on 22nd February 1991 have already been set out in sub-sections (v) and (vi) of section 3. Certain features of this require amplification insofar as they bear on what was to follow at review and subsequently.
- 11.29 The responsibility for the preparation of a report (as a basis for oral presentation) and any related conditions fell to Mr Sinden who, at that stage, appears to have been the case officer. Mr Sinden's first appraisal report dated 4th February 1991³³ recommended refusal based not on the mix of uses but on drainage concerns, conflict with the Development Plan and visual intrusion into an area of high landscape value. Significantly his report states that "I assume that the reason for departing from established policy is connected with the size/viability of the adjoining land use, but no argument is adduced to support such an assumption."
- 11.30 That led to his letter of 5th February 1991 to Mr Spence, the agent and a Director of Radcon which, as we have seen, in paragraph 3.37 above, asked why it was "necessary to propose the erection of buildings on this (the unzoned) part of the site". A subsequent meeting appears to have led to a "request" for an amended plan which was submitted with an accompanying letter on 19th February 1991. The sequence of events as set out in paragraph 3.37 indicates that the amended plan, 1A, with its restricted area was not actively sought by the applicant, but it did enable the first step in the incremental approach towards approval for the whole site and whole development.
- 11.31 Either way, the change represented by plan 1A was sufficient for Mr Sinden to be able to recommend approval on the basis of sixteen conditions with number 12 requiring drainage details to be treated as a reserved matter. Condition number 5 linked occupation to bona fide tourists and expressly prevented permanent occupation which reflected Mr Sinden's uncertainty (referred to in paragraph 11.10 above) as to whether the applicant's intent was limited to tourism. The applicant had nevertheless secured a permission albeit one which was substantially different from that sought in terms of both extent and use.
- 11.32 Such an outcome was in many ways typical of the department's approach to applications both now and at that time, in that it represented a philosophy of reluctance to refuse and a preference, with modifications, to approve. This approach was particularly stressed by Mr Magee, the Secretary to the Planning Committee at the time, in his evidence to the Commission.³⁴ He indicated that Planning Officers and the Planning Committee "were inclined not always to answer the question they were being asked" and described it as "common practice" for the applicant to ask for one thing and the officers and Committee to actually agree to

³³ Mr Sinden Document Q12 Appendix 1

³⁴ Evidence of Mr Magee Q14 Transcript Day 11 pages 47 & 48.

something different because “they didn’t like saying no”. He advised against it on many occasions but it persisted, as was later agreed in evidence from the Planning Officers. Mr Sinden confirmed that Mr Magee regularly advised that applications should be determined “in precisely the form they were submitted. It nevertheless was, and to an extent remains, our practice to approve applications subject to conditions which have the effect of varying the proposal in some way.”³⁵ Miss S Corlett indicated that, subject to the scale of the change “the practice of issuing decisions which answer slightly different questions to the ones which were posed in the application is one which was and still is used in the department.”³⁶ The use of modifications in this way, which both Mr Sinden and Miss Corlett continued to defend in their responses to criticism in the draft report,³⁷ is not acceptable practice and we refer to it later in this section (paragraphs 11.76 and 11.77) and in our recommendations. It is sufficient to note here that Circular 11/95 of the Department of the Environment (England and Wales), to which both Miss Corlett and Mr Sinden refer in defence of their position, does not in fact refer to modifications but to the use of conditions as enabling and enhancing. Mr Cretney, chairman of relevant Committee meetings in 1991, in written representation³⁸ to us did not accept that this practice occurred, nor did Mr Faragher, but the evidence, as we have indicated, is compelling that it did, and does, take place.

- 11.33 In the case of application PA 90/1842 Mr Magee suspected that it was being dealt with in this way i.e. as a modification of what was actually submitted.³⁹ He added that the Committee were inclined to take the view that “if the applicant is unhappy, he can seek a review” (which, it may be noted in passing, serves to reinforce the Commission’s concern about the two stage process). He believed that was “indeed what happened in this instance, but the applicant did not seek a review against that condition [number 5].” As we have noted at paragraph 11.30, the applicant had secured a permission, albeit not as applied for, which was quite clearly seen as the first stage of an incremental approach.
- 11.34 It is apparent to the Commission that at outline stage the fact that the intent of the applicant was not made more explicit was at least partly due to the unfortunate practice of the Committee to approve a form of development it found supportable, rather than face up to and possibly have to refuse what was actually applied for. If there were doubts and suspicions from such perusal of the submitted documents which did take place, (and there were as we later point out) this could be addressed by modifying the decision with appropriate conditions to conform with the Development Plan, reinforced by the fallback position offered by a review.
- 11.35 The sequence of events leading to the decision on review has been set out in section 3, paragraphs 3.39 to 3.42. The applicant’s case centred wholly on the issue of the extent of the site with approval now sought for development on the open agricultural land at the rear, exactly as had been proposed in the first place with the original submission which, as already noted, was deferred and not withdrawn. The increase in site area over and above that as zoned was approximately 130% which, in the Commission’s opinion, was a change of such magnitude as to raise considerable doubts about the appropriateness of using a review procedure instead of treating the altered scheme as a new application. The Commission’s understanding of Schedule I to the 1982 Order is that a review

³⁵ Letter from Mr Sinden Q12 26.7.02

³⁶ Letter from Miss Corlett Q13 30.7.02

³⁷ Annex 4

³⁸ Annex 4

³⁹ Evidence of Mr Magee. Q14 Transcript Day 11 pages 47 & 48

relates to the previous initial decision subject to any limited variation that paragraph 11 of the Schedule might allow. However, we have already noted the practice at this time of accepting amendments and, in this case, there seems to have been no procedural query raised.

- 11.36 The applicant's case was, as we have seen, based on the argument that plan 1A had "so strayed from the original concept as to be less aesthetically pleasing and economically unviable". This derived from an attachment to a letter from Mr Spence to the Secretary to the Planning Committee dated 20th March 1991.⁴⁰ The attachment referred almost entirely to visual factors such as the need for water features and for rural attractiveness. It did however state at paragraph 2.5 that the total number of beds (500 in the covering letter) had to be as originally proposed to allow the facilities complex to be developed. No justification of this was provided and none appears to have been requested.
- 11.37 Significantly, it is clear to the Commission that at this stage the influence of the Department of Tourism was starting to become apparent. Mr Spence met the Minister, Mr Bell, for at least the second time on 20th March 1991 and subsequently met with Messrs Watson, Sinden, Vannan and Magee on the same or next day.⁴¹ There are no records of these meetings but Mr Magee recalled that at the meeting on 20th March 1991 the intended use of the housing was explained. The explanation was similar to that in the Buyer's Guide. The other three officers were unable to assist us on what was said. Following these meetings Mr Mitchell, then a development consultant with the Department of Tourism, wrote to the Planning Committee Secretary on 3rd April committing support to the forthcoming review.⁴² In part of that letter he said: "The consent as presently given does not allow sufficient core development to achieve viability" but the Commission has seen no evidence of any kind, either then or at any stage, to indicate that the scale of development needed to achieve viability, as claimed by the applicant, was ever supported by any commercial evaluation. Mr Mitchell appears simply to have restated the applicant's own assertion and the Committee to have accepted that without question.
- 11.38 In the meantime planning responsibility for progressing the review had been taken over largely by Mr Vannan. Mr Sinden, concerned about the precedent which a large development on open agricultural land had set, nevertheless wrote to Mr Vannan on the 11th April 1991 making it clear that there was no doubt about the extent of the unzoned land and asking whether "the applicant has demonstrated clearly and irrefutably that the 18 acre wooded [zoned] site could not be used for a successful tourist accommodation scheme."⁴³ The evidence of Mr Magee, as Committee Secretary, and of Mr Sinden himself was that the Planning Committee did take account during the review meeting of Mr Sinden's views, but that these were not concurred with by Mr Vannan.⁴⁴ Mr Vannan had recommended to the Committee that the application be supported on the basis of a revised condition number 4 (relating to the amended and extended layout). The restriction on tourism use which had not been raised by the applicant as an element of the review was, however, retained.
- 11.39 It is a matter of some concern and surprise to the Commission that no report, even as a basis for oral presentation, appears to have been prepared for the review

⁴⁰ File A pages 44 - 49

⁴¹ File A page 50

⁴² File A page 51

⁴³ File A page 52

⁴⁴ Evidence Mr Sinden Q12 Transcript Day pages 41-45; Mr Magee Transcript Day 11 pages 33 & 34

meeting on 12th April 1991. The Committee nevertheless approved the application subject to the recommended conditions. We thus arrive at a position where the applicant had achieved a permission to build on a significantly extended area outside the Development Plan guidelines. In doing so, the applicant does not appear to have been required to demonstrate why the scale of development proposed, involving a major departure from the Development Plan, was needed to secure viability. The Committee nevertheless came to a judgement on what was before it, which it was entitled to do.

11.40 We have referred above to the fact that at this stage the applicant did not seek a review of the occupancy condition so as to allow permanent homes even though the approval given on 12th April related to an application of which the Buyer's Guide and the Notes of Presentation were still a part. Mr Willers and Mr A Gubay were not prepared to answer the Commission's questions as to the reasons for this although, based on Mr Willers' evidence regarding the normality of an incremental approach, the Commission consider that the applicant simply preferred to leave that critical feature to a later stage and to later argument. They had achieved an extension of the area which could be developed, and were shortly to seek a relaxation of the tourism constraint as we consider in sub-section (v) below. These were both elements within the overall scheme for which they were seeking ultimate approval.

11.41 As for the Planning Committee at the April meeting, the evidence of Mr Magee (see paragraphs 11.33 and 11.34) indicates that it had some understanding at that stage of the developer's intent to achieve at least some permanent residential use. That understanding was not achieved as a result of officer advice, but the Committee's concerns were no doubt assuaged in any case by the imposition of condition number 5 on PA 90/1842 (limiting to tourism use). Mr Vannan said, in evidence, that the use of houses for permanent homes was not clear at the time "because I don't think that any of us fully appreciated that that was the intention. We were looking at it as a tourist based facility".⁴⁵ However, the Commission is satisfied that he was already aware from Mr Watson that the applicant had a wider intent and believes that, even at this early stage, the Committee were either being knowingly misled, or attempts were being made to that end.

v) The First Full Application for Housing and the Events leading up to it.

11.42 Section 3 of this report (paragraphs 3.44 to 3.66) has set out the basic sequence of events which followed the review decision on application PA 90/1842, up to the second initial decision on application PA 91/0953 issued on 4th October 1991. We consider below the evidence from Planning Officers, members of the Planning Committee, and of government in relation to these matters, but a number of general points need to be made.

11.43 First, it is evident that within a very short time following the April decision, the applicant was expressing concern about the occupancy condition (on which it had chosen not to seek a review) not, so far as the Commission is aware, by way of representations to the planning office or by way of appeal but, at least in the first instance, through the Department of Tourism. There is no explicit evidence to indicate why this strategy was followed, and the "recent correspondence" referred to in Mr Bell's letter to Mr Spence of 9th May 1991, if it still exists, is not in the files which we have been able to acquire and examine. The Department of Tourism was however known to be presiding over a period of decline in tourism and it is unsurprising that it should be in strong support of the development at Mount Murray

⁴⁵ Evidence Mr Vannan Q32 Transcript Day 20 page 21

which it had already endorsed at outline stage. A direct approach by the applicant to the Planning Officers to secure permanent residential use, without the support of the Department of Tourism, could have risked rejection.

- 11.44 The second general point is that no dissatisfaction appears to have been expressed to the planning office concerning the consent it had just given, and there is equally no evidence that Planning Officers themselves were personally present at the meetings which Mr Bell evidently had with Mr Spence. Mr Bell's reference in his subsequent letter to Mr Spence to "a more appropriate planning solution" and to "the possible shortcomings of the planning system" derive, in the Commission's view, from Mr Bell's wish for development to proceed and from an apparent realisation based presumably on the pressures from Mr Spence to the effect that the developer was unlikely to proceed with occupancy restricted to tourism.
- 11.45 In his evidence to the Commission Mr Bell explained his comments in the letter to Mr Spence as being related to difficulties with the planning office in finding a definition for timeshare "that fully satisfied Planning and fully satisfied Tourism demands at the same time".⁴⁶ Mr Bell put substantial weight on this argument as explanatory of other statements including telephone calls which he was later questioned about during the giving of evidence.
- 11.46 The Commission feel it quite certain that if this was really such a fundamental issue and had in fact been raised with Planning Officers, there would be evidence to that effect by way of correspondence, memoranda or meeting notes. We have not been able to obtain such evidence but we do not accept Mr Bell's reasons for his comments to Mr Spence. There is, in our view, little doubt that Mr Bell's letter to Mr Spence of 9th May expresses exactly what was intended, and that Mr Bell would use his position to assist the applicant in getting the terms of the consent changed. Later events in no way alter the Commission's view on this matter.
- 11.47 Sometime between Mr Bell's letter of 9th May and 13th May it is evident that a meeting took place between Mr Bell, Mr Vannan and Mr Vannan's then Chief Executive, Mr Savage.⁴⁷ It is also clear from the letter which Mr Vannan subsequently sent to Mr Bell on 13th May (and which the minister then faxed on to Mr Spence) that this was intended to "confirm" matters previously discussed. The importance of this is that all three were aware and evidently supportive of the key statement in Mr Vannan's letter of 13th May that "the planning conditions attached to PA 90/1842 ... are in no way in conflict with the principle of the development as set out in the documentation attached to the application". Without exception, all witnesses who, having considered this documentation, were then asked to consider the accuracy of what Mr Vannan had said, agreed that it was completely incorrect. Mr Vannan himself, whose evidence we examine later, indicated that he was aware that it was wrong when he wrote it.⁴⁸
- 11.48 Mr Bell's telephone message⁴⁹ left with Mr Spence on the same day as Mr Vannan's letter is referred to in detail at section 3 (paragraph 3.47). It is sufficient to state here that it made quite explicit reference to permanent residential accommodation as allowable under the present conditions, notwithstanding that Mr Bell was to say later in evidence that "I am absolutely clear in my mind that we did

⁴⁶ Evidence of Mr Bell Q9 Transcript Day 9 page 10

⁴⁷ File A page 59

⁴⁸ Evidence of Mr Vannan Q32 Transcript Day 20 pages 54 & 55

⁴⁹ File A page 189

not discuss permanent accommodation.”⁵⁰ It also claimed Planning Committee confirmation of this position, but the Commission found no evidence either by way of an agenda item or a minute to support this contention, whilst members of the Committee at the time, in evidence, either had no recollection of having confirmed such a position or indeed of it ever having come to the Committee. The chairman at the time, Mr Cretney, was emphatic saying that “it certainly was not confirmed by the Planning Committee.” He was equally clear that Mr Vannan’s letter of 13th May had not been seen by him or by the Committee.

