



**TYNWALD COURT
OFFICIAL REPORT**

**RECORTYS OIKOIL
QUAIYL TINVAAL**

PROCEEDINGS

DAALTYN

(HANSARD)

**SELECT COMMITTEE ON THE
POACHER'S POCKET**

**BING ER-LHEH TINVAAL MYCHIONE
POAGEY Y GHADDEE-FEIYS**

Douglas, Thursday, 31st January 2008

Members Present:

Chairman: The Speaker of the House of Keys (Hon. S C Rodan)
 Mr J D Q Cannan, MHK
 Mr J R Turner, MLC

Clerk:
 Mr P Lo Bao

Business transacted

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The Committee sat in private.

Tynwald Select Committee on the Poacher's Pocket

*The Committee sat in public at 10.19 a.m.
in the Millennium Conference Room,
Legislative Buildings, Douglas*

[MR SPEAKER *in the Chair*]

Procedural

The Chairman (The Speaker of the House of Keys, Hon. S C Rodan): Good morning, everyone. I would like to welcome you to this meeting, which is a sitting of the Select Committee of Tynwald on the Poacher's Pocket. We are here to take oral evidence this morning in public session. This evidence will be recorded and published.

The Committee was established by Tynwald in October 2007, and it may be helpful if I set out the remit of the Committee. It is:

'to investigate all matters related to the handling of planning application 02/0712, in particular by the Department of Local Government and the Environment, and notably:

(i) the failure of the Department to advertise various amendments to the main application, subsequently the subject of condition 19, or to advertise further applications which were made pursuant to that condition;

(ii) the use by the Director of Planning and Building Control of delegated powers to approve major changes which it is claimed should have been the subject of a formal and advertised application determined by the Planning Committee, as required by the explicit wording of condition 19;

(iii) the use by the Director of Planning and Building Control of delegated powers to approve major changes in relation to the development without reference to the Planning Committee, when he had previously acted in the same matter as an advocate before the Committee who reached conclusions different from those in the Director's later approvals;

and to report with recommendations by the March 2008 sitting of the Court;

and Tynwald, concerned about aspects of the administration and operation of the Planning Directorate of the Department of Local Government and the Environment, calls for the immediate implementation of a full and independent review, by an appropriately qualified person or persons, of the planning administration, procedures and process, and to report to the Minister of the Department with recommendations as appropriate, and for the said report to be published by the Minister with any comment, and laid before Tynwald.'

So that sets out the remit of the Committee.

If I could now introduce my colleagues on the Committee: Mr David Cannan, MHK for Michael; Mr Juan Turner, Member of the Legislative Council. My name is Steve Rodan, and I am the Chairman of the Committee.

Our Clerk today is Mr Lo Bao, and the *Hansard* recording is being undertaken by Deborah Pilkington and Ellen Callister. At this point, could I ask everyone to ensure that all mobile phones and other electronic devices are switched off to avoid interfering with the recording.

Could I just ask colleagues and witnesses to remember that, because the proceedings are being recorded, people should take care not to speak across each other, one person to speak at a time.

So it now falls to me to call forward our first witness, Mrs Clare Christian MLC, who is appearing in her capacity as Chairman of the Planning Committee.

Mrs Christian was called at 10.23 a.m.

EVIDENCE OF MRS C M CHRISTIAN

The Chairman: Thank you, Mrs Christian, for coming to meet with us this morning.

If I could begin by asking a number of questions, and no doubt we will have further questions as we move along. Could you just inform the Committee when you became Chairman of the Planning Committee, please.

Mrs Christian: Yes, I was appointed on 12th July 2005.

The Chairman: Thank you very much indeed. We understand that one of your roles is to decide whether a planning application should be determined and decided on by the Planning Committee or the Director. Could you confirm that, Mrs Christian?

Mrs Christian: Yes, I would confirm that.

The Chairman: When did that process come into operation?

Mrs Christian: The Committee may be aware that in November 2005 there was a change to the planning procedures. The issue of determining which applications come to the Committee was introduced after the introduction of the new processes. At the moment, the applications which have been advertised are submitted to me on a weekly basis and I review those, with an issue to determine which ones should go to the Committee and which should be dealt with by the Director, under his delegated powers.

The Chairman: Thank you. So that was a new system, introduced, when you were Chairman, by the Department.

Mrs Christian: Yes. The whole of the planning structure changed, as you may recall. The new legislation went through Tynwald, and the processes changed somewhat in November 2005.

The Chairman: Before November 2005, how was it decided whether a planning application went to the Committee or went to the Director for delegated decision?

Mrs Christian: There was not a formal process, as I recall, except that it was the system which had been in place for many years prior to my becoming involved in the Department in the planning area; the same system, I suspect, as when you were there, Mr Chairman.

The Chairman: Yes.

Mrs Christian: The issue of what the Director could or could not deal with was set out in the delegations approved by the Minister, and those delegations changed as well in 2005.

Procedural

The Chairman: Would it be correct to say that, before 2005, when applications came, in the first instance to yourself, to decide whether they would be determined by the Director or the Planning Committee, prior to that the applications went first to a planning officer, who made a report and a recommendation which then went to the Director of Planning, who then either made a decision or referred the matter for decision to the Committee?

Mrs Christian: Yes. The delegation determined which applications could straightforwardly be dealt with on a delegated basis, and which applications had to be referred to the Committee. For example, if there were any objections, an application would be referred to the Committee. If, indeed, the Director disagreed with the recommendation of the Planning Officer... If there was a disagreement, it would be referred to the Committee.

The Chairman: Would it have been up to the planning officer, at that time, then, having assessed the application and noting an objection, that application would have automatically –

Mrs Christian: Gone to the Committee.

The Chairman: – gone to the Committee (**Mrs Christian:** Yes.) and, according to the list of criteria, either the Committee or the Director.

Mrs Christian: If there was an objection, it would have gone straight to the Committee.

The Chairman: Straight to the Committee. I am just trying to –

Mrs Christian: Under the old system.

The Chairman: Under the old system, the... So, in effect, it was the planning officer, having assessed the application, who looked at the category into which it fell and either directed the application to the Director, if there was no objection, or, if there was an objection, for example, to the Committee.