- 11.49 Mr Bell’s statement to Mr Spence that the Planning Committee had given clearance was quite erroneous, but indicated his central involvement in these matters and that he knew what he was doing. Mr Bell himself, in evidence, claimed limited recollection and stated that the information must have been given to him “on behalf of the Planning Committee rather than directly”.⁵¹ So far as the Commission are concerned, it is difficult to escape the conclusion that the telephone message to Mr Spence again reflected Mr Bell’s clear intent to assist the applicant by securing the permanent residential use which the company was seeking.
- 11.50 One other feature of the telephone message should be mentioned here and that is the reference to “a letter of comfort coming from the Planning Committee” which, based on the views expressed in paragraph 11.48 above was a matter of which it had no knowledge. In point of fact, it was the Chief Executive, Mr Savage, who wrote to Mr Spence on 16th May. This letter has been referred to above (paragraphs 3.48 and 3.49) and was not sent on behalf of or with the knowledge of the Planning Committee. Quite apart from inviting Mr Spence to submit a “draft agreement for sale” for approval by the Committee, the letter is significant for several other reasons apart from its curious construction which we have referred to above in paragraph 3.49
- 11.51 First, it refers to previous letters of 13th May from Mr Savage himself to the Minister for Tourism and of 16th May from Mr Spence, neither of which have been located by the Commission. Second, and more significantly, it repeats the completely incorrect statement in Mr Vannan’s letter of 13th May (to the minister) that planning condition numbers 5 and 6 of PA 90/1842 were in no way in conflict with the principle of the development as set out in the documentation attached to the application.
- 11.52 The implications of the above are of great significance. Despite its odd construction, the letter genuinely originated with Mr Savage and the Commission regards it as clear evidence that he was wholly involved with events of this time and that Mr Vannan was not acting alone. The extent to which Mr Vannan regularly briefed Mr Savage is not clear. However, it is known that Mr Vannan was under Mr Savage’s direction at the time, and whilst Mr Watson by his own evidence claimed not to have played a prominent role in matters pertaining to Mount Murray,⁵² he was well aware from the pre-application discussion of the developer’s intent, and could hardly have been unaware of the actions of Mr Vannan whose letter to Mr Bell of 13th May 1991 was copied to him. In addition, we refer below to the evidence of Mr D Killip, the Committee Secretary, who told us that both Mr Watson and Mr Vannan had advised the Committee on 4th October 1991 that the notice issued on 2nd October was erroneous and that Mr Watson was aware of the revised notice. Mr Watson’s involvement is not therefore in doubt.

⁵⁰ Evidence of Mr Bell Q9 Transcript Day 9 page 22

⁵¹ Evidence of Mr Bell Q9 Transcript Day 9 page 18

⁵² Evidence of Mr Watson Q3 Transcript Day 7 pages 127-128 and 134-135

- 11.53 The further and more fundamental implication of the letter from Mr Savage is that in accepting that occupancy in accordance with the Buyer's Guide (and other supporting documents) was also in accordance with the conditions of approval, he was effectively confirming that permanent residential occupancy was allowable. The Commission is in no doubt that Mr Savage (and Mr Vannan) understood this perfectly well, and does not accept Professor Crow's defence of the officials that "they acted in what they perceived as the best interests of the Island". There is little actual evidence for this and, even if there had been, the fact that the Planning Committee were in effect excluded from the process makes any such actions indefensible for whatever reason. It was for the Committee and the government to act in the best interests of the Island not Mr Savage and Mr Vannan.
- 11.54 The steps leading a few days later to approval by the Planning Committee on 24th May of a draft Agreement for Sale have been outlined earlier in paragraphs 3.50 to 3.54. As we have indicated there, the version before the Planning Committee referred to the principles of the Buyer's Guide rather than the wording of an earlier version which set out plainly and explicitly that permanent residential occupation was intended under the Mount Murray proposal. Whilst it appears to have been the Department of Local Government and the Environment which invited approval of the document, it is very clear that Mr Spence for the applicant would have demanded it in any event. A fax to Mr Mitchell in the Department of Tourism dated 23rd May says bluntly that "we have to have approval of the sales agreement" and uses this as a lever by threatening to "go elsewhere" without it.⁵³
- 11.55 This document significantly reinforced the intent to achieve permanent residential occupancy already forming part of the Buyer's Guide and in the boxed footnote signed by Mr Savage stated that use in accordance with the Buyer's Guide was acceptable notwithstanding condition numbers 5 and 6 of the approval. The Commission find it difficult to arrive at a conclusion other than that Mr Vannan and Mr Savage, as well as Mr Bell and Mr Mitchell, were at this stage aware of the implication of the Planning Committee's approval of the Agreement for Sale. As to the Committee itself, the type of document it had approved lay quite outside the matters defined as the Committee's remit in the 1982 Order. Mr Magee referred generally to similar earlier documents but was not able to substantiate this when invited to do so and there is little, if any, credible evidence to support his view that such a document had any parallel either before or since. Although the official minute is vague, the record set out in the informal Meeting Book (see paragraph 3.56 and 3.57 above) makes it clear that the Committee members did have an understanding of the significance of what they were approving. See also paragraphs 17.47 to 17.49 above as to the Committee members understanding on these matters.
- 11.56 We look later at the evidence given by Mr Vannan and others by way of explanation of these events. Either way, the position had now been reached where Mr Spence on behalf of the applicant had secured a planning approval for the full site area with one document, the Buyer's Guide, forming part of the approved application, and another, the Agreement for Sale, being "hereby approved by the Department of Local Government and the Environment Planning Committee under the terms of planning approval 90/1842". The boxed footnote is signed by Mr Savage and specifically says that "the use at paragraph (3) of the Second Schedule above is confirmed as being permitted notwithstanding condition numbers 5 and 6 of the said approval."⁵⁴

⁵³ File A page 63

⁵⁴ E3

- 11.57 The first detailed application was therefore submitted against the background of a Committee which continued to say it was limiting any development to tourism but had agreed a document which Mr Savage and Mr Vannan knew said exactly the opposite. Mr Magee's view, in evidence to the Commission, was that he did not feel that such an approval would alter the conditions attaching to PA 90/1842 i.e. he did not believe it had any effect at all.⁵⁵ He agreed that this confused situation was aptly described as "a mess" although he considered it to be one which was "by and large in the applicant's court".⁵⁶
- 11.58 The application itself, PA 91/0953, was submitted on 23rd August 1991 for the development of 150 house sites, roads and drainage. The first feature to note is that it was a full detailed application which was treated as such, and not an application for the approval of reserved matters as might have been expected in the light of the conditions attached to PA 90/1842, particularly condition numbers 2 (siting and design details) and 12 (foul sewage). Mr Sinden, in evidence, ascribed this to a deficiency in the planning application form.⁵⁷ The review decision of 12th April referred, at condition number 4, to an amended layout plan 1B but this is essentially illustrative and it is not possible to say how many houses it refers to, nor was it intended to do so.
- 11.59 In itself, the Commission does not see this as a matter of any concern. At paragraph 11.4 above, we indicate that we have taken the initial figure to be 150, and it was up to the Planning Officers and the Committee to judge whether that number could be satisfactorily accommodated within the site. They were not however helped in this regard by the nature of the submitted plan (number 16A) which was to be later described by Miss Corlett⁵⁸ in correspondence with the Forestry Officers as "schematic" and which was to lead, amongst other things, to the loss of trees during the course of development (referred to below in section 12).
- 11.60 As mentioned earlier in paragraph 3.61, the press advertisement for the scheme referred to "150 dwelling sites" with no mention of tourism. The Committee Secretary of the time, Mr Killip, did not accept that this was indicative of permanent occupancy and described it as acceptable in as much as the sites were "not to be developed for example as either shops or offices".⁵⁹ The Commission find this explanation to be unconvincing. A "dwelling house" is clearly defined in the 1982 Order as a house designed for use as a dwelling by a single family. In addition, the phrase "dwelling site" appears to be regularly used in the weekly lists at that time to describe permanent homes, and we find the advertisement for PA 91/0953 to be indicative of the fact that to some extent at least officials were aware of the intent. Nevertheless, we accept Mr Killip's subsequent representation⁶⁰ to the effect that this press advertisement was not at the time expressly brought to his attention, and that the explanation for the wording used was given in good faith.
- 11.61 It is relevant here to examine the way in which the conditions were prepared for the Committee at its meeting on the 13th September. The evidence to the Commission from Miss Corlett is to the effect that, following the Committee meeting, Mr Vannan invited her to prepare draft conditions. She had a clear recollection of him saying

⁵⁵ Evidence of Mr Magee Q14 Transcript Day 11 pages 70-72

⁵⁶ Evidence of Mr Magee Q14 Transcript Day 11 page 55, 71 and 77

⁵⁷ Evidence of Mr Sinden Q12 Transcript Day 10 pages 58 & 59

⁵⁸ Document C23 page 243

⁵⁹ Mr Killip Q15 Letter 17.10.2002

⁶⁰ Annex 4

“Do you want to have a go at drafting the notice for the Mount Murray applications?’ They were quite complicated and it would be good experience for me, so I presumed that’s why he asked me to do them.”⁶¹ In drafting the conditions, she said she had had particular regard to those previously attached to the outline application PA 90/1842 including the tourism occupancy condition and to additional, mainly technical, views which had been submitted in respect of the application. Her further recollection is that her conditions as drafted were then handed to and taken forward by Mr Vannan⁶² and formed the basis, without alteration, of the decision notice issued by fax on 2nd October. This recollection is supported by Miss Corlett’s initials being marked on the decision of the 2nd October 1991, and the evidence of Mr Killip, who although not present at the Committee meeting which made the decision, did confirm that the initialling showed that Miss Corlett had drafted the conditions, and accepted the fact that she had done so.⁶³

11.62 Mr Vannan’s perspective is somewhat different. He maintains that condition number 5 was drafted by him prior to the Committee meeting “because I had been involved in the meetings with Mr Savage and this was really the continuity which was coming from that meeting” and “in order to have continuity between the advice which had previously been given.”⁶⁴ The conditions which he said actually went before the Committee on 13th September 1991 did not however include his modification to condition number 5 which he said had been “changed to ... bona fide tourists.”⁶⁵ The reason for taking the application to the Committee on 4th October 1991 he told us was partly at least to correct this error. Mr Killip’s evidence supports this last claim. He told us that Mr Vannan’s argument to the Committee was that the 2nd October decision had been incorrectly drafted and should have reflected earlier agreement on occupancy. Mr Savage’s view had been relied upon.⁶⁶ Miss Corlett, for her part, was unaware of any further conditions being prepared, modified or otherwise after she handed her draft to Mr Vannan subsequent to the 13th September 1991 Committee meeting.⁶⁷ We consider this discrepancy later in this section at paragraphs 11.78 and 11.79. Suffice it to say here that the Committee minute simply says “approved” and records no consideration being given to the modification of the tourist condition which it surely should have done if such a change had been mooted.

11.63 The application approved on 13th September was subject to the conditions referred to in paragraph 3.63 above.⁶⁸ These were unexceptional apart from number 4 which related to the approval of 13 submitted main house types (in three families), the location of each to be agreed with the Architect and Planning Officer. The planning application file shows the approved plan to be number 16A date stamped 11th September 1991 (confirmed to the Commission by Miss Corlett⁶⁹). It is noteworthy however that this plan shows only 11 main house types (together with 12 variations within them). As we shall see, the condition was shortly to be modified in other ways but the 13 main house types were to be retained without the submission of any other plan. This continued absence of a clear relationship between an approval and the plan or plans on which it was based was symptomatic

⁶¹ Evidence of Miss Corlett Q13 Transcript Day 10 page 109

⁶² Evidence of Miss Corlett Q13 Transcript Day 10 page 110

⁶³ Evidence of Mr Killip Q15 Transcript Day 18 pages 50-53

⁶⁴ Evidence of Mr Vannan Q32 Transcript Day 20 page 91

⁶⁵ Evidence of Mr Vannan Q32 Transcript Day 20 page 89

⁶⁶ Evidence of Mr Killip Q15 Transcript Day 18 pages 60 & 61

⁶⁷ Evidence of Miss Corlett Q13 Transcript Day 10 page 110

⁶⁸ File A pages 94 & 95

⁶⁹ Miss Corlett Q13 letter 30.7.2002 page 2 & memo 24.11.99 attached

of the lack of procedural precision at this time and was to have unfortunate implications for the quality of the estate which was eventually to be constructed at Mount Murray.

- 11.64 The review of this approval was sought in a faxed letter from Mr Spence on behalf of the applicant to the Committee Secretary on the same day as the issued decision notice (2nd October 1991). This asked for clarification of certain conditions but its actual proposals sought something far more fundamental.
- 11.65 On condition number 4, the original condition included in the notice of 2nd October 1991 required the specific location of each house type to be agreed with the Architect and Planning Officer. The modification now meant that the agreement of the planning office was only required where the developer wished to build a house other than of a type agreed for a particular site. The applicant's case for the change was based on flexibility of choice but it further weakened the degree of control on the part of the planning office when added to the fact that condition number 4 did not require agreement on the actual location of a dwelling within a plot. This was to have highly regrettable consequences particularly with regard to loss of trees which we consider later in section 12.
- 11.66 The change requested to condition number 6 was equally far reaching. As originally worded, agreement on the details of sewage treatment and facilities was quite reasonable and normally required "prior to the commencement of development". To change this to "work under this condition number" allowed the applicant to proceed with the whole development without such details being provided. Such a change was described to the Commission as unusual⁷⁰ and left the Department of Local Government and the Environment in a position where the securing of adequate sewage treatment facilities would be that much more difficult.
- 11.67 By far the most far reaching of the changes requested however was to condition number 5 and the linking of occupancy to the principles of the Buyer's Guide. The faxed letter of 2nd October 1991 refers to this "as previously agreed" which the Commission finds can only be a reference to the correspondence in May from Mr Bell and Mr Savage to Mr Spence (paragraphs 11.47 and 11.51). We have noted above that this effectively confirmed the acceptability of permanent residential occupancy but was not taken to nor seen by the Planning Committee which continued to presume that the original condition limiting occupation to "bona fide tourists" remained in place. It is a matter of argument as to whether an Agreement for Sale, whatever its wording, can override the conditions legitimately attached to a planning permission in accordance with legal and statutory procedures. The Commission's opinion is that in itself it cannot. Nevertheless the aggrieved stance taken by the applicant after the 2nd October decision was hardly surprising. The Agreement for Sale was not binding in itself and the Committee had its suspicions, but the pragmatic effect of its approval was substantial and made the position of the Committee very difficult, if not impossible, to sustain.
- 11.68 The modifications to the various conditions including those referred to above were approved by the Committee and issued in a notice by the Secretary on the same day, the 4th October 1991 only two days after the issue of the first decision. In terms of procedure the applicant had asked for a review but Planning Officers treated the situation as one of a reconsideration of the initial decision. It is relevant to note here that Professor Crow said of this approach that "as I see it, the issue of a second initial decision notice was highly irregular and in my understanding of the

⁷⁰ Evidence of Mr Teare Q41 Transcript Day 19 page 96

law based on the practice of the England and Wales Planning Inspectorate was invalid.”⁷¹ The Commission agrees with this view. The Commission also considers that there is no reason why Mr Vannan, as an experienced professional officer, should not have been well aware of the unlawfulness of the irregularity he was perpetrating, as might Mr Watson, Chief Architect and Planning Officer, who, on the basis of evidence of Mr Killip which we accept, had also advised the Committee that a second initial notice could properly be issued.⁷² We note in passing that Mr Watson was later to observe in a memorandum to the Chief Secretary⁷³ that such second notices were not unique and claimed in his later representation⁷⁴ that the notice (of 4th October 1991) was not without precedent. Mr Watson here acknowledged in retrospect the dubious legality of a procedure which, had it not been followed, might have facilitated a closer scrutiny of the applicant’s intention at review stage.

11.69 Mr Vannan should have been even more aware of the technically flawed nature of the modified condition number 5 which he persuaded the Committee to accept. To link directly to a condition and, in its entirety, a lengthy, undated, external document which did not even mention the word “principles” was professionally irresponsible. Such a condition would, at least, have failed to meet any test of precision, a point of which a senior, experienced Planning Officer simply could not have been unaware, and more junior staff recognised immediately.⁷⁵ The other modifications to condition numbers 4 and 6, although less far reaching, were of considerable significance, but there is no indication from the minute that the implications of the changes or the reasons for making them were made clear to the Committee. We return later in this section to address the question of why Mr Vannan acted as he did and why the Committee accepted and approved the changes. The Committee may have been in a state of some uncertainty and undoubtedly attempts were made to mislead but it was not, by that stage, as we have indicated in sub-section 3 (vii) and later, entirely unaware of the implications of substituting a condition maintaining a tourist restriction with one which incorporated the Buyer’s Guide.

vi) The Evidence of the Junior Planning Officers

11.70 In this and the remaining parts of this section we examine the specific evidence given by those most closely involved with the events at Mount Murray up to November 1991. We start first with Mr Sinden and Miss Corlett.

11.71 Mr Sinden confirmed to the Commission that he was the originator of condition number 5 attached to the initial (outline) application PA 90/1842: “The proposed buildings must be occupied only by bona fide tourists; permanent occupation of the buildings is not permitted”. He acknowledged that the latter part of this condition was a strengthening of a standard condition added because of his uncertainty over the intent of the documents accompanying this application, which we have referred to in paragraph 11.10 above. Mr Sinden also emphasised in evidence the weight attached to the Development Plan indicating that “it was rare to grant permission other than in accordance with it.”⁷⁶ In the case of PA 90/1842 he took the view that “the reasons for making an exception to the Development Plan had not been

⁷¹ Document C6 Crow Report paragraph 1.26

⁷² Mr Killip Document Q15 page 2

⁷³ File A page 140

⁷⁴ Annex 4

⁷⁵ Evidence of Miss Corlett Q13 Transcript Day 10 page 114

⁷⁶ Evidence of Mr Sinden Q12 Transcript Day 10 page 32

advanced. If one is going to make an exception there needs to be an exceptional reason to do so.”⁷⁷

- 11.72 Mr Sinden was not impressed with the reasons advanced by the applicant for making that exception which partly at least prompted his internal memorandum to Mr Vannan of 11th April to that effect.^{78 79} Mr Sinden must be criticized for his failure to examine the Buyer’s Guide and other supporting documents (see below) but his otherwise responsible attitude is to his credit. He ensured that the Committee faced up to the issues raised by a major departure from the Development Plan and, at least at that stage, ensured that the tourist occupancy condition was retained, even if his reasons for doing so were more instinctive than reasoned.
- 11.73 On other matters, Mr Sinden considered the formal involvement of the Minister for Tourism and that of the Chief Minister (prior to application) to be unusual but that “attempts to persuade the Planning Committee one way or another” were not. He also indicated that the use of the phrase “bona fide tourist” was well established and on the subject of timeshare said that “we [the planning office] would have been content that some sort of timeshare arrangement would have complied with the condition as attached”⁸⁰ (it will be noted that this is contrary to Mr Bell’s contention on this point in paragraph 11.45 above).
- 11.74 With regard to the crucial paragraph of Mr Vannan’s letter to Mr Bell of 13th May 1991 and Mr Savage’s letter to Mr Spence of 16th May claiming consistency between the documentation attached to this application and condition numbers 5 and 6, Mr Sinden regarded both as “wrong”.⁸¹ He was clear that the subsequent Agreement for Sale was unusual and maintained that “the Committee was not empowered to alter their decision [PA 90/1842 on review] to the extent if any that this proposal sought to do”⁸² In addition he was equally clear that “there was no power given to the Planning Committee to issue a second notice [on 4th October 1991] or make a second decision other than on review”⁸³ and he agreed with Professor Crow that this second notice was invalid.
- 11.75 As to the amended condition number 5 in the notice dated 4th October 1991, in answer to the question as to whether the reference to the Buyer’s Guide disguised the effect of what the Committee were being asked to decide, Mr Sinden’s response was “intentionally, or otherwise, I think it does, yes.”⁸⁴
- 11.76 On the Buyer’s Guide itself, Mr Sinden did not claim he had read it, and we have noted earlier (paragraph 11.71) that the tourist occupancy condition reflected some uncertainty on his part as to the applicant’s real intention. He also accepted that the Planning Committee should have been made aware that permanent residential was one of the uses proposed.⁸⁵ A point of concern to the Commission however is his conjecture (acknowledged as intended to be helpful) that even if the document had been read in full “the shape of the approval emerging from the Committee would

⁷⁷ Evidence of Mr Sinden Q12 Transcript Day 10 page 34

⁷⁸ Evidence of Mr Sinden Q12 Transcript Day 10 page 36

⁷⁹ File A page 50

⁸⁰ Evidence of Mr Sinden Q12 Transcript Day 10 page 50

⁸¹ Evidence of Mr Sinden Q12 Transcript Day 10 pages 51 - 53

⁸² Evidence of Mr Sinden Q12 Transcript Day 10 page 56

⁸³ Evidence of Mr Sinden Q12 Transcript Day 10 page 62

⁸⁴ Evidence of Mr Sinden Q12 Transcript Day 10 page 67

⁸⁵ Annex 4

have been the same".⁸⁶ In other words he was saying that even if the Committee were aware that permanent residential occupancy was part of the application in addition to tourism, instead of refusing it they would have approved a modified scheme more in accordance with the Development Plan. It should be noted here that the Commission considers that the Committee was aware of the objectives of the application but is satisfied that at no stage did the Committee realise that the estate might become completely residential

- 11.77 The Commission believes the modification of some applications may derive to some extent from the cushion provided by the review stage. In other words, if an applicant does not like the modification brought about by the imposition of conditions, they can always request a review. Either way, such an approach is flawed and inappropriate because it represents poor practice, it creates uncertainty about what is actually determined, and most particularly, it can deprive interested parties of their right to make representations through lack of awareness and understanding of the extent of the modification. We make reference to this in our conclusions and recommendations. We consider that officers should not have allowed such a practice to persist (other than in a minor way on very minor proposals) but feel that Mr Sinden may not have been in a position to influence the matter. He can and should be criticised for his failure properly to read the Buyer's Guide and other supporting documents, but he did not seek to defend this later and the Commission found his evidence to be clear and consistent, whilst his views on subsequent events, when he was no longer directly involved, were of considerable assistance.
- 11.78 In the case of Miss Corlett, her statement to the Commission⁸⁷ indicated that she did not get involved in the applications for Mount Murray until towards the end of September 1991 when, as earlier indicated, Mr Vannan asked her to draft an appropriate notice following the Planning Committee meeting of 13th September 1991. Miss Corlett told us that she received no instruction on the content of the notice nor any indication that the occupancy condition should be changed.⁸⁸ With regard to Mr Vannan's contention, which we explained in paragraph 11.62 above, that he did prepare draft conditions prior to the Committee, including a modified condition number 5 which was then altered back by someone prior to the meeting, she did not claim he did not do so but that he didn't bring it to her attention.⁸⁹ Her clear recollection was that she did not draft conditions until after the meeting and did not recall anything being on the file which said that any conditions had been drafted prior to the Committee meeting.⁹⁰
- 11.79 The Commission has not been able to confirm categorically the sequence of events at that time because relevant documentation on the planning application file, such as it is, is undated. Mr Vannan was quite clear that he drafted a revised condition number 5 prior to the Committee meeting,⁹¹ but the Commission has no reason to dispute Miss Corlett's involvement as being limited to the drafting of conditions on Mr Vannan's behalf following the September Committee meeting and that, in doing so, she relied on the outline approval (PA 91/1842) in the absence of any instructions to the contrary nor any evidence that the Committee at its meeting had changed its position on the matter of occupancy.

⁸⁶ Evidence of Mr Sinden Q12 Transcript Day 10 page 76

⁸⁷ Miss Corlett Document Q13, paragraph 3.1

⁸⁸ Evidence of Miss Corlett Q13, Transcript Day 10 page 110

⁸⁹ Evidence of Miss Corlett Q13 Transcript Day 24 page 3

⁹⁰ Evidence of Miss Corlett Q13, Transcript Day 24 page 3

⁹¹ Evidence of Mr Vannan Q32 Transcript Day 20 page 90

- 11.80 Miss Corlett had no input to the drafting of the revised notice which emerged from the planning office on the 4th October which she stated was done by Mr Vannan as it was marked with his reference.⁹² She considered that it was extremely unusual for a notice to go out on the same day as the Committee meeting,⁹³ and she thought it unlikely that the Committee would have seen the final form of the conditions because “that’s just not how we did things in those days”.⁹⁴ On the modified condition number 5 itself, she told us that its vagueness would fail the test of precision and therefore it was invalid. She added that the notice itself was invalid because one cannot issue a second notice. That gave a second reason why the condition was invalid; an invalid notice also invalidates the condition.⁹⁵
- 11.81 Miss Corlett’s evidence referred at some length to the later difficulties created for the department in controlling the implementation of the approval due to the inaccuracy of the plans and their schematic nature, and the multiplicity of house types on any one plot allowed under condition number 4. These matters are considered further in the next section of our report.
- 11.82 The Commission take the view that it is self evidently important for officials to read relevant documents thoroughly, a view which Miss Corlett fully accepted, stating that “it is important and correct conduct for a Planning Officer to read documents ... that form part of the application.”⁹⁶ This applied equally in the case of Mount Murray to the Agreement for Sale on which she commented with some force that she did not know “what it has to do with the Planning Committee or why they were even considering it”.
- 11.83 The Commission is aware that in 1991 Miss Corlett was a relatively inexperienced officer but we were impressed by the manner in which her evidence was given, and by the way she dealt with the subsequent difficulties which the Mount Murray decisions in 1991 and 1992 were to create. We refer to these in section 12 below but it may be noted here that Miss Corlett drew the difficulties of reconciling plans with approvals to the attention of the Director of Planning, Mr Vannan, in an internal memorandum dated 24th November 1999 to which she received no response. Even by the end of 1999, therefore, the running of the planning office by government was still unsatisfactory.

vii) The Evidence of the Planning Committee

- 11.84 We have indicated earlier in this section that the position taken by the Committee chairman and members throughout 1991 and up to 1997 was that all the Mount Murray planning applications were for tourism purposes and that there was no evidence put to them of any other intent. Whilst that is the stated position of the members, we refer below to reasons why we consider there was some degree of understanding by at least certain members that their decision could result in an element of permanent housing.
- 11.85 The chairman of the Committee at most of the key meetings in 1991, Mr Cretney, said in evidence as we have seen above at paragraph 11.25 that the Planning Committee only supported the scheme at Mount Murray on the basis that it was a

⁹² Evidence of Miss Corlett Q13 Transcript Day 10 page 111

⁹³ Evidence of Miss Corlett Q13, Transcript Day 10, page 112

⁹⁴ Evidence of Miss Corlett Q13, Transcript Day 10, page 113

⁹⁵ Evidence of Miss Corlett Q13 Transcript Day 10 page 113-114

⁹⁶ Evidence of Miss Corlett Q13, Transcript Day 11, page 11

tourist development and nothing else.⁹⁷ Importantly Mr Cretney also stated that a visitor to the Island on a timeshare basis fell within the definition of a tourist as intended in condition number 6 to PA 90/1842 at both initial and review stages.