Mrs Christian: Mr Chairman, I have outlined some of the criteria. I think, if the Committee does not have the delegations, we can certainly provide them for you.

The Chairman: Yes. I was anxious just to get on the record what the system had been previously, before 2005.

So, in 2005, the application comes straight to you, as Chairman.

Mrs Christian: No. After November 2005, the applications go through the process of being advertised. A list of applications is submitted to me with a note of whether there have been any objections, or not, and I review that list.

The Chairman: What exactly are the criteria you use for assessing whether a planning application should go to the Planning Committee or the Director?

Mrs Christian: I take into account issues such as, perhaps, the size of the application. If it is a major planning

development, then that will go to the Committee. If there are a lot of representations on the application, it will go to the Committee. If there is a previous history of applications on the site which have been controversial, it will go to the Committee. If there are applications which clearly have an impact on members of staff, it will go to the Committee.

It is a subjective decision, but I do look at the applications and the nature of the objections to them. Many of the applications which come in are fairly small scale and straightforward and they can be delegated.

The Chairman: Thank you. So when you assess the applications in that fashion, is either the Director or another senior planning officer with you at your side to give advice?

Mrs Christian: Yes, I have a senior planning officer there with me to give me any advice, not the Director.

The Chairman: Not the Director.

Mrs Christian: No.

The Chairman: So it is never the case that the Director advises you on whether –

Mrs Christian: Advises me on anything that might be... No.

The Chairman: Thank you. So you always have a planning officer present?

Mrs Christian: Yes.

The Chairman: Thank you. If a planning officer was not present, presumably the scale and impact of the application you would not be able to assess, if there was no professional advice to hand?

Mrs Christian: I might be able to assess, but it is always better to be able to have the access to the information, or the advice of a planning officer. Most applications, by virtue of their description, or the plans which are there, can give you an idea of the scale of the operation and whether or not they are likely to be controversial, or not.

The Chairman: Under the old system, when the application, after advertising and so on, went to the planning officer, the planning officer would have made a site visit, would have assessed the application, and indeed made a recommendation. Under the new system, bearing in mind that all you are deciding is whether it should be decided by the Committee or the Director, you have the planning officer, but he will not have made a site visit and he will not have formally assessed the application. Is that correct?

Mrs Christian: No, that is correct. That process takes place after the delegation has been determined. But can I add that the Director, on receiving those delegated applications after the full process has gone through and the reports have been produced, can determine... If he considers that it would have been more appropriate that it went to the Planning Committee, he can determine to send it to the Planning Committee.

The Chairman: Does that system work well, in your view, in deciding who should make the decision?

Mrs Christian: I think it has worked reasonably well. I can think of one or two applications which the Director has subsequently referred to the Committee. The Committee, in any case, have at their disposal, at their public meetings, a record of all the decisions made by the Director under his delegated authority.

The Chairman: Mr Cannan.

Mr Cannan: Chairman, could I just ask: the Director makes all these decisions – and you realise that the term of the questioning is because the Director made decisions under recommendation 19, that is the whole basis of what we are determining – how do you see that there is a democratic process in having a Planning Committee appointed by Tynwald, yet only seeing certain of the planning applications? How do you see that that gives balance to the person who has made the planning application, when they know that a bureaucratic decision is made, rather than an open decision is made?

Mrs Christian: First of all, can I comment on the point that you have made about this Committee's remit, and the issue here was a condition. I have been talking about planning applications, and not about conditions.

The Chairman: I was going to come on to conditions: how the process you have described applies to conditions.

Mrs Christian: Yes, Chairman. May I reply to the point made by Mr Cannan, and that is: this has always been the case.

It has never been the case, to my knowledge, that the Planning Committee deals with all applications. There has always been an element of work which is done on a delegated basis. You would need to have a much bigger office if all applications were to be submitted to the Planning Committee.

Added to that, the Director of Planning is a professional planner, and I do not believe that the public should have any concerns that their applications are not being considered in a balanced way. In any event, there is the appeal process if they are not satisfied with the decision.

The Chairman: Thank you. We have discussed how you decide whether a planning application should be decided, either by the Committee or the Director, a system of decision by the Director which you have just reminded us has always been the case. In the case of planning conditions, how are they dealt with?

Mrs Christian: Chairman, prior to the introduction of the new processes, conditions went to the Committee for consideration; that is the implementation of conditions. Any consideration that had to be referred back went to the Committee for consideration. Normally, these are things like the colour of roof tiles, or paving, or whatever it may be.

Under the new process, because of the more extensive preparation required for submitting the applications to the Committee – and it is now in public session – it was determined that conditions would be delegated to the

Director. That is set out in the Delegation of Functions to Director of Planning and Building Control Government Circular 41/05, which says that determination of submissions required by condition of any planning approval may be determined by the Director, and that includes submissions arising on or after 1st November.

So although the application which you are considering was submitted prior to that date, the actual conditions application came in after 1st November, and was therefore dealt with by the Director under his delegated functions, as set out in this paper.

The Chairman: So from 1st November 2005, the new system, for the first time, allowed for conditions to a planning approval to be determined by the Director.

Mrs Christian: Yes.

The Chairman: Before 2005, it had always been the case that any condition to an application was determined by the Planning Committee.

Mrs Christian: Yes.

The Chairman: Any condition, no matter how small – colour of roof tiles, for example – went to the Committee for decision.

Mrs Christian: It is my understanding that they all went to the Committee. My limited period of operation under the old system would make me hesitate to be absolutely positive about that. I know we did have some samples of roof tiles submitted to us. I do not think that there were any variations from that, but perhaps the Director could assist me when he presents his evidence.

The Chairman: We will certainly come back to that. What, then, was the rationale in 2005 for changing that to requiring all conditions, no matter how complex or how trivial, to be determined by the Director with no option, unless the Director said so, to go to the Committee?

Mrs Christian: The Director actually... I have not covered the whole issue there. There are some exceptions set out in the paper under the new delegation. If I may just locate it...

The Chairman: Are you looking at Circular 41/05?

Mrs Christian: Circular 41/05, yes. There are exclusions:

'The Director may not, by virtue of this instrument, exercise any function in relation –'

The Chairman: 'Shall not'.