- 11.86 In respect of the documents, Mr Cretney's position was that he could not recall seeing either the draft Agreement for Sale nor recall the correspondence referred to in the minutes as being reported upon by Mr Vannan at the meeting on 24th May 1991. He was adamant that if he had read it, he would not have approved the former. On the correspondence itself (Mr Vannan's letter of 13th May 1991 to Mr Bell and Mr Savage's letter of 16th May 1991 to Mr Spence), he agreed that, as worded, claims that condition number 5 and 6 were not in conflict with the documentation attached to the application (PA 90/1842) were clearly wrong.⁹⁸ With regard to the telephone call from Mr Bell to Mr Spence on 13th May 1991, his view was that "it's certainly not truthful in terms of what the Planning Committee position was at that time."⁹⁹ The Buyer's Guide itself was apparently not seen by Mr Cretney until the time of Professor Crow's investigation although he accepted, having looked at it, that it contemplated use of the houses as permanent homes.¹⁰⁰
- 11.87 It was pointed out to Mr Cretney that the approval notice issued on 2nd October permitted tourism and therefore permitted timeshare so that at least from the Committee's point of view there should have been no need for any further modification. Mr Cretney could not satisfactorily explain in his own oral evidence to us why he nevertheless accepted Mr Vannan's assertion that condition number 5 needed to be changed. He maintained that he and his colleagues thought they were clarifying the tourism definition within the condition but felt, with hindsight, that "we were either knowingly or otherwise, misled."¹⁰¹ In his later written representation to us¹⁰² he drew attention to his position which we have set out at paragraph 11.9 above.
- 11.88 As the Commission see it from the above, the Committee, under Mr Cretney's chairmanship, agreed a draft Agreement for Sale which they had never read (and was a type of document rarely, if ever, put to the Committee). Mr Cretney has, in written representation,¹⁰³ taken issue with this on the basis that he had never seen the draft Agreement for Sale and therefore could not approve it. This representation confirms the error made on 24th May 1991 by the Committee in passing a resolution approving a document, a draft Agreement for Sale, which had not been seen, or read and without any proper understanding of its significance. Later, the Committee did not demur when Mr Vannan asked them to agree modified conditions, one of them referring to the Buyer's Guide, again a document which would appear not to have been seen, let alone read. The effect of these decisions was in the first instance to make later refusal of permanent residential use extremely difficult and, in the second, except for any constructional points as to validity of conditions, actually to allow it. The Commission accepts in both cases that the intent was not made clear by Mr Vannan. An attempt does appear to have been made to mislead the Committee although, as we have noted above at paragraph 11.9, the Committee were not entirely unaware of the implications of their decision. Suffice it to say here that Mr Cretney, in the light of the minutes, felt

⁹⁷ Evidence of Mr Cretney Q22 Transcript Day 17 page 15

⁹⁸ Evidence of Mr Cretney Q22 Transcript Day 17 page 23

⁹⁹ Evidence of Mr Cretney Q22 Transcript Day 17 page 26

¹⁰⁰ Evidence of Mr Cretney Q22 Transcript Day 17 page 22

¹⁰¹ Evidence of Mr Cretney Q22 Transcript Day 17 page 33

¹⁰² Annex 4

¹⁰³ Annex 4

that he was not given honest advice.¹⁰⁴ He nevertheless accepted that, as a member of the Planning Committee and indeed as chairman, it was his responsibility to be sure that he understood what he was being called upon to decide. Notwithstanding the evidence to the contrary, he asserted in oral evidence that it was the Committee which was making the decisions “100 per cent”,¹⁰⁵ as opposed to officers, and re-iterated this in his later written representation.¹⁰⁶ This is an opinion which the Commission is quite unable to share.

- 11.89 Turning to other members of the Committee, it can be seen from the minutes available to the Commission, that Mr Guard attended the meeting on 22nd April 1991 (review decision on PA 90/1842) and on 4th October 1991 (modification of a previously issued notice on PA 91/0953). Mr Guard’s recollection concerning the latter was limited but he indicated that he saw no papers prior to the meeting other than an agenda and a list of applications. He also recalled that issuing a decision notice on the day of the meeting was unique.¹⁰⁷
- 11.90 Mr Guard’s view of the 2nd October decision notice was that it not only said that permanent residents could not live there, but that that accurately reflected the wishes of the Planning Committee.¹⁰⁸ He said that the “Planning Committee to a man were not in favour of residential development on that site and, if it had been clearly stated to us at that meeting [4th October 1991] that we were being asked to allow any element of residency in those buildings, Mr Vannan would have been out in the corridor.”¹⁰⁹ The Buyer’s Guide was not seen by him until 1993, following a site visit to Mount Murray which made Mr Guard suspicious as to the uses intended, but he agreed (following later reading of it) that the change from 2nd October to 4th October was crucial. He also took the view that the change to permanent homes could only be read into the minutes if one was completely conversant with the Buyer’s Guide.¹¹⁰ The change was more than a matter of terminology and, as recorded in the minutes of the Committee, was totally obscure¹¹¹
- 11.91 In overall terms Mr Guard agreed that, as a Committee member, he should be informed of what the applications were about before making judgements although importantly he stated that the Committee never saw (or asked for) the original planning applications and relied heavily on the officers talking the matter through. This is a point to which we return later. Surprisingly Mr Guard said he did not see Mount Murray as any more important than other applications. Whilst the Commission fully appreciates that all planning applications should be determined on the basis of the (planning) matters set out in the 1982 Order, the magnitude and importance of the proposal would surely have warranted much greater care and attention than it apparently received.
- 11.92 Mr Faragher appears to have been present at all the important Committee meetings in 1991 with the exception of the review of application PA 90/1842 on 12th April 1991. He did not think that Mount Murray was going to turn into a permanent residential development and stressed the very different requirements which this

¹⁰⁴ Evidence of Mr Cretney Q22 Transcript Day 17 page 41

¹⁰⁵ Evidence of Mr Cretney Q22 Transcript Day 17 page 59

¹⁰⁶ Annex 4

¹⁰⁷ Evidence of Mr Guard Q4 Transcript Day 8 page 12

¹⁰⁸ Evidence of Mr Guard Q4 Transcript Day 8 page 14

¹⁰⁹ Evidence of Mr Guard Q4 Transcript Day 8 page 19

¹¹⁰ Evidence of Mr Guard Q4 Transcript Day 8 page 18

¹¹¹ Evidence of Mr Guard Q4 Transcript Day 8 page 19

would have implied¹¹² (later to become a factor of great significance.) He was never aware at the time of officers having any different view from the Committee about restricting the use to tourism.¹¹³

- 11.93 Unlike Mr Guard and Mr Cretney, Mr Faragher felt, with regard to the Agreement for Sale, that “long term residence, shall we say, as a small proportion of this concept (a resort village), was something that we perhaps knew of and accepted” but was “a million miles away from the concept of a residential development”. It is noteworthy here that Mr Faragher did not appear, by the use of the word “we”, to confine this viewpoint only to himself. He felt he could not say with certainty that he was misled at the meeting on 24th May.¹¹⁴
- 11.94 With regard to the Committee meeting on 4th October, Mr Faragher clearly saw the item on Mount Murray as “an amended notice of decision”¹¹⁵ not a review (even though this had been sought by the applicant). He felt that the minute was misleading and more closely related to the Buyer’s Guide itself¹¹⁶ which he did not see any time during this period. He was quite clear that if he and the Committee had truly understood what was happening by way of decision on 24th May and 4th October, the Committee would not have decided as it did. Like Mr Cretney, Mr Faragher agreed that it was the members who make (or should make) the decisions but, in practice, relied heavily on the officers. He thought that “we [the Committee] were reasonably understanding of what we were being asked to make a judgement on, otherwise we wouldn’t have done it” but added that “if I was aware of the implication of this decision that day [4th October 1991] was that we were going to open the doors to intensive and, as it subsequently turned out, primarily residential use on that site, then, no, we wouldn’t have made that decision.”¹¹⁷
- 11.95 The last member of the Committee at that time, Dr Moore, who attended all the significant meetings on Mount Murray in 1991 which we have been referring to, except that on 4th October, had only limited recollection of events. He said that following the meeting on 24th May, when the draft Agreement for Sale was approved, he was not aware that the conditions had changed.¹¹⁸ He accepted that, if the decision at Mount Murray was wrong because the Committee was misled or misunderstood, that would be of concern but he was in no doubt that none of the officers had ever advised the Committee that Mount Murray involved anything other than a tourist scheme.¹¹⁹ He did however say that he had a great deal of respect for the officers whom he assumed “knew exactly what was happening.”¹²⁰
- 11.96 There are a number of conclusions which can be drawn taking the evidence of the Planning Committee as a whole. On the balance of evidence from the Committee themselves and from the Committee minutes, the intent by the applicant to secure at least an element of residential development at Mount Murray was not made clear by the officers at any stage. In forming that opinion we have considered the effect of the practice of giving a planning permission somewhat different from that for which approval is sought. In other words, did the Committee have at least some

¹¹² Evidence of Mr Faragher Q8 Transcript Day 8 page 108

¹¹³ Evidence of Mr Faragher Q8 Transcript Day 8 page 110 & 111

¹¹⁴ Evidence of Mr Faragher Q8 Transcript Day 8 page 119

¹¹⁵ Evidence of Mr Faragher Q8 Transcript Day 8 page 120

¹¹⁶ Evidence of Mr Faragher Q8 Transcript Day 8 page 121

¹¹⁷ Evidence of Mr Faragher Q8 Transcript Day 8 pages 124 & 125

¹¹⁸ Evidence of Dr Moore Q35 Transcript Day 22 page 12

¹¹⁹ Evidence of Dr Moore Q35 Transcript Day 22 page 23

¹²⁰ Evidence of Dr Moore Q35 Transcript Day 22 page 24

understanding of the applicant's intent but chose nevertheless to impose a tourist condition on the basis that the applicant could always fall back on a review or an appeal. The Committee Secretary at the time, Mr Magee, indicated in evidence that he believed this was what occurred (as we see in the next sub-section) and that would be consistent with the evidence of Mr Faragher (paragraph 11.93) and with the suspicions recorded by Mr Magee in the Planning Committee Meeting Book for the Committee meeting on 24th May 1991 (paragraph 3.56). An attempt was made to mislead the Committee by officers on whom they placed undue reliance but that does not excuse it from properly exercising its responsibilities for planning decisions rather than evading them by maintaining a tourist condition when it knew that the applicant's intent to some extent at least was otherwise. In the Commission's view the Committee breached the standard of care and competence it should have been expected to exercise in the public interest, although it could not have been expected to know that consideration of an amended notice of decision at the meeting on 4th October 1991 was outside their power and invalid. In that, the Committee were poorly advised by Mr Vannan and the Committee Secretary, a matter we consider below.

viii) The Evidence of the Committee Secretaries

- 11.97 The position of Committee Secretary was occupied by Mr Magee up to the end of June 1991 and thereafter by Mr Killip. Mr Magee described his role as management of the clerical staff and services to the Committee which included preparation of meeting agendas, procedural advice at meetings and production of minutes. He did however have some involvement in developing planning policies and local plans. Mr Killip was self evidently a new Secretary for that part of the period being considered here and whilst willing to answer any Committee questions, policy and planning matters were directed to the Planning Officers.
- 11.98 Mr Magee was present at the initial and review meetings in relation to application PA 90/1842 and, at the latter, believed the Committee were advised of Mr Sinden's views and that the report as put was "fair and balanced".¹²¹ Prior to that, Mr Magee had been involved in a meeting with the applicant's agent, Mr Spence, Mr Watson, Mr Vannan and the then Chief Executive, Mr Savage. His recollection of this is that the proposed use of dwellings as described were unusual and he "took comfort from the imposition of the tourism condition on the planning consent"¹²² as, he believed, did the Planning Committee. With regard to the condition itself, he had "no recollection of it being a problem"¹²³ and considered it to be "inconceivable that the Planning Committee would have made these decisions without the imposition of that condition".¹²⁴
- 11.99 With regard to the Buyer's Guide, Mr Magee believed he looked at it sometime between submission of the application and the initial Committee meeting and did not recall it as being particularly significant. When asked to look at it when giving evidence to the Commission, he accepted "that you don't have to read it that closely"¹²⁵ to be clear about its intent.
- 11.100 As we have noted earlier, it was Mr Magee who first drew the Commission's attention to the practice of the Committee whereby it gave the permission which it

¹²¹ Evidence of Mr Magee Q14 Transcript Day 11 page 33

¹²² Evidence of Mr Magee Q14 Transcript Day 11 page 37

¹²³ Evidence of Mr Magee Q14 Transcript Day 11 page 39

¹²⁴ Evidence of Mr Magee Q14 Transcript Day 11 page 40

¹²⁵ Evidence of Mr Magee Q14 Transcript Day 11 page 47

considered appropriate rather than refuse what was actually sought. He believed in the case of the review decision on PA 90/1842 that this was indeed what happened.¹²⁶ He had no reason to doubt that the Committee members had taken “some comfort”¹²⁷ (as he did) from the condition limiting the occupancy to tourism. However, as we have seen, there is evidence to support the view that the Committee did have some awareness of a residential intent, whether the officers told them or not, which was in effect set to one side by the retention of the tourist condition.

- 11.101 Mr Magee commented on the letter of 9th May 1991 from Mr Bell to Mr Spence,¹²⁸ that he was not aware of any need for a “more appropriate planning solution” or of “possible shortcomings of the planning system”. Further he could not agree with the contention in the May 1991 correspondence of both Mr Vannan in his letter to Mr Bell and Mr Savage in his later letter to Mr Spence that there was no inconsistency between condition numbers 5 and 6 of the outline approval and the supporting documents to the application.¹²⁹ He had no explanation for the letters but saw this correspondence as outwith the planning process and thought it would not change the condition on the planning consent. On Mr Bell’s telephone call to Mr Spence he said that Mr Bell’s contention that the present condition allowed for permanent residential use was “not true at all”.¹³⁰
- 11.102 As we have seen, a draft Agreement for Sale was considered by the Committee on 24th May 1991 apparently at the suggestion of the Chief Executive. Mr Magee was quite certain that the official minute on this item was his.¹³¹ From its style, he deduced that Mr Vannan reported on but did not circulate documents and that the Committee did not actually see the draft Agreement for Sale. Mr Magee agreed that the effect of approving it was to permit permanent homes but still maintained that this did not materially alter the terms of the planning permission.
- 11.103 We find that Mr Magee did not advise the Committee as he should have done at its meeting on 24th May 1991. He did not draw the Committee’s attention to the very unusual nature of the item which a Committee Secretary ought to have done. Mr Magee was not given any initial training for his role but by 1991 he had sufficient experience so that he should have realised that such a document needed greater care and should not have been dismissed as trivial. Initially Mr Magee told us that he agreed that approval of the draft Agreement for Sale created a terrible mess, but that he did not believe this to be sufficient reason for him to advise the Committee against considering the document.¹³² Later he agreed that it was his duty to avoid such mess,¹³³ and ultimately volunteered that he was perhaps trying to build a case as to why he did not give as much weight to the matter as he should have done.¹³⁴ Surprisingly in a second written representation¹³⁵ Mr Magee now maintains that his limited interest in documents such as the Buyer’s Guide and Agreement for Sale was understandable because ownership is not generally a planning issue. This statement avoids the point that permanent residential use, identified in those

¹²⁶ Evidence of Mr Magee Q14 Transcript Day 11 page 48

¹²⁷ Evidence of Mr Magee Q14 Transcript Day 11 page 37

¹²⁸ File A pages 57

¹²⁹ File A pages 59 & 61

¹³⁰ Evidence of Mr Magee Q14 Transcript Day 11 page 58

¹³¹ Evidence of Mr Magee Q14 Transcript Day 11 page 63

¹³² Evidence of Mr Magee Q14 Transcript Day 11 page 71

¹³³ Evidence of Mr Magee Q14 Transcript Day 11 page 78

¹³⁴ Evidence of Mr Magee Q14 Transcript Day 11 page 79

¹³⁵ Annex 4

documents, is a planning issue and contrasts with his oral evidence to us that if he had read the Agreement for Sale he would not have allowed the Committee to approve it (see paragraph 11.104). The Commission nevertheless understands the point made by Mr Magee in representations¹³⁶ to the Commission that, in 1991, there were insufficient resources to “facilitate the ideal”, but do not find that that problem is material to the matters identified in this paragraph or to him otherwise advising the Planning Committee appropriately on 24th May 1991.

- 11.104 In explaining his position and that of the Committee, he and they relied heavily and, in our view, unwisely on the planning permission already given to the extent that the Committee decision on the Agreement for Sale did not matter. The Committee had in fact formed some concern about the document as the reference to “accept suspiciously” in Mr Magee’s own Meeting Book confirms (paragraph 3.56), a record which Mr Magee no doubt did not expect would be exposed.¹³⁷ The remarkable difference between the wording of the official minutes and the private Meeting Book, by the same author, has not been explained. We make no further inference than that it is supportive of a view that there was in the mind of the author at least a suspicion that there was something amiss with the whole situation. However, it appears that neither he nor the Committee members read the Agreement for Sale and that no explanation of it was given at the meeting. Mr Magee indicated to us that had he read the document he would not have allowed the Committee to approve it. Whether or not this would have been the case, his apparent reliance on the force of the approval given by PA 90/1842 and his failure to read the document was a serious misjudgement.
- 11.105 The Commission nevertheless acknowledges the assistance of Mr Magee in providing information regarding planning procedures in 1991. His explanation of the Committee’s weakness in being reluctant to refuse applications was also of significance as the Commission see it, and provides some corroboration of our view that the Committee were not wholly ignorant of the actual intent of the applicant at Mount Murray, and that their decision effectively avoided the residential issue which the applications raised.
- 11.106 Turning to Mr Killip, he advised the Commission that he had no knowledge of the Planning Committee and its workings prior to appointment, and on appointment was not given any training, or briefing on those applications which were current and ongoing. He also indicated that at that time Mr Vannan had “particular responsibility for liaison with the developer” at Mount Murray.
- 11.107 On general matters, Mr Killip stated that, in his opinion, timeshare would fit with the tourist restriction in condition number 5 of PA 90/1842, and he confirmed also that it was the practice, as was the case with the first detailed application at Mount Murray, PA 91/0953 which went to the Committee on 13th September 1991, for conditions to be drafted outside the Committee and usually not referred back for subsequent agreement. Mr Killip was not present at this meeting but it was pointed out to him that the application appeared as a hand written addition to the agenda. He accepted this “probably” meant that the Committee did not know about the item until the meeting but said this was not unique and that, in any event, the information on the circulated agenda was limited in extent.¹³⁸ The implication of this appears to be that the agenda was really of little use to the Committee and that it did not matter if items were added at the last minute, regardless of their complexity. The

¹³⁶ Annex 4

¹³⁷ Mr Magee Q14 letter 10.10.2002

¹³⁸ Evidence of Mr Killip Q15 Transcript Day 18 pages 89

Commission accepts on this point that it had been standard practice, prior to Mr Killip's appointment to bring late items to the Committee in this way, that the agendas circulated were really of little use to the Committee, and that at the meeting on 13th September, the Committee do not appear to have sought additional time. The Commission find this approach to the conduct of business inappropriate and is illustrative of general poor practice in the planning office at that time. We also regard it as unfortunate that Mr Killip did not seek to question it, but we acknowledge that his lack of experience, training and briefing at that stage, itself also illustrative of poor handling of the planning office by government, would have made it less obvious to him that it was appropriate to do so.

- 11.108 Mr Killip attended the meeting on 4th October when the Committee agreed a second initial decision. He believed that the faxed letter of 2nd October 1991 from Mr Spence¹³⁹ which led to that change went directly to Mr Vannan. His recollection was that he did not see the letter before the meeting, pointing out that, had he done so, he would have initiated the review process which Mr Spence was requesting. His further recollection was that the modified conditions of approval contained within the revised notice were drafted by Mr Vannan¹⁴⁰ and brought to the Committee on the basis that the 2nd October notice "should not have been issued because it was incorrect" in that it had not taken account of "an earlier agreement or earlier application by which the document referred to as the Buyer's Guide had established the nature of occupancy of the buildings".¹⁴¹
- 11.109 He stated that Mr Vannan made reference at the Committee meeting to this earlier agreement and to Mr Savage's involvement in the previous discussions. Mr Killip did not recall the Committee querying the nature of this previous agreement. He agreed that the alteration to condition number 5 represented a fundamental change in occupancy which his minute did not make clear but he claimed that it reflected "what I understood to be the circumstances of the time." He did not agree that the change was covered up or disguised, but rather that language of far greater clarity as to the consequences of what the Committee was being asked to do should have been used by Mr Vannan.¹⁴²
- 11.110 With regard to the changes to condition number 4, house types; and 6, drainage, Mr Killip had no recollection of Mr Vannan explaining these and did not think the significance of the changes were made evident to the Committee. So far as the procedural irregularity of issuing a second initial decision notice was concerned (as later identified by Professor Crow) he did not draw this to the Committee's attention because he did not realise the importance of this himself.
- 11.111 The Commission's view with regard to the evidence of Mr Killip is that much of it was qualified in one way or another; in response for example to a question as to whether it would be unusual for something of the significance of PA 91/0953 to appear during the course of the day at the Committee meeting (as referred to in paragraph 11.107 above) his response was "it would be unusual inasmuch as it wouldn't be a common occurrence for initial planning applications."¹⁴³ On the processing of the same application, in answer to the question of whether the very short minute indicated that conditions were not discussed, or whether, if they had been, the minute book would record it, his response in both cases was "not

¹³⁹ File A pages 96-99

¹⁴⁰ Mr Killip Document Q15 page 1

¹⁴¹ Evidence of Mr Killip Q15 Transcript Day 18 page 60

¹⁴² Evidence of Mr Killip Q15 Transcript Day 18 page 69

¹⁴³ Evidence of Mr Killip Q15 Transcript Day 18 page 88

necessarily.”¹⁴⁴ His recollections also appeared to be more from the perspective of someone almost standing apart from the events of the time which, in a later response to criticisms at draft report stage, he ascribed to the lead position already taken by Mr Vannan and his view that it was not part of his role to challenge statements being made. Some allowance does need to be made for his unfamiliarity with the role, a circumstance not helped by the absence on the part of the department of any guidance or training. That said, however, Mr Killip appears merely to have accepted the position as stated by Mr Vannan at the critical meeting on 4th October and did not at any stage enquire as to what the so-called previous agreement was, nor examined the Buyer’s Guide despite incorporating this into the minutes. In short, he does not, regrettably, seem to have appreciated that his duties as Secretary did require an involvement on his part, and that the absence of clarity in what Mr Vannan said (paragraph 11.109 above) should not have gone unchallenged. Mr Killip has confirmed¹⁴⁵ that he has not intended any inference that Mr Vannan’s lack of clarity referred to in paragraph 11.109 above was incidental.

11.112 The argument by Mr Vannan to justify this second initial decision notice appears to have been the allegedly erroneous notice issued on 2nd October after the 13th September Committee meeting. That implies a procedural failing of some kind following that Committee to which the request for a review should have alerted Mr Killip. Mr Killip did not enquire into the nature of the previous agreement, instead relying largely on Mr Vannan’s reference to its existence. In the Commission’s opinion, Mr Killip should not have simply accepted the alleged error without investigation and should not have allowed the Committee to do so either notwithstanding his lack of experience, and notwithstanding his entitlement to place some degree of reliance on what this senior officer said.

11.113 Finally, on procedural matters, the Commission finds Mr Killip’s explanation as to why PA 91/0953 should have been presented to the Committee without notice at the Committee meeting on 13th September as unconvincing.¹⁴⁶ Mr Killip may be excused to some extent as he had barely started in his post, but it is still a matter of some surprise to the Commission that a major scheme in the form of a full application (not a reserved matter) should have been presented to the Committee in a way which allowed no time for proper consideration and should then have been minuted as approved without reference to any conditions.

ix) The Evidence of Ministers and Senior Officers

11.114 In the final part of this section, we review the evidence provided to the Commission by the then Chief Minister and other ministers responsible for the relevant departments in 1991, that is the Departments of Local Government and the Environment, and of Tourism. We also consider the evidence of the senior officials in the two departments involved and make comment insofar as we feel able where, for various reasons, oral evidence could not be taken.

11.115 We have noted earlier that the Chief Minister of the period, Sir Miles Walker, is recorded in the initial application as one of those with whom discussions took place prior to the submission. That contact is confirmed in a statement by the Chief Minister to the Commission dated 3rd July 2002,¹⁴⁷ and in oral evidence, and

¹⁴⁴ Evidence of Mr Killip Q15 Transcript Day 18 pages 90-91

¹⁴⁵ Annex 4

¹⁴⁶ Evidence of Mr Killip Q15 Transcript Day 18 page 87

¹⁴⁷ Sir Miles Walker Document Q16

consisted of two meetings with Mr Spence the first of which we have referred to in paragraph 11.21 above. The date of this meeting was prior to 14th November 1990 and shortly precedes a meeting with Mr Watson. The limited evidence available to the Commission suggests that such prior discussions were unusual but, in our view, are indicative at that early stage of the applicant's intent to pursue its objectives at the highest political level as well as through the required Committee process. It is also relevant to note our finding at paragraph 11.22 above that this aspect of the applicant's thinking, permanent residential use, was raised even at that early stage.

- 11.116 The position of Mr Brown was, or should have been, more central to the Mount Murray decisions. However, as we have seen earlier, in section 7, the minister maintains a detached position with respect to development control as a result of his ultimate responsibility for appeal decisions which considerably restricted Mr Brown's direct involvement in the events affecting Mount Murray in 1991.
- 11.117 We return below to the merits or otherwise of this arrangement but, in practice, it meant that Mr Brown knew little, if anything, of the Chief Minister's discussion and when asked if he was "not even curious as to why the Chief Minister should be getting himself involved with a planning application" replied that it was "nothing to do with me".¹⁴⁸ In a similar way when asked "wouldn't it be right for you as Minister to draw the proposal (the initial application) to the attention of the Council of Ministers because it was a proposal of major significance?" his response was that "As a Minister, I was not allowed to have an opinion."¹⁴⁹ He went on to say that because the land was identified for development, it was "a matter for the Planning Committee" and "not a matter that the Minister could get involved in".¹⁵⁰ In fact, the land "identified for development" was less than 50% of the total initially applied for so that the degree of departure from the Development Plan was considerable. In addition, Mr. Brown himself acknowledged to the Commission that he was made aware of the pressures relating to this application by Mr Savage.¹⁵¹
- 11.118 In terms of particular points of contact with material events, the letter sent by Mr Vannan to Mr Bell on 13th May 1991¹⁵² was copied to the minister, Mr Brown, which he explained on the basis that when an officer in one department wrote to another minister, he copied to his own minister. Mr Brown said that this did not imply any involvement on his part, and he maintained, contrary to the understanding of Mr Vannan, that he had no contact with Mr Bell at that time.¹⁵³ He was also asked whether he was aware of any pressure being exerted on his officials by Mr Bell and Mr Mitchell. Mr Brown indicated that he was aware in general terms from Mr Savage but seems not to have considered whether such pressure was reasonable, again on the basis of his detached position, nor to have appreciated that such pressure was indicative of the importance attached to the proposal by another minister. For the same reasons he was unaware of any ministerial involvement in the establishment of an agency agreement by the then Department of Highways, Ports and Properties which we have identified in section 14 below.
- 11.119 Local residents, Mr and Mrs Reeves, to whom we have referred earlier in sub-section (ii) were able to identify from the 4th October notice that the Buyer's Guide permitted permanent residential development, and later wrote to Mr Brown in