Mrs Christian: Shall not, sorry:

'in relation to any matter',

and then it sets out matters which he cannot deal with. There is an option at (f):

'which he considers should properly be determined by the Planning Committee.'

So he has an option to refer a matter to the Committee.

'or when he is instructed by the Chairman of the Planning Committee to submit to the Planning Committee for consideration and determination.'

So there are some exclusions there which are 'shalls' and 'mays', actually.

The Chairman: So, whereas a condition up until 1st November 2005 would automatically be taken to the Planning Committee for a decision, after that date, under this delegated authority by this Circular, it goes, in the first instance, to the Director, who has the discretion to refer it to the Planning Committee.

Mrs Christian: You asked why this was determined in that way. I think a lot of work went on in the Department before the change to the new planning system. The major change, of course, as you are aware, is that the Planning Committee now sits in public. There is a considerable amount of work to do to ensure that all the documentation and reports are published in a way that they were not published before. It was a balance between the work which had to go to prepare for the public sittings of the Committee and the work which could be dealt with under delegation, and it was determined that a reasonable balance was to submit these conditions for delegation to the Director. This meant that they could be dealt with on a basis when they came in, perhaps, rather than waiting for Planning Committee meetings.

The Chairman: So the more formal system of conducting Planning Committee decisions in public, with the accompanying documentation and agenda setting, was considered to be burdensome, was it, for every condition to have to go before it?

Mrs Christian: I am not party to the thinking that went on to any great extent before the changes, Mr Chairman, so I am sorry, I am not able to assist very much on what the thinking was before that change, but my understanding is that it was felt to be reasonable to send the conditions, which by and large were relatively minor matters that had to come back for consideration.

The Chairman: The delegation 41/05 replaced an earlier one, 57/01. It was issued in 2001, and you have touched on this in that that particular delegation excluded the Director automatically from using any delegated powers where objections had been received. Could you indicate why the 2005 delegation did not have such an automatic exclusion from the Director in the case of objections?

Mrs Christian: It was felt that the Director, as a professional planner, was perfectly well able to assess the merits of any objection.

The Chairman: Thank you.

Before moving on to the specifics of the particular planning application relating to the Poacher's Pocket – we have been discussing process in a general sense – I will ask my colleagues if there is anything at this stage? Mr Turner?

Mr Turner: Nothing at this stage.

The Chairman: Mr Cannan?

Mr Cannan: Not at this stage, except to, perhaps, express my surprise at the amount of delegation, or the power given to the Director of Planning as against what perhaps some Members of Tynwald thought was a more democratic system, and the Planning Committee determining decisions. But that is history, and a quantum decision was made in 2005 to give the Director of Planning powers which perhaps exceeded the public interest.

Mrs Christian: Mr Chairman, I would say that the changes in delegation were fairly limited. They did change, but they were fairly limited. They gave him the power to look at the conditions; they allowed him to look at applications with objections.

They still require him to refer to the Committee a difference of opinion with the planning officer's recommendation when it is one direction, whereas I think in the previous one it was in both directions: either disagreeing with a recommendation to approve, or disagreeing with a recommendation to refuse. So there were some changes, but not huge changes in relation to the processes before and current.

The Chairman: But the material change that was made was a critical one –

Mrs Christian: In respect of Poacher's – ?

The Chairman: Of this particular condition 19.

Mrs Christian: Yes.

The Chairman: So, clearly you became aware of the planning application relating to the Poacher's Pocket. It was initially decided, I think, before your time, was it?

Mrs Christian: Yes. I did not become aware of this element of the Poacher's Pocket application probably until I was on the Committee looking... I probably was not specifically aware of this application to any great extent until the issues arose relating to the condition. I was, obviously, sitting on the Committee which dealt with applications relating to layout, which came through in September 2005, and applications relating to specific properties on the plot.

The Chairman: Yes, for detailed approval.

Mrs Christian: Yes, but not aware of the condition application.

The Chairman: Were you aware of the degree of public interest in the development of this particular site?

Mrs Christian: I became aware, Mr Chairman, when the Committee had before it an application in relation to the layout of plots, roads and sewers, and I became aware then that there had been a lot of interest in the site and the difficulties that were... the objections which had been registered down there, and the complications which were –

Mr Cannan: Sorry, through you, Chairman: could you tell us the date when you became aware?

Mrs Christian: The first application that I was involved with was considered on 16th September 2005.

Mr Cannan: And you were actually aware then of a contentious planning application?

Mrs Christian: I was aware that that application was contentious.

The Chairman: Did you become aware that amended plans were submitted by the developer in 2005-06, relating to condition 19, relating to flood protection, and condition 16, relating to landscaping?

Mrs Christian: I cannot tell you when I became actually aware of that.

I find it difficult in the wording of the terms of reference to understand part (i), in the sense that it refers to various amendments to the main application which the Department are alleged to have failed to advertise, which were subsequently the subject of condition 19. I am not aware of any such amendments, Mr Chairman, which were subsequently the subject of condition 19.

As I understood it, the application came in, it went through the process to appeal, the appeal decision included condition 19, which required a referral back to the Committee, but I am not aware – or maybe it is the way it is worded – of any amendments to the main application subsequently the subject of condition 19.

The Chairman: If we read it as amendments to the main application which were the subject of condition 19, does that follow more easily?

Mrs Christian: Perhaps it does. In that case, I was not party to the original application. If I may try to develop some understanding of it, the main application was subject to – as I understand it – a review, and then an appeal decision. The appeal decision quite often requires a change of something that came in on the first application. I would certainly suggest that conditions are not normally advertised.

The Chairman: We will come on to that, I think, but what we are getting at is amended plans to meet condition 19.

Mrs Christian: Yes.

The Chairman: Condition 19 required certain things to be done relating to flood protection, bund wall and so on; condition 16, certain things to be done relating to landscaping. This would be before any work could be done on site, or to implement any detailed approval.

As far as condition 19 is concerned, amended plans were submitted in order to implement that. Did you become aware of amended plans in relation to condition 19?

Mrs Christian: I was not, because I was not involved with condition 19.

The Chairman: So you did not discuss those amended plans with the Director?

Mrs Christian: No.

The Chairman: No.