¹⁴⁸ Evidence of Mr Brown P14 Transcript Day 4 page 60

¹⁴⁹ Evidence of Mr Brown P14 Notes Day 4 page 52

¹⁵⁰ Evidence of Mr Brown P14 Notes Day 4 page 62

¹⁵¹ Evidence of Mr Brown Q49 Transcript Day 25 page 37

¹⁵² File A page 59

¹⁵³ Evidence of Mr Brown Q49 Transcript Day 25 pages 35 – 36

December 1992¹⁵⁴ pointing out the significance of the change. We look at Mr Brown's response to this in the next section. It is important to note here however that Mr and Mrs Reeves had earlier written to the Committee Secretary, Mr Killip in September 1991 as had Mr Midgley, another local resident, in February 1991 (in both cases before the first full application) drawing attention to the fact that, in their view, housing at Mount Murray might simply become private dwellings. There is no evidence before the Commission to indicate that the Committee saw this letter but, if so, it appears to have given it little weight perhaps in view of the tourism condition which, at that stage, remained in place. Mr Brown took the view that, in any event, they were simply raising a point of view which was not unusual and he seemed to attach no importance to the fact that the letter might have prompted the Committee to take a harder look before agreeing a schematic plan for 150 houses.¹⁵⁵

- 11.120 Finally, with regard to the events at Mount Murray as a whole, Mr Brown maintained that "I am satisfied there is nothing wrong with the [planning development control] system"¹⁵⁶ and that the problems were created by an officer exceeding his own authority (although he based this on the report of Professor Crow).¹⁵⁷ He was later to clarify his position by saying he was talking about the planning legislation and not the system of administration associated with the operation of the Committee.¹⁵⁸ Nevertheless, when asked what system he had in mind to ensure that if inefficiency was going on all the time it would be brought to his attention, he stated "I think it's a wild statement to say that it was always inefficient."¹⁵⁹ The Commission do in fact accept that Mr Brown did have a system both formal and informal for maintaining contact with his department which included his monthly departmental briefing meetings which he chaired. However, if Mr Brown took into such meetings his premise of total detachment from all development control matters, as opposed to questions of merit as advised by the Attorney General, then it is not surprising that this system did not work well. He was, in the Commission's view, unaware of the serious deficiencies in his department which we set out in this report.
- 11.121 The Commission's overall perception of Mr Brown's evidence is that, far from demonstrating that the system where a minister keeps his distance from planning applications is sensible, it highlights the serious flaws in such an approach. The Commission has some sympathy with Mr Brown in that his detachment arose from him seeking to follow the advice of the Attorney General and to make a judgement as to the degree of detachment which he should apply, and he has explained further in his written representation to the Commission at Annex 4 that in his actions he was following legal requirements. The Commission's clear view is that he took this detachment much further than any legal requirement demanded and consequently excluded himself from the business of the Planning Committee and the planning business of the Department of Local Government and the Environment although still undertaking responsibility for the planning system. The consequence was that Mr Brown was basically unaware of the irregularities which were occurring in the planning procedures concerning the Mount Murray applications and unaware, as the minister, of whether those procedures were adequate, and even if they were, whether they were being efficiently operated, which they were not. However, as we have indicated in paragraph 8.21 above, the minister was not precluded by the Attorney General's advice from involvement in matters of procedure at Mount

¹⁵⁴ Mr & Mrs Reeves Document Q29 page 34

¹⁵⁵ Evidence of Mr Brown Q49 Transcript Day 25 page 17

¹⁵⁶ Evidence of Mr Brown P14 Notes Day 4 page 54

¹⁵⁷ Evidence of Mr Brown P14 Notes Day 4 page 54

¹⁵⁸ Evidence of Mr Brown Q49 Transcript Day 25 page 51

¹⁵⁹ Evidence of Mr Brown Q49 Transcript Day 25 page 11

Murray, including the question of “call in”. The exercise of call in procedures by Secretaries of State in England and Wales requiring planning applications to be referred to them for determination under, for example s77 of the Town and Country Planning Act 1990 (England and Wales) is not uncommon in sensitive cases which the Secretary of State believes should be more closely scrutinised before permission is granted. In so far as human rights aspects of this procedure are concerned, the House of Lords has held that, although the Secretary of State was not an independent or impartial tribunal for purposes of Article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the procedural safeguards governing his decision making and the extent to which his planning functions were within the supervisory jurisdiction of the High Court meant that the requirements of Article 6 were met¹⁶⁰ There can be little doubt that the type of procedural safeguards and High Court supervision discussed in that case are in place in the isle of Man and so the position would be the same in the Isle of Man. It is interesting to note that it was not argued in this decision that the mere fact of call in should be challenged, but the arguments were based on the Secretary of State making decisions in respect of policies which he himself made, or had a pecuniary interest in the outcomes of the decisions. However this case confirms the lawfulness of the minister calling in applications for decisions in which he might be involved, provided appropriate inquiry and judicial processes are in place. Whilst occasions for call in must be a matter of judgement, the Commission finds it difficult to see in the case of Mount Murray, given the scale and nature of the proposals, the acknowledged very high importance of the proposals for the failing tourism sector of the Island’s economy, and the degree of departure from the Development Plan, why Mr Brown could not and did not even consider such a step. Overall, whether or not we are correct in our understanding of the legal restrictions upon the minister, and we are quite satisfied that we are correct, the Commission makes the critically important finding that a system which leaves a major and sensitive part of the planning office without ministerial support and allows another minister to exercise undue influence upon that office with impunity, to be in need of fundamental reconsideration.

11.122 The minister exercising such influence was Mr Bell, the then Minister for Tourism. We have already referred to certain of the evidence given by Mr Bell, particularly in relation to the events and correspondence in May 1991 in sub-section (v) and we return to this below in the context of the pressure which was exerted by Mr Bell and his department on the officers (not the minister) within the planning office. Before doing that, it is relevant to recall briefly the state of the tourism industry in the Isle of Man in the 1980s. This was without doubt a pertinent factor in what was to happen at Mount Murray and affected the way the Department of Tourism was to conduct itself. In his written statement to the Commission, Mr Bell stated that the Isle of Man experienced a steady decline as a tourist destination throughout the 1980s, and that by 1991, the Department of Tourism faced a major battle not just to revive the industry but to prevent its total collapse.¹⁶¹ The Commission does not doubt the seriousness of the decline in tourism and there can be no surprise that the initial Mount Murray application would have represented an inviting prospect.

11.123 A related factor was the introduction into the picture by Mr Spence of the Radisson Hotel Group. Of this, Mr Bell said in evidence that such added bonus of a major

¹⁶⁰ R (on application of Alconbury Developments Ltd) v Secretary of State for Environment, Transport and the Regions and other cases (2001 2 AER 929)

¹⁶¹ Mr Bell Document Q9 page 1

international name attached to the Isle of Man would have been quite a coup for the Island at that juncture.¹⁶²

- 11.124 On the evidence, the Commission's view is that in 1991 and 1992 there was a clear perception that the applicant was linked to Radisson, and we are satisfied that this connection was genuine for the reasons we have set out in sub-section 3 (x) above
- 11.125 In the light of that it is not surprising that Mr Bell and his department saw the prospect of a new hotel, as part of the Radisson chain, inviting. In reality, that prospect appears to have become mesmeric to the extent that he and Mr Mitchell were encouraged in the pursuit of their own agenda, and were very willing to accede to the demands of Mr Spence, in the process placing pressure on Planning Officers to an unreasonable and unacceptable extent.
- 11.126 Mr Bell in evidence denied that this pressure "was anything unusual"¹⁶³ We hope that such pressure was unusual, because, as we have just said, we find that in the case of Mount Murray it was unacceptable pressure. Mr Spence in his letter of 23rd May 1991 to Mr Mitchell¹⁶⁴ says that "a changing few will want to live there as one of the inducements for making the investment" and goes on to say that "if you want this and other related investment my clients have under consideration totalling close to £50 million, then we have to have approval of the Sale Agreement. If not, I am afraid they will go elsewhere".¹⁶⁵ Mr Bell in evidence agreed that similar threats were made on a number of occasions and could not explain why the "changing few" were seen as critical by Mr Spence.¹⁶⁶ It is also relevant to refer here to Mr Willers view in his later written representation¹⁶⁷ to the Commission that there should be justification of the claim that there was continuous pressure from the developer. We find that the letter from Mr Spence referred to above provides a clear and not untypical example of the pressure to which we refer. Mr Spence's letters to the then minister, Mr Brown, of 1st August and 26th August 1994¹⁶⁸ concerning extensions of time, are other cases in point.
- 11.127 In addition the later pressure to secure Planning Committee acceptance for a Draft Agreement for Sale and in the process to have this modified to make it less transparent, all demonstrated to the Commission that the developer intended to pursue its objectives in a covert or incremental rather than in a clear and open way. Pressure on Mr Bell and Mr Mitchell was in turn to translate into pressure on the planning office to the point where Mr Quine was to state that the development was "in effect sponsored by the Department of Tourism."¹⁶⁹ They [the planning office] were being pressured "to be more amenable to the proposition" whilst at the same time being "up against the Development Plan." "I find that a quite intolerable position to put the planners in."¹⁷⁰
- 11.128 Mr Vannan initially said that he did not "recall any direct individual pressure" but later accepted that "we were all aware that there was pressure to have this

¹⁶² Evidence Mr Bell Q9 Transcript Day 9 page 6

¹⁶³ Evidence of Mr Bell Q9 Transcript Day 9 page 73

¹⁶⁴ File A page 63 4th paragraph

¹⁶⁵ File A page 63

¹⁶⁶ Evidence of Mr Bell Q9 Transcript Day 9 pages 31-33

¹⁶⁷ Annex 4

¹⁶⁸ File A pages 147 & 157

¹⁶⁹ Evidence of Mr Quine P2 Notes Day 1 page 72

¹⁷⁰ Evidence of Mr Quine P2 Notes Day 1 pages 72 & 73

development proceed”.¹⁷¹ In relation to his letter to Mr Spence of 13th May 1991 (which, as we have seen, implicitly accepted permanent residential dwellings) “the Chief Executive was persuaded that we should try and accommodate the Minister of the Department of Tourism and ... I was under pressure to do something of the sort”.¹⁷²

11.129 An external perspective on this matter was provided by Mr Lewin, the Clerk to the Braddan Parish Commissioners whom we found to be an impressive witness. Mr Lewin referred to “the pressure that started to come” (to extend the development after the initial approval) and that it was from Mr Mitchell “where the pressure was being generated”.¹⁷³ He recalled that Mr Vannan at this stage was “put under horrendous pressure” to include the additional land.¹⁷⁴ On Mr Bell’s letter to the developers of 13th May 1991, Mr Lewin viewed it as “extremely rare in my experience for a letter to go out from the Minister to the applicant. It might be more appropriate for a letter to go from the Minister to Mr Vannan”.¹⁷⁵ This pressure was to reappear over the drainage issue (which we consider later in section 14) where Mr Lewin agreed that the involvement of the Department of Highways, Ports and Properties (in the establishment of an agency agreement) as a means to persuade the Braddan Parish Commissioners to drop their request for a review of PA 91/0953, was at least partly due to the pressures exerted by the Department of Tourism.¹⁷⁶ He instanced Mr Mitchell saying that “If I can’t sort it out, then the minister will come to bang heads together.”¹⁷⁷ We should make it clear here that Mr Lewin did not refer to any direct pressure from the developer, although that does not mean that the pressure coming from Mr Mitchell and Mr Bell was unrelated to what the developer was seeking. It clearly was not.

11.130 It is important to note here that Guidance Note 3.1 of the document entitled “Ministers and Civil Servants: Duties and Responsibilities” requires that ministers are expected to refrain from asking or instructing civil servants to do things they should not do.¹⁷⁸ Mr Bell, in the view of the Commission, seriously exceeded the intent of that guidance, a situation made worse by the fact that the civil servants under pressure were not even in his department. It is true that the guidance document was not published until 1992 and the pressure of which we write here was in 1991 but the document in this regard merely formalised a truism. In his written representation to the Commission Mr Brown included a letter to him dated 7th May 2003 from Mr Cornwell-Kelly, the Clerk of Tynwald.¹⁷⁹ In the letter, Mr Cornwell-Kelly draws attention to paragraph 11.25 of the Report of the Select Committee on Complaints of Maladministration by Mrs A E S J Pilling which states: “11.25 The Minister is not an official and his essential function is not that of administering the department that is a matter for the Chief Executive and his deputies; by contrast, the Minister’s functions relate to policy and to choices concerning the implementation of policy. In the event of it being brought to the Minister’s attention that a complaint has been made and the SCP [Standardised Complaints Procedure] not applied, it may then of course be appropriate for him to require an explanation of why correct administrative practice has not been

¹⁷¹ Evidence of Mr Vannan Q32 Transcript Day 20 page 28

¹⁷² Evidence of Mr Vannan Q32 Transcript Day 20 page 55

¹⁷³ Evidence of Mr Lewin Q33 Transcript Day 22 page 43

¹⁷⁴ Evidence of Mr Lewin Q33 Transcript Day 22 page 44

¹⁷⁵ Evidence of Mr Lewin Q33 Transcript Day 22 page 52

¹⁷⁶ Evidence of Mr Lewin Q33 Transcript Day 22 page 70

¹⁷⁷ Evidence of Mr Lewin Q33 Transcript Day 22 page 45

¹⁷⁸ Document C8 page 157

¹⁷⁹ Annex 4

followed.” Mr Bell’s role in relation to the applications for planning permission at Mount Murray bears little relation to the role of a minister as it is described in the Report of the Select Committee.