Mr Cannan: Could I ask you: do you find it, in hindsight, strange that the Director did not draw to your attention condition 19, and the fact that the Inspector – at the appeal hearing, and then in his report – made conditions under 19, and that they were never brought to your attention?

Mrs Christian: He made –

Mr Cannan: Or did the Director bring them to your attention at any time?

Mrs Christian: I became aware of them, eventually, when the issues in relation to this matter became more high profile. I do not recall condition... Because the delegation was to the Director to deal with conditions –

The Chairman: It would not have automatically come to you.

Mrs Christian: – it would not be normal for the Director to advise me about every condition that came in that he was considering.

Mr Cannan: I accept that, but you just said – I think it was in circular 41 – that the Director had a discretion, if he felt it was contentious, to bring it to your attention, or the Committee's attention.

Mrs Christian: The Director had a discretion, and the Director made his decision.

Mr Cannan: What I am asking is: do you find it strange that the Director did not exercise his discretion in this matter, which required fundamental changes, as appear to have occurred, without bringing it either to your attention or the Committee's attention?

Mrs Christian: It is for the Director to communicate his thinking on that matter, I think.

If it had been brought to the Committee, they would have given it due consideration, but the changes which were made were, I think, driven by the Department of Transport Drainage Division...

I do not think it is unusual for... What was unusual was for the parties to be advised of the plans on the conditions. That was a courtesy that was extended, which made them aware of the additional plans which came in, which would not be the normal practice.

The Chairman: Are you saying that, in the case of a condition to a planning approval, under the old system, the condition would have been brought to the Planning Committee for decision?

Mrs Christian: Yes.

The Chairman: Was it not normal practice for the parties to the original decision to be advised of the condition, or details of the condition?

Mrs Christian: Not to my knowledge. If someone was submitting a roof tile, we would not notify the parties that we

had agreed on such and such a... that we had had a submission of a roof tile. We would not notify the parties.

Mr Cannan: But, with respect, this is not a roof tile –

Mrs Christian: No, I accept that, Mr Chairman.

Mr Cannan: – and, with respect, Mrs Christian, this is a serious matter which cannot, in my opinion, be trivialised to the colour of a roof tile.

Mrs Christian: Chairman, it is not my intention to trivialise it.

The Director exercised his discretion. The Director had considerable previous experience of the site, and he determined to deal with the delegation. That is a matter for us all to –

The Chairman: If I put it another way: given the contentious nature of the local opposition to the original application, and the body of written evidence from opposing parties, what was being proposed to implement, to deliver condition 19, represented something quite different from the plans originally submitted at the inquiry. Do you think it is appropriate, from what you know, that the Director should have exercised delegated authority, or should he have exercised the discretion he had in the circular to pass the decision to the Committee?

Mrs Christian: Chairman, again, I was not party to the appeal. My understanding was that there was a lot of discussion about all the conditions with the parties.

If the original plans had been appropriate and satisfactory, there would have been no requirement for the Planning Committee to look further at that issue. The Inspector would simply have said, 'These plans will be the plans that apply to that development.' But the Inspector said, in condition 19, 'Prior to the commencement of any building works, *further details*, including, where appropriate, the precise location, construction, elevation and cross-sectional details of the proposed flood protection bund and wall, and surface water attenuation tank, must be submitted for approval by the Planning Committee.'

First of all, it implies to me that the Inspector deemed that there would be some alteration; otherwise, he would have simply accepted the plans that were before him. Secondly, there is quite often a variation in the wording which the inspectors use: they sometimes refer to 'Planning Committee'; they sometimes refer to 'Planning Authority'.

The Hon. Member, Mr Cannan, has indicated that the Director had a discretion. I certainly would not wish to trivialise that. I suspect now the Director may well wish he had referred it to the Committee. What the outcome of that would have been, in planning terms, who knows? It may not have been any different, but there was a general delegation to him, which he reasonably interpreted –

The Chairman: I do not think we are in dispute he was entitled to make the decision. I think what we are saying is that, given the extensive nature of the changes in these amended plans to implement condition 19 for a flood alleviation scheme, did it not appear that what was being dealt with here was more than just matters of minor detail, but actually something substantially different, on which

other parties should have been given the opportunity to make comment through a further planning application?

Mrs Christian: That would be not normal practice. Conditions are not normally subjected to a repeat process of the planning procedure. Conditions are the final stop, the end of the planning process. Conditions are not normally advertised. In fact, I noted on a submission from one of the parties – or, at least, a submission on a review decision on another application on this site – where another Inspector has commented on this issue...

If I may refer to that Inspector's comments... The application, Mr Chairman, was to do with a particular dwelling on plots 9 and 10, and some of the objectors raised issues not relating to those plots but to the general issues which had been of concern about the bund and so on. The Inspector, in his report, said:

'The question of whether there is a need for a separate application for the approval of any revised bund wall is a legal matter.'

We know the matter did not proceed to a Petition of Doleance, and that is a matter which you may well be considering, but he also says:

'As far as I can see, it was included in the scheme approved in principle, and the detailed work following that does not bring a requirement for a separate planning application'.

That is the view of another Inspector, sir, so it is not normal, in planning terms, for a condition to be subject to a separate planning application.

The Chairman: But if that condition could only be implemented by the submission of amended plans, which are different from what was approved initially, would there not have then been an obligation to advertise the application, and treat it as a new application, on which all parties could then express a view, rather than simply to be decided by the Director as a straightforward condition? Is there not a difference of degree? If, to implement a condition needs new plans, and something different from what was originally approved, should that not be treated as a new application?

Mrs Christian: I think if the Inspector felt that it should have been subject to a new application, he would have said so, but he did not say so. He treated it in the normal way, as any other condition, and left it to be determined as a condition.

The Chairman: Is it possible the Inspector then –

Mrs Christian: My understanding is it is not normal practice, in similar jurisdictions, for a condition –

The Chairman: Are you saying the Inspector should have treated it as a reserved matter?

Mrs Christian: If he had said it was a reserved matter, then it would have gone through the process again, but he did not say it should be treated as a reserved matter.

The Chairman: And by treating it as a condition, therefore, the route for considering it was through the Director.

Mrs Christian: Yes, or, I think, the Planning Authority.

The Chairman: Mr Turner.