11.131 In coming to conclusions concerning the evidence of Mr Bell, the Commission has fully accepted the parlous state of the tourism industry in 1990 and 1991 as an acknowledged factor in the support given by the minister and his department to the Mount Murray applicant. We also recognise the working relationship with Mr Spence, to which the minister refers in a later written representation¹⁸⁰ to the Commission as, in itself, being neither unusual or improper, and we fully recognise the benefit of approachability and easy access referred to by the High Court as identified to us by Mr Bell in his written representations.¹⁸¹ We see that this can be an appropriate exercise of duties relating to policy and choices concerning the implementation of policy as referred to in the last preceding paragraph.. The issue is where the line is drawn. We consider on the evidence that the relationship was unwisely close and that the manner in which the project was pursued was unacceptable and heedless of the impact on the planning staff. Mr Bell’s direct communications with Mr Spence in May 1991 reveal an intent to support the scheme in spite of the serious implications for the planning office whose officers were, as a result of the pressure which was applied, unacceptably compromised. Mr Bell, both in evidence and in his later representation¹⁸² claims that on no occasion was Mount Murray discussed in terms of permanent occupation. Again the evidence does not support this and Mr Bell’s contention that the words “permanent accommodation” followed immediately by the further words “residential accommodation” (in his telephone call to Mr Spence on 13th May 1991)¹⁸³ actually meant something else is unconvincing. Indeed Mr Bell wrote to Mr Spence on 9th May 1991 in terms which suggest quite strongly that he was involved in the instigation of those events in May 1991 which ultimately led to the Planning Committee decision of 4th October 1991 i.e. the letter of 13th and 16th May 1991 and the suggestion for an approval of a draft Agreement for Sale. That letter bears repeating. It said: “Further to your recent correspondence I have now instructed Mr Mitchell to undertake positive discussion with representatives of the Department of Local Government in order to seek a more appropriate planning solution for the Alex Inn project. I think you appreciate our dilemma and the possible shortcomings of the planning systems, however, we will endeavour to identify a more acceptable way forward with an emphasis on multi-ownership with associated letting thereof. The meeting will take place later this month following which I will contact you again.” While we do not have the correspondence referred to, we find it to be significant that a meeting with the planning office did follow and that Mr Bell did contact Mr Spence following the meeting setting out broadly the apparent effect of the two letters and Agreement for Sale which had not yet been sent or drafted.¹⁸⁴

11.132 The impression given to the Commission by Mr Bell is that permanent residential accommodation, although not necessarily to the extent which it has occurred, was a price worth paying as the scheme was seen as preventing the tourist industry from dying. That decision was one for government and not an individual minister to take and, in failing to consider this before offering unwise and premature support to the scheme, Mr Bell’s judgement can only be regarded as questionable. Indeed, he became so closely associated with the developer that he virtually surrendered his

¹⁸⁰ Annex 4

¹⁸¹ Annex 4

¹⁸² Annex 4

¹⁸³ File A page 189

¹⁸⁴ File A page 189

powers of sensible independent judgement. In forming our view on Mr Bell and his evidence, the Commission wishes to emphasise that it has carefully examined and considered the later written representations¹⁸⁵ made by him in response to draft criticisms. We are bound to say however this has not altered our view that the evidence confirms Mr Bell's central involvement with these matters and his knowledge of the intent and actions to achieve permanent residential use, albeit not for the whole estate. We return to this later in our conclusions in section 17 (iv)

- 11.133 With regard to the conduct of Mr Bell it is relevant to note that a parliamentary question was put to him on 7th April 1992¹⁸⁶ which asked what market the Mount Murray developers hoped to attract "to ensure that this tourism development will not require at some time a change of planning use to permanent residency." His initial reply related simply to marketing but the questioner pressed him after a reference to the nature of the development by asking "... will the Minister indicate that no undertaking will be allowed that may finalise this site being for housing permanent resident development?" Mr Bell's reply was as follows: "Mr Speaker, I am not a member of the Planning Committee. Any change of use on that site would be entirely in the hands of the future Planning Committee. As far as the Tourism Department is concerned, we have always fought for this site to be retained in tourism. That is precisely what this development is and I am very disappointed that suggestions are being made that it may in fact be used for other purposes."
- 11.134 This reply was incorrect, and misled the House of Keys and Mr Bell, we find, knew that it was incorrect. The language of the question had been in very similar language to that used by Mr Bell almost a year earlier in his recorded telephone call to Mr Spence: "There's no need for you to apply for change of use for permanent accommodation, residential accommodation out there, the present condition will allow you to do exactly what you want." It is relevant also to draw attention to the letter from Mr Savage to Mr Spence on 28th May 1991 which was copied to Mr Bell.¹⁸⁷ This letter explained that a revised version of the draft Agreement for Sale had been approved by the Planning Committee. If Mr Bell was copied in on the revised version it is a reasonable inference that he was aware of the original version which said in explicit terms that the houses could be used for permanent occupation.¹⁸⁸ Furthermore, given Mr Bell's close connection with the developer, we are fully satisfied that Mr Bell would be aware that the position he set out in his recorded message was formalised by the Planning Committee on 24th May 1991. The Planning Committee had already made their decision on change of use and Mr Bell knew that.
- 11.135 The questioner had also asked "Will public money be required in this development?" The reply from Mr Bell was "As I have said on many occasions, no application for Government financial assistance has been submitted, nor has there been any intimation that an application will be submitted in the future." Read literally this answer was correct. However, as explained in sub-section 13 (vi) below, Mr Bell was at the time of this parliamentary question directly involved with the funding of the highways improvements necessitated by the Mount Murray development and which resulted in funding of the works by government to a considerable extent.

¹⁸⁵ Annex 4

¹⁸⁶ Hansard 7.4.1992 K180 right hand column

¹⁸⁷ File A page 190

¹⁸⁸ File B page 224

- 11.136 Before turning to the evidence of senior officers, it is important to note that in commenting above on the evidence of Mr Bell we have made several references to the involvement of Mr Mitchell who acted in various capacities between 1990 and 1995 on behalf of Mr Bell with respect to the Mount Murray development. The Commission was unable to take evidence from Mr Mitchell on grounds of his ill-health, but we consider it appropriate to consider his actions at this point in the report bearing in mind his particular and personal role on behalf of the minister which we have noted as part of the evidence concerning Mr Bell, and to which we return below.
- 11.137 From the tourism files available to us, we have noted that Mr Mitchell was initially engaged under the title of Development Consultant to the then Department of Tourism, Leisure and Transport in December 1988. He was later appointed to the established post of Director of Development on a three year contract .
- 11.138 From the evidence of others it is clear to the Commission that Mr Mitchell operated more or less as right hand man to the minister independent of the Chief Executive, Mr T P Toohey. His central position in Mount Murray affairs at the Department of Tourism was confirmed to the Commission by Hon Mr A F Downie MHK who was later a political member of the department (but without delegated responsibility), by Mr Toohey himself, and by the then Chief Minister, and was not disputed by Mr Bell. Mr Downie referred to confusion within the department from time to time “because the line of communication was generally direct to Mr Bell and not necessarily to Mr Toohey.”¹⁸⁹ That position appeared to change only after Mr Mitchell occupied an established post. Mr Downie considered he was “the main link between the Department of Tourism and the Minister in the context of Mount Murray” and was “the main person representing the Department with the developers”.¹⁹⁰
- 11.139 Mr Lewin, of Braddan Commissioners described Mr Mitchell’s “typical pattern” as being to say “if we can’t sort this, if we can’t resolve it, then Mr Bell will have to get involved”.¹⁹¹ He considered that Mr Mitchell was there to push development through, and that he was very pro-active in the Mount Murray development.¹⁹² Mr Mitchell was, in short, a key figure in exerting pressure on the Planning Officers, on behalf of his minister. As we have seen earlier (paragraph 11.128), Mr Lewin believed that it was from or through Mr Mitchell that “the pressure was being generated”¹⁹³ and referred also to “the horrendous pressure”¹⁹⁴ placed on Mr Vannan to include additional land in the scheme.
- 11.140 All of this is consistent with Mr Mitchell’s close links with the applicant, and Mr Spence in particular, from a very early stage. He is identified in the initial planning application, as we have already noted, as having been involved in pre-application discussions on behalf of the minister, when permanent housing was specifically referred to. Indeed, that is one reason why the Commission feel confident that Mr Bell consequently would have been well aware of such an intent. Mr Mitchell was also the chosen recipient of several key communications from Mr Spence including, in particular, the fax of 23rd May 1991 requiring approval of the Agreement for Sale.¹⁹⁵ Mr Mitchell was additionally identified specifically in the letter from Mr Bell

¹⁸⁹ Evidence of Mr Downie Q19 Transcript Day 15 page 4

¹⁹⁰ Evidence of Mr Downie Q19 Transcript Day 15 page 5

¹⁹¹ Evidence of Braddan Commissioners Q33 Transcript Day 22 page 44

¹⁹² Evidence of Braddan Commissioners Q33 Transcript Day 22 page 44

¹⁹³ Evidence of Braddan Commissioners Q33 Transcript Day 22 page 44

¹⁹⁴ Evidence of Braddan Commissioners Q33 Transcript Day 22 page 44

¹⁹⁵ File A page 63

to Mr Spence of 9th May 1991 as the person he was instructing to undertake positive discussions with representatives of the Department of Local Government and the Environment to seek a more appropriate planning solution.¹⁹⁶

- 11.141 In the absence of direct evidence from Mr Mitchell, it would be inappropriate for the Commission to draw too many critical conclusions from the observations of others. However, there can be little reasonable doubt that he was, in effect, the specific instrument of Mr Bell's intent to secure development at whatever cost in planning terms and would have been equally well aware that the developer was not just seeking housing for tourism purposes. He is therefore subject to at least some of the criticism we made earlier in respect of the minister, even though he was acting under Mr Bell's direction.
- 11.142 Turning now to the senior officers, the head of the planning office in 1990 and 1991 was Mr Watson who had the title of Chief Architect and Planning Officer. On specific events Mr Watson appears to have approached his job in a very relaxed manner to the extent of saying in evidence that "I suppose I was the officer in charge of the Department." He did however emphasise in a later representation both the range of his responsibilities beyond planning, and his view that the office at that time could not support a "sophisticated bureaucracy".¹⁹⁷ On his working relationship with Mr Vannan, he said "I would set policy, if you like, and Barry Vannan would, in day-to-day planning matters, execute that policy fundamentally."¹⁹⁸ He informed the Commission that Mount Murray "was his [Mr Vannan's] baby"¹⁹⁹ and when asked why this very important application wasn't his baby, he replied "The job needed doing by somebody and we had a perfectly competent officer to handle it. I don't go around looking for kudos." He added, however, that he thought that he did, by and large, follow what was happening on the application.²⁰⁰
- 11.143 Mr Watson said that he had no recollection of the meeting of 20th November 1990 referred to in Mr Spence's covering letter with the initial planning application for Mount Murray.²⁰¹ He was also vague about responsibilities for the application at the time of the review in April 1991 being unsure whether he or Mr Vannan was dealing with the case²⁰² despite his remarks as referred to in paragraph 11.143 above. We have already referred in sub-section (ii) above (paragraph 11.8) to Mr Watson's limited familiarity with the Buyer's Guide early in 1991 and his acceptance, having looked at it in evidence, that the intent to secure a mixed development was quite clear. However he said that he was surprised when Professor Crow informed him that it was a mixed development,²⁰³ a claim which the Commission is unable to accept for the reasons we have set out earlier in this section.
- 11.144 With regard to the correspondence in May 1991, he acknowledged that Mr Vannan's letter to Mr Bell of 13th May which was copied to him was wrong (although he claimed he did not know this at the time) but said he had no idea how Mr Vannan came to write it and could not recollect seeing it other than when shown it

¹⁹⁶ File A page 57

¹⁹⁷ Annex 4

¹⁹⁸ Evidence of Mr Watson Q3 Transcript Day 7 page 127

¹⁹⁹ Evidence of Mr Watson Q3 Transcript Day 7 page 128

²⁰⁰ Evidence of Mr Watson Q3 Transcript Day 7 page 134

²⁰¹ File A page 9

²⁰² Evidence of Mr Watson Q3 Transcript Day 7 page 99

²⁰³ Evidence of Mr Watson Q3 Transcript Day 7 page 104

by Professor Crow.²⁰⁴ He said he could not recall a document such as the Agreement for Sale ever going to the Committee although, as we have noted as did Mr Magee the Committee Secretary, he (Mr Watson) had taken the view that the position would still have been protected by the original planning permission. Similarly, he said that he had no recollection of the Committee meeting on 4th October 1991 and of what Mr Vannan may have said. As to this it was the evidence of Mr Killip that Mr Watson, as well as Mr Vannan, had suggested to the Committee that condition number 5, as issued on 2nd October 1991 was erroneous and could be corrected by the issue of a replacement notice with the revised wording of the condition relating to occupancy.²⁰⁵ Mr Watson accepted however that the intent of the changed condition should have been made clear to the Committee and that the resultant minute was obscure.²⁰⁶

- 11.145 The Commission's main concern with regard to Mr Watson's evidence was his relationship with Mr Vannan and his awareness of what was going on. He may have had limited recall but, whatever his memory, the Commission is satisfied that he had some awareness of Mr Vannan's actions and considers his involvement in matters concerning Mount Murray to be clear and to have begun even before the initial application was submitted. Mr Watson contended in his later representation²⁰⁷ to the Commission that to the best of his recollection he did not know of the contents and implications of Mr Vannan's letter of 13th May 1991 (to Mr Bell) despite it being copied to him. However in his oral evidence to the Commission he did not dispute Mr Vannan's evidence that he was made aware of the first paragraph of the letter of 13th May saying that he had no recollection of the details.²⁰⁸
- 11.146 Mr Watson fully accepted that it was a serious matter for an officer to express a view known to be wrong and equally serious for the Committee both in May and October not to have this matter properly explained. Equally, he did not dispute that the responsibility was his for the action and decisions being taken in his department. His explanation of how these things were allowed to happen was that there was a failure of communications²⁰⁹ between Mr Vannan and the Planning Committee. The Commission believe that Mr Vannan did keep him informed, and that he was party to what went on. The failures at Mount Murray therefore were at least partly attributable to Mr Watson's lack of direction and disinterested position and not solely to Mr Vannan.
- 11.147 Last in this section, we consider the evidence of Mr Vannan who, as we have seen, played the lead role in progressing the various Mount Murray applications throughout most of 1991. Mr Vannan had the title of Architect/Planning Officer at that time, answering to Mr Watson as Chief Architect and Planning Officer and through him to the Chief Executive, Mr Savage. He is not recorded as having any full involvement in pre-submission discussions with the applicant but he received project documentation from Mr Spence, he was aware of the involvement of the Chief Minister even though he agreed that this was unusual²¹⁰ and it must be assumed that Mr Watson would have advised him following the meeting with Mr

²⁰⁴ Evidence of Mr Watson Q3 Transcript Day 7 page 108

²⁰⁵ Mr Killip Document Q15 page 2

²⁰⁶ Evidence of Mr Watson Q3 Transcript Day 7 page 118

²⁰⁷ Annex 4

²⁰⁸ Evidence of Mr Watson Q3 Transcript Day 23 pages 34-35

²⁰⁹ Evidence of Mr Watson Q3 Transcript Day 23 page 41

²¹⁰ Evidence of Mr Vannan Q32 Transcript Day 20 page 11

Spence on 20th November 1990. Mr Vannan would, therefore, have had extensive knowledge of the scheme prior to its formal submission.