Mr Turner: Yes. If I could just go back to the point of conditions: would you say it is unusual for conditions to contain content of such scale as in condition 19? We were talking about conditions being roof tiles and paving, and so forth. Is it unusual for conditions to contain content of this scale?

Mrs Christian: Perhaps I should not have emphasised too much the roof tiles issues, but they are the majority. There are other conditions that need to be complied with which are more detailed than those things. Occasionally, we need plans of working systems. There are, not infrequently, requirements for plans in relation to landscaping schemes and so on, which may be reasonably detailed, but they do not go through the repeat planning process.

The Chairman: Mr Turner.

Mr Turner: Would it be fair to say, in this case, the Inspector's condition 19 was talking about specific water attenuation tanks, cross-section details of flood protection, and therefore he would not have been aware that, to satisfy those conditions was going to be a completely amended plan, as residents were notified on 7th July? So, he may not have considered that that would have been a completely amended plan; he was purely relating to specifics regarding, if I may just quote:

'the location, construction, elevation and cross-sectional details of proposed flood protection bund, and wall and surface water attenuation tanks'.

Would it be fair to say he was completely unaware that a completely amended plan was going to appear?

Mrs Christian: Well, that depends on how much the plan was amended. To say 'a completely amended plan' almost implies that it is going to be somewhere else and completely different. It may be a matter of degree and interpretation how much change there was.

The Chairman: Can I just follow up on this point, before Mr Cannan comes in. You told us earlier, when I asked was it not normal for all parties to be advised about planning conditions being implemented, and you said no, it was not normal.

Mrs Christian: No, it was not normal to say that a –

The Chairman: No necessity for it to happen.

Mrs Christian: No.

The Chairman: No necessity. Why, in this case then, were the parties advised about the detail of the amended plans to implement the planning condition 19, if it was not normal procedure?

Mrs Christian: I was not party to the decision, so I think you better direct the question... I would suggest that it was...

Because there had, as I understand it, at the appeal, been a lot of discussion to try and get a satisfactory resolution for everybody, the Planning Authority, the Department, as a courtesy – and because there had been such discussion – wrote to the parties who had been at the appeal to say that this had come in.

You might argue that that should have resulted in further consideration or reflection when they were changed, but that is what happened, yes.

The Chairman: Do you think, in retrospect, given that, and the complexity of what was being proposed, it would have been better for this amending plan to go to the Committee?

Mrs Christian: In the sense that it is obviously a controversial matter, it might well have been better if it went to the Committee.

In the sense that it had full and professional consideration, I cannot see that there is, in planning terms, fundamentally a difference, except that a wider view would have been taken of the application. It certainly would not have required it to have been advertised any further.

The Chairman: But if it had gone to the Committee, it would have given other parties the opportunity to make their case.

Mrs Christian: No, it would not. No case is made before the Committee. The only difference would have been that it would have been considered in public, and parties could have heard the deliberations of the Committee. It would not have gone through the process where you could have made objections to it, or not. It would have been dealt with purely as a submission of a condition on which the Committee would make its determination.

The Chairman: Thank you.
Mr Cannan.

Mr Cannan: First of all, I notice, from time to time, in the published list of planning applications, 'Amended plan'.

Mrs Christian: Yes.

Mr Cannan: The amended plan is published and goes through the planning procedures.

Mrs Christian: Yes.

Mr Cannan: If condition 19 had been published as an amended plan, and while you say that the people who oppose it... and it had been heard in public, and the people cannot make representations against it, they could and would have the right to go to appeal over the amended plans. Will you agree that?

Mrs Christian: Amended plans are normally made to original applications before they have gone through the whole process of appeal. The circumstances pertaining to condition 19 are not those which come up every day. If they had submitted it as an amended plan, instead of it being dealt with as a condition, it is hard to understand why they would

start again when they had a condition to comply with which completed the planning process.

Mr Chairman: I do not –

Mr Cannan: Could I just finish this line of questioning?

The amended plan was of substantial alteration. It was not trivia, as we have heard so far. This was substantial amendment, which perhaps people are of the view that it was of a magnitude that required a fresh application, not for the whole project, but for this amended part. Would you agree with me that, if there was an application published of an amended plan, it would have gone to the Committee and, if there were parties dissatisfied with the Committee's decision, they could have gone to appeal?

Mrs Christian: If that... Yes.

Mr Cannan: Thank you. That is all.

Mrs Christian: I think so. I am not sure if it would be an amended plan or a new plan. It would be a different proposal than that which had been looked at by the Inspector, I suppose, but, as I am not party to the original one, I am not sure about the nature of the changes.

Mr Cannan: And now will you give us your opinion, in hindsight, and I know hindsight is a wonderful thing. Was there an error of judgement, in your opinion, by the Director of Planning, in not referring this to the Committee, or requiring a new application, which I have just explained, for the amendments, because they are amendments of some magnitude?

Mrs Christian: I do not know whether they are amendments of some magnitude, or not, in terms of the original plan. I did not look at the original plan, nor did I study the amended plans. I was not party to that application, so I will not comment on whether they were major changes. The issue –

Mr Cannan: Sorry to interpose. Have you studied them now, knowing that you are coming to this inquiry?

Mrs Christian: No, Mr Chairman, I have not, because I was not party to the original. You are aware of the complications of the original. You are aware of the issues which are before you in connection with condition 19. I have seen some of the plans, but I would not say that I am fully briefed on the changes that have been made.

In terms of your asking me whether the Director made an error of judgement: in planning terms, I believe the application got as detailed a consideration as it would have done before the Committee. In political terms, clearly, with hindsight, it would have been easier, certainly for the Director, if he had referred it to the Committee.

Mr Cannan: Thank you.

The Chairman: On the latter point, given your earlier comment, referring it to the Committee would have done precisely that. It would have been determined in public by the Committee –

Mrs Christian: Yes.

The Chairman: – but you advised that that would not have given parties the opportunity to make their case before the Committee.

Mrs Christian: That is certainly my understanding of the procedure. When we considered conditions under the old system – to the limited knowledge that I have of that process – certainly, parties did not appear to make their observations.

The Chairman: So, it would not have made any difference, would it?

Mrs Christian: It would not have made any difference from the point of view of process.

The Chairman: It would only have made a difference – and given the objectors and other parties the opportunity to comment and dispute these plans – if it had been treated as a new application, albeit on a narrower element of the original application.

Mrs Christian: Yes.

Mr Cannan: But, just to follow that, it could have been a decision, had it gone to the Planning Committee in public session, that the Planning Committee said that these are of such magnitude they require a fresh application. We are making suppositions on what might have happened at the Planning Committee, but none of us know, because it did not go there. But if it had gone there, the Planning Committee could easily have made a decision that these were of a magnitude for a fresh plan.

Mrs Christian: Mr Chairman, that is a hypothetical situation, and I cannot consider whether they would have made that hypothetical decision.

The Chairman: What would have happened – but it might have happened.

Mrs Christian: I cannot comment on whether it would have happened, or not. It would be normal for it to be considered as a condition. It is a hypothetical situation which I cannot comment on.

The Chairman: Forgetting this particular condition, if a condition was referred to the Committee by the Director, and, in assessing it, you noted that it was alleged to be substantially different, and that could only be tested by a new application, you would have the authority to require the applicant to produce a new application.

Mrs Christian: Again, I would need to take planning advice on that, but my view would be that, because it was a condition they were dealing with, they could well say, 'We do not accept this conclusion to the issue which the Inspector has raised as a matter to be dealt with by condition, go and bring us another conclusion to the condition,' which would not necessarily have meant going out to an advertising process.

The Chairman: Mr Turner, is it on the same point?

Mr Turner: It is focusing on the timetable, really, so I will come to that in a moment.

The Chairman: If you come back to that in a moment...

While this was going on, of course, you would be aware that there was a Petition of Doleance lodged, which the Department would be required to answer.

Mrs Christian: Yes.

The Chairman: Are you aware of legal opinion which suggested that condition 19 should have been the subject of a fresh planning application?

Mrs Christian: I have not got the legal opinion, Mr Chairman. I have not been involved in the Petition of Doleance issues.

The Chairman: So, you are not aware of that specifically?

Mrs Christian: No.

The Chairman: As a Member of the Department and Chairman of the Planning Committee, would you not expect to be aware of legal actions against planning decisions?

Mrs Christian: Yes, but I understood this action stopped, Mr Chairman. It was withdrawn.

The Chairman: Yes, indeed, it did stop. I am simply asking: in the Department's consideration and taking of advice, were you aware of such an opinion?

Mrs Christian: I cannot be accurate about my answer on that, Mr Chairman. There are a number of Petitions of Doleance in relation to the Department. I would need to check on which ones I had been given advice.

The Chairman: Thank you.
Mr Turner.

Mr Turner: Yes. If I may just focus on the period of time which I believe is where the actual main problem has arisen – and that is between 7th July 2006 and the end of September 2006 – on 7th July 2006, the residents received a letter from Miss Callow, Secretary of the Planning Committee, indicating that the additional information had come in in the form of an amended plan. I will not go into the details of what those changes were at the moment, but on 17th July, Miss Callow replied to the residents, indicating that the amended plans did not make up a new planning application.

Two days later, the residents wrote, directly pointing out that there were major differences between the original and the amended plans, such as the removal of the boulder clay foundation and various other items. So, it was pointed out to Miss Callow straight away by the residents.

Then, on 27th July, Miss Callow is alleged to have replied, indicating that the question of a new planning application was being assessed.

Time went on, and at the end of September, the residents then discovered that Mr McCauley had used his powers to determine the plans; the amended plans satisfied condition 19.

In view of the fact that they received a letter stating that the question of a new planning application was being assessed, and heard no more, do you not feel that maybe this is why they feel they have been led astray into believing that the Department was considering the matter to be dealt with as a new application?

Mrs Christian: Having heard that, yes, they may well have thought that. I have no recollection of being directly involved in the discussions about whether or not this condition would be subject to a planning application.

Mr Turner: I do not know whether you are aware at all, was any of that correspondence, and the backwards and forwards of letters between the residents and the Department, ever brought to your attention, as Chair, or the Committee's attention, during that period, July 2006 to September 2006?

Mrs Christian: I do not think so.

The Chairman: I think we had Mrs Christian's evidence at the start as to when she first became aware.

Could I just wind up, Mrs Christian, by asking you what lessons, if any, has the Planning Committee, Planning Department, learned from the Poacher's Pocket planning application?

Mrs Christian: Chairman, you will know that, when the Committee was set up, the Minister determined that the delegation would change somewhat in order to recognise the issues which were being addressed by this Committee. So, there was a new delegation for the Director which, if you have not got copies, I am sure we can let you have.

The Chairman: Certainly, in your written evidence, you advised us – and thank you for that – that:

'In the light of the appointment of the Select Committee, the Department reviews the use of delegated powers.'

and we note that, in November 2007... I just ask you to confirm that the Minister:

'decided that delegated powers should not be exercised in the following circumstances: firstly, where conditions require approval and relate to applications where the Director or Senior Planner has represented the Department at any planning inquiry or where any conflict or perception of bias might be argued; and secondly, where conditions require approval to elements which were of significant concern to objectors, at the committee or inquiry stage.'

In these matters, the Director and Senior Planner should seek the advice of the Chairman of the Planning Committee before proceeding.

Given that new conditions and then amended procedure, in a situation where the Director sought the advice of the Chairman of the Planning Committee before proceeding, what options do you see as being open to how, let us say, condition 19 might be treated where this would be the procedure applied?

Mrs Christian: Chairman, the option would be to refer the matter to the Planning Committee. In the light of what has just been read about consideration of advertising, I would need to take further planning advice on whether that, indeed,

was an option in relation to a condition.

In your earlier question, you said, 'what other issues have the Department taken on board in the light of this inquiry?' You will be aware that the Department, when it embarked upon the new planning process, said that it would review the new planning process after a period of time. That time had elapsed and we were in the process of starting a review of the planning procedures, which now overlapped with the further will of Tynwald as expressed in the second part of the resolution of 18th October, in that the administration and operation of the planning department would be subject to an independent review.

So I think that all of those things together, we will await the outcome of those, to see what changes it would be appropriate to make to the planning processes.