- 11.148 With regard to the initial application PA 90/1842 Mr Vannan agreed that the Buyer's Guide was part of the application and that it was intended to define the proposed use of the site.²¹¹ He further agreed that looking at it now, it was clear that the Guide contemplated that housing could be used for permanent homes but claimed, as we have seen earlier, that it was not at the time "because I don't think any of us fully appreciated that this was the intention."²¹² Mr Vannan did not make it clear to the Commission why this was the case.
- 11.149 By the time of the review Committee meeting in April 1991 Mr Vannan confirmed that there was really strong support by the Department of Tourism and the minister for what they saw as a flagship enterprise.²¹³ However, he was not aware of any concern on the part of the applicant about the tourist condition which was retained as part of the review decision in April, and had no understanding of Mr Bell's reference to "seeking a more appropriate planning solution" in his letter to Mr Spence of 9th May.²¹⁴ With regard to Mr Bell's later telephone call on 13th May,²¹⁵ and the statements in this "that there's no need for you to apply for change of use for permanent accommodation" and "the present conditions will allow you to do exactly what you want." Mr Vannan agreed these were wrong and that there were no decisions by the Planning Committee to indicate that a change of use was not required.
- 11.150 A curious part of Mr Vannan's evidence however concerned the correspondence in May between himself and Mr Bell (13th May) and between Mr Savage and Mr Spence (16th May). Mr Vannan accepted that the first paragraph of the former was wrong and stated that, with hindsight, he should not have written it. It stemmed, in his view, from "persuasive argument put by the Department of Tourism minister through the Chief Executive of the time".²¹⁶ The only such "argument" he could recall related to the Island's tourism needs²¹⁷ which, without further explanation, seems irrelevant given that the applicant already had a planning permission for tourism. When asked about how the benefits of tourism could make his letter right, his response was "that is a good question which I cannot answer."²¹⁸
- 11.151 The reality, as he conceded, was that the applicant was seeking to relax the occupancy condition, the tourism condition, and he maintained that this was what Mr Savage and Mr Bell had discussed at the meeting he referred to in his letter of 13th May 1991.²¹⁹ Mr Vannan indicated that, when he wrote the first paragraph of this letter, the intention which was that of Mr Savage, was to relax the tourism condition, and that he, Mr Vannan, signed it on Mr Watson's behalf.²²⁰ In doing so, he conceded he was aware that there was a conflict between the Buyer's Guide (which he must, therefore, have read by then) and the restrictive tourist conditions imposed on PA 90/1842. His explanation for this was that "the Buyer's Guide was

²¹¹ Evidence of Mr Vannan Q32 Transcript Day 20 page 13

²¹² Evidence of Mr Vannan Q32 Transcript Day 20 page 21

²¹³ Evidence of Mr Vannan Q32 Transcript Day 20 page 27

²¹⁴ File A page 57

²¹⁵ File A page 189

²¹⁶ Evidence of Mr Vannan Q32 Transcript Day 20 pages 43

²¹⁷ Evidence of Mr Vannan Q32 Transcript Day 20 page 45

²¹⁸ Evidence of Mr Vannan Q32 Transcript Day 20 pages 47

²¹⁹ Evidence of Mr Vannan Q32 Transcript Day 20 page 50

²²⁰ Evidence of Mr Vannan Q32 Transcript Day 20 page 51

part of the application...and overtook these conditions".²²¹ This, with hindsight, was "the weak rationale that was used".²²² Mr Vannan did not claim he was instructed to write the letter, and said "it would be wrong to say that". However he agreed he was under pressure to write it and that "there's not really much difference between the two".²²³

- 11.152 On the letter sent by Mr Savage on 16th May to Mr Spence which confirmed what he, Mr Vannan, had been persuaded to write, he accepted that this was simply wrong for the same reasons as above and that neither he nor Mr Savage had the authority to vary the conditions attached to the April approval. Mr Vannan claimed he did not have anything to do with the subsequent letter of Mr Savage to Mr Spence suggesting that an Agreement for Sale be taken to the Committee, but he did not dispute that this Agreement explicitly made provision for permanent occupancy which was in conflict with the conditions in the planning permission. He claimed not to remember the reasons why the Agreement was taken to the Committee except that he was asked to take this by the Chief Executive following his correspondence.²²⁴
- 11.153 The minute of the meeting on 24th May does not make clear what the Planning Committee were being asked to approve and refers quite explicitly to the "erection of tourist houses". Mr Vannan, in evidence on the minute, accepted that "No, it is not clear"²²⁵ but claimed that he did not mislead the Committee intentionally. However, such a contention cannot be regarded as credible unless Mr Vannan had been wholly unaware of the circumstances leading up to the submission to the Planning Committee of the draft Agreement for Sale, and of its contents. He may or may not have fully read the document but he was well aware by writing as he did to Mr Bell on 13th May 1991 that permanent residential occupancy was implicitly accepted, and that what was said to the Committee was wholly misleading as was the minute.
- 11.154 With regard to the first full application (PA 91/0953) which went to the September 1991 Committee, approval of the 150 dwellings was given, subject to conditions including a range of house types, the specific location of which "must be agreed with the Architect and Planning Officer".²²⁶ In the Commission's opinion that condition was imprecise in that "location" could mean either within the site or within the development. Mr Vannan believed it was the latter so that, in effect, the developer could site a house anywhere within a plot without further permission provided it was one of the accepted house types. Mr Vannan agreed that such a condition had never been used before or since and the Commission is not aware of it being used anywhere else. It was worded in this way according to Mr Vannan to give the developer additional flexibility.²²⁷
- 11.155 The Committee's decision of 13th September was translated into a decision notice dated 2nd October which retained condition number 5 restricting occupancy to bona fide tourists. The notice was sent by fax to Mr Spence for the applicant on the same day something which Mr Vannan stated was most unusual.²²⁸ As we have

²²¹ Evidence of Mr Vannan Q32 Transcript Day 20 page 53

²²² Evidence of Mr Vannan Q32 Transcript Day 20 page 54

²²³ Evidence of Mr Vannan Q32 Transcript Day 20 page 57

²²⁴ Evidence of Mr Vannan Q32 Transcript Day 20 pages 71 to 73

²²⁵ Evidence of Mr Vannan Q32 Transcript Day 20 page 75

²²⁶ File A page 94

²²⁷ Evidence of Mr Vannan Q32 Transcript Day 20 page 81

²²⁸ Evidence of Mr Vannan Q32 Transcript Day 20 page 86

seen, this gave rise to Mr Spence's faxed response, also of the same date, seeking a review of condition numbers 4, 5, 6 and 12 which led, in turn, (but without review) to the new initial decision notice approved by the Planning Committee on 4th October.

- 11.156 We have referred already to Mr Vannan's claim that the alteration to condition number 5 (relating the use of buildings to the principles laid down in the Buyer's Guide) had previously been drafted by him for inclusion in the notice of 2nd October but had, at some point, been altered back to the form of wording used as a condition on the outline application in April. Irrespective of how this may have occurred, there is no evidence of the Committee having considered the substance of such a change at its meeting on the 13th September and therefore of any authority being given to Mr Vannan to change condition number 5. Whilst Mr Vannan had known that the Buyer's Guide permitted permanent dwellings, the Committee had not at any stage had this made clear to them.
- 11.157 From careful inspection of the planning application file for PA 91/0953 the Commission do believe there is evidence which indicates that Mr Vannan did seek to include the Buyer's Guide as part of an altered condition number 5 in the notice issued on 2nd October 1991. We comment on the propriety of this below. No conclusion can be drawn from the file as to why the notice as issued did not include the altered condition. What is clear however is that there is no foundation for Mr Vannan's claim that this "error" was a legitimate basis for the actual notice which the Committee approved two days later²²⁹ as there was no "error" to be corrected. The correspondence in May and the approval of the Agreement for Sale undermined the Committee's position but Mr Vannan had no authority to change condition number 5 without explicit Committee agreement.
- 11.158 Whether the Committee understood this so called administrative error is not clear but the minute does not make any reference to it and Mr Killip said that it was accepted by the Committee.²³⁰ Mr Vannan himself was well aware of the implications of the change to condition number 5 and when asked why he did not clearly explain this said that "I thought that the Committee were conversant [with the Buyer's Guide]" and that "it had formed part of the application. I assumed they had read it."²³¹ In fact, as the minute indicates, if the Buyer's Guide was mentioned, it was only in the context of criteria for the interpretation of tourist use. This is consistent with the recollection of the chairman, Mr Cretney, who said that "I had no doubt in my mind that bona fide tourists included timeshare. However my understanding is that we were being addressed to properly clarify that for the development company."²³² There is, in fact, no evidence that the Buyer's Guide was ever seen by, explained or presented to the Planning Committee at any time, and whilst, as we have already noted, the Committee were not unaware of the applicant's intent, the tourist restriction was retained throughout including this decision on 13th September 1991.
- 11.159 With regard to the other changes to conditions sought by Mr Spence in his fax of 2nd October, alterations were agreed to numbers 4 (house types) and 6 (sewage). The effect of the former was to further weaken what we have already seen was an unclear condition by limiting officer control to circumstances where house types were not standard. The latter allowed the applicant to build houses before sewage

²²⁹ Evidence of Mr Vannan Q32 Transcript Day 20 pages 88-91

²³⁰ Evidence of Mr Killip Q15 Transcript Day 18 page 73

²³¹ Evidence of Mr Vannan Q32 Transcript Day 20 pages 92 & 93

²³² Evidence of Mr Cretney Q22 Transcript Day 17 page 33

details were finalised, instead of (as at 2nd October) before any development commenced. Mr Vannan could not explain why this change was made.²³³

- 11.160 Looking at Mr Vannan's evidence overall, the fundamental question for the Commission was whether he intentionally and knowingly misled the Committee. Mr Vannan himself maintained that he did not but there are only two circumstances under which such a claim would be regarded as sustainable. The first is that Mr Vannan himself remained in ignorance of the content and implications of the applications with which he was dealing. The Commission find it impossible to accept that an officer having the professional experience of Mr Vannan would not have been aware of what he was doing. Even if his perception of the supporting document to the outline application may have been limited, it was not so by the time of the crucial committee meeting on 4th October, and he had been aware of the developer's intent to secure at least an element of permanent housing since before the outline application was submitted. The second is that the Committee itself had, in fact, some understanding of the developer's objectives. We have referred to the evidence for this in sub-section (vii) above. There is no evidence that the Buyer's Guide was ever seen by or put to the Committee or that its contents were ever made clear, but it can reasonably be inferred that the decisions of the Committee reflected some acceptance of a small element of permanent housing. The inescapable conclusion of the Commission is that Mr Vannan did attempt to mislead the Committee both in May and October of 1991 and that he was aware he was so doing because, if the Committee had become aware of the true position, that the permission allowed permanent housing on the whole site, the application would have been refused or not approved in that form. That conclusion is reinforced by Mr Vannan's own admission that he endeavoured to include a condition in the decision notice of 2nd October (referring to the Buyer's Guide) which the Committee had given him no authorisation to do. The fact that, by chance or otherwise, this change was not made does not alter the fact that this was an act of great impropriety.
- 11.161 Mr Vannan must also bear considerable responsibility for the unprofessional and inadequate nature of the first full approval given on 13th September. Neither the schematic nature of the submitted plan nor certain of the conditions as we have identified, were adequate to secure proper control of development. In the same way, condition number 5 of 4th October was imprecise and unenforceable and Mr Vannan should have been aware of that, irrespective of whether such a condition was in itself acceptable.
- 11.162 The Commission must equally state, however, that the responsibility for the irregularities which occurred up to October 1991 and the flawed decisions which were made was not solely that of Mr Vannan. In the Commission's view, he was put in an invidious position by the actions or lack of them of his own Chief Executive. Mr Savage was spoken of very favourably by a number of witnesses and we accept that such views were genuinely expressed. Nevertheless, he knowingly placed unacceptable pressure on Mr Vannan to make statements in writing which both knew to be incorrect. He was subject also to intense pressure from Mr Bell and Mr Mitchell which Mr Savage not only did nothing to counter but colluded in to secure approvals acceptable to the applicant even if that meant compromising officers of his own department. Finally, Mr Vannan appears to have had no support or direction from his immediate superior, Mr Watson. The Commission considers Mr Watson to have been aware of the actions being taken

²³³ Evidence of Mr Vannan Q32 Transcript Day 20 page 103

by Mr Vannan and to have failed to take steps to prevent the issue of false statements in letters written on behalf of his office.

11.163 None of the above excuses Mr Vannan from blame. He continued, albeit under pressure, to secure planning permissions at Mount Murray which have resulted in a sub-standard private estate in an unsuitable location. He should not have acted as he did and had numerous opportunities to put things right which, for whatever reason, he did not take.

End of Section 11