The Chairman: Would you agree that the temporary restrictions placed on the Director's delegated powers in November 2007 amount to an implicit admission of failure in the Poacher's Pocket planning process?

Mrs Christian: No, I would not, Chairman. I think that they recognise the concerns that have been expressed in relation to Poacher's Pocket. I think the action taken by the Director was one that he could take under his delegated powers. It is a matter of judgement whether that was the right decision.

I would not accept that it is an implicit acceptance that there was a failure; I think it is simply an acknowledgement on the part of the Department that a major issue of concern is before a Select Committee of Tynwald and we are cognisant of that fact and have acknowledged the issues by changing the delegation.

Whether or not the delegation should remain in that format will, I think, depend on both your report and the review which will take place into all the planning processes.

The Chairman: Nonetheless, the Department independently concluded that the process was deficient and required some amending.

Mrs Christian: I do not think it was... I think you would need to ask the Minister what his thinking was in terms of the delegation. I think it simply acknowledged that there was controversy in relation to the process which had been followed and therefore, while it was under review by a Select Committee, we should acknowledge the issues which the Committee was investigating.

The Chairman: Thank you, Mrs Christian. Mr Cannan.

Mr Cannan: Just one moment. If you say that this was a decision by the Minister to bring this review in last November, what was your advice to the Minister? He must have discussed it with you.

Mrs Christian: The review of the planning process?

Mr Cannan: Yes.

Mrs Christian: You are not talking about the delegation, sir, are you?

Mr Cannan: The delegation, this one and –

Mrs Christian: That was not last November. The review I was talking about was a review of the whole of the planning process, the new planning process, the public sittings, the Development Orders and so on.

Mr Cannan: I am talking about –

Mrs Christian: With regard to the delegation, the Minister determined what the new delegation should be when the Select Committee was established.

Mr Cannan: Yes, I accept that and you have already said that. What I am asking is when he determined that last November, what advice did you give to the Minister or did he not discuss it with you?

Mrs Christian: The Minister did not discuss it with me.

Mr Cannan: Thank you.

The Chairman: I would like to thank you Mrs Christian. We have overrun slightly, but thank you very much for your time, it has been most helpful. Thank you.

We will take, if we may, a five-minute comfort break and then at half past eleven, we will invite Mr McCauley to take the chair. Thank you.

*The Committee adjourned at 11.25 a.m.
and resumed its sitting at 11.30 a.m.
when Mr McCauley was called.*

EVIDENCE OF MR I McCAULEY

The Chairman: Good morning, Mr McCauley. Thank you for appearing before the Committee and, just for the record, could you tell us when you were appointed Director of Planning and Building Control, please.

Mr McCauley: I think it was actually 1st July 2001. It was certainly July 2001.

The Chairman: When you were first appointed, what delegated powers were available to you to determine planning applications and to determine conditions?

Mr McCauley: I had no delegations when I was first appointed, Chairman. The Minister at the time – and I discussed it with himself and the former Chief Executive – were of the view that I needed some time to settle into the post and understand how the system operates and things like that. Therefore, to start off with, it was probably a good idea if I did not have delegated powers and the Planning Committee would continue to deal with things as they had done when there was an acting Director, before I took up the post.

The Chairman: When were you given delegated powers then, after taking up your post?

Mr McCauley: I think it was November 2001.

The Chairman: Would that be through Circular 57/01.

Mr McCauley: It is, yes, December 2001.

The Chairman: Was that the first time, to your knowledge, that delegated authority to the Director had been given by the Department?

Mr McCauley: No, it was not the first time. The previous Director had had a more extensive delegated authority than I was granted and the acting Director, as I understand it, did not have any delegation at all. It was decided to do things through the Planning Committee.

The Chairman: Your predecessor had delegated authority to determine applications even when objections had been made?

Mr McCauley: That is my understanding, yes.

The Chairman: And 57/01, your first delegation, specifically provided that you would not make a determination where there was any objection?

Mr McCauley: Yes, Chairman, I think you might recall what the context was round in 2001. There were issues around how planning applications had been dealt with in the past; the question of use of delegation. Therefore, we made an assessment of the types of applications that were being submitted and how to get the balance between items that rightly needed to go to the Planning Committee and those that were relatively straightforward, the obvious one being that about 80 per cent of applications are actually approved without any objection. That was the basis of looking at the delegation that I was granted at that point.

The Chairman: Yes, and subsequently in 2005, the delegation which came in, coincidental with changed Planning Committee procedures, gave you continued delegated authority, including where objections had been made, so we are back in a way to the previous system, and including the determination of conditions at your discretion.

Mr McCauley: Yes, I would not say it was coincidental, it was part of the package.

The Chairman: Part of the package.

Mr McCauley: I think Mrs Christian explained before that there was actually a considerable administrative, and there continues to be a considerable administrative, burden to the Planning Committee meeting in public. There is a lot of work that has to be done in terms of preparation. There was a move away from, prior to my arrival, reports being handwritten reports or, in fact, briefings by the officers at the Planning Committee to the situation we have today where all applications have a written report, all planning applications that go to committee have a written report which is published and available.

So, as part of that, it was a look at again the nature of the applications that we had and, given the rights of objection and appeal, the Department felt that the balance was such that, yes, significant applications should continue to go to the Planning Committee. That is quite right and proper and it was viewed that certainly the scope of applications that I

deal with at the moment, plus this element of the Chairman of the Planning Committee reviewing applications, meant that we could make sure that the applications that needed to go to the Planning Committee went to the Planning Committee, and the more straightforward ones could be dealt with at officer level.

The Chairman: Thank you. Mr Cannan.

Mr Cannan: You just said, and just to clarify, that planning applications at the Committee sitting in public needed greater preparation than the Planning Committee looking at an application obviously in private. Why is that?

Mr McCauley: I think I have explained, Mr Cannan. I did explain that now all planning applications are subject to a full detailed written report, a typed report which is part of the file... is available on the file.

Mr Cannan: I accept that, but you did say it needed greater preparation when it was heard in public, with the indication that they would need less preparation when it was heard in private.

Mr McCauley: Yes, as I have just explained, because you... Have you seen the agenda papers for Planning Committee?

Mr Cannan: No.

Mr McCauley: Well, they are about so thick... There is a considerable amount of work involved in that. We did not publish those agenda papers before the 2005 changes. It was one of the fundamental changes, so there is a considerable change from what happened before 2005, to what happens now.

Mr Cannan: But what I am trying to get at is the information that the Planning Committee has, whether it sits in public or private, must surely be the same?

Mr McCauley: I would suggest that it probably has a more detailed report on applications now than it had previously and that, certainly, there was more need for discussion with the Planning Committee, when it met in private, to explain the background to applications.

Mr Cannan: Thank you.

The Chairman: Is this a presentational aspect? Before the planning officer comes to the Committee there is more detail for the Committee in writing, whereas in private it would have been a verbal explanation across the table.

Mr McCauley: You have experienced it, Chairman, yes, that is exactly what it was. The officers would prepare reports beforehand. Quite often, they were summary reports. But now the agenda is published in advance of the meeting, the members of the Committee are sent the agenda prior to the meeting, so they have got an opportunity to read through all the papers and, if necessary, come and inspect any of the applications that they feel they want further information on.

Mr Cannan: But that would not have happened before, when they were sitting in private; it was just verbal?

Mr McCauley: Yes, it was a verbal presentation. There were *some* written reports. It is not a static situation, Mr Cannan, it changed over the years. There were some written reports submitted, but the majority of applications that were dealt with by the Committee were not on the basis of written reports given to the Committee members. The officer would write a report and do a verbal presentation.

The Chairman: Is this new system working well, in your opinion?

Mr McCauley: In my opinion, it is working well, yes. That is the feedback I get from most of the people that attend. Clearly, there are a lot of people who would like to attend and speak, but in terms of knowing when the meetings are going to happen, being able to get hold of the papers in advance of the meeting, it is working well, yes.

The Chairman: So while the decision is made in public and conducted in public and the arguments presented in public, the public and the parties to the application do not have a right to speak – is that the situation?

Mr McCauley: That is the case, yes.

The Chairman: Should they have a right to speak, in your view?

Mr McCauley: That is a matter for the Department to take a view on and for it to be discussed through the review.

Certainly, at the time that we introduced the changes in 2005, it was discussed and it was decided that going from where we were to full open Planning Committees was probably quite a big change to take on board and, to add to that, public speaking was probably too great a change. But these things do evolve, Chairman.

The Chairman: Without the review stage, where parties would be given an opportunity to make the case and cross-examine other parties before the Committee, now there is no option but to go straight to appeal. I just wonder, in passing, whether you had a view that, perhaps, at the initial stage parties ought to be given a short opportunity to speak direct to the Committee and perhaps correct any errors as they see the report from the officer, for example.

Mr McCauley: It is always a difficult point, correcting the errors. What we quite often find is that applications... the applicant will ask for the application either to be withdrawn or to be deferred from the Committee once they have actually seen the officer's report. Certainly, if there are any points in the officer's report, then we quite often get supplementary correspondence before the Committee meets, or the applicant or the agent will ask for the application to be deferred from that meeting, provide any information or corrections if they feel things need correcting, and we can make that assessment. That happens quite regularly.

The Chairman: We heard from the Chairman how the system of delegation operates and how the Chairman with

the senior planning officers make an initial assessment of the application to decide whether it should be determined by the committee or yourself as Director. Having been presented with applications then, do you apply any form of checklist or criteria to determine whether you should use your delegated powers in a given situation?

Naturally we have heard about the exclusion provisions in the order of delegation but do you have... I am thinking particularly about your discretion to pass to the Planning Committee any decision that you consider appropriate for whatever reason. What criteria would you apply in determining whether to pass something on to the Planning Committee?

Mr McCauley: I normally work on the basis that if the Chairman has seen the application in the early stages and decided that it is appropriate for it to be done under delegation, then I would normally assume that it would be a delegated item.

There will be occasions where I may not necessarily agree with the officer's recommendation one way or the other. I may feel that not sufficient consideration is being given to objections or conversely not sufficient consideration is being given to actually what the applicant is seeking to obtain. On cases like that, I will exercise my judgement and direct it towards the Planning Committee.

As Mrs Christian has explained, all the significant applications go to the Planning Committee, and I would see that as being the case. I do deal with some quite significant applications, if you look at them baldly, but in a lot of cases, it may well be, for example, planning permission has already been granted for 50 houses and there is an amended layout. I may deal with the amended layout, rather than it going back to Planning Committee.

But it is a matter of judgement: there is not really a check list or a tick list that is used.

The Chairman: No matter how major an application, if it meets the criteria as set down and the Chairman decides it should go to the Director, no matter how major, or the fact of very few objections or comment, you would make your decision clearly on your professional expertise as a qualified planner, you would make the decision on that basis. The Planning Committee, not being professionals but acting under professional advice, have a different task, do they not, to assess the merits of competing points of view?

Mr McCauley: Yes, in general terms, you are correct.

The Chairman: Thank you. Mr Cannan.

Mr Cannan: You mentioned, Mr McCauley, a moment ago, that if there was, for example, a 50-house housing-estate development and the original plan was fully advertised and open for public inspection, there was a condition or the developer wished to have amended plans, you said that you alone made the decision –

Mr McCauley: I said I *may* make the decision, Mr Cannan.

Mr Cannan: You may make the decision. Would you think it appropriate, if the plan was contentious, to involve other parties into this amended plan, this amended layout –

the objectors, in other words – or a new planning application or would you give people – ?

Mr McCauley: Well, I do not deal with amended layouts.

Mr Cannan: I thought you just said you did.

Mr McCauley: No, I deal with planning applications which constitute amended layouts. I think it is quite important to be specific about the words that we use. An amended plan is an amended plan. It depends in what context it is submitted.

If we get an application which has a layout which is amended from a previous permission, then I will exercise my judgement. If, for example, the first application had been contentious, and the second application was not contentious because it was a minor change and there were no objections, then I would probably exercise my judgement to say it is a minor change, there have been no objections, I will deal with it as delegated.

On the other hand, if it is a significant application, there were objections the first time round, it is an application – and I say *an application* – the second time round and there are still significant objections, then yes, I would probably exercise my discretion and forward it to the Planning Committee.

Nine times out of ten Mrs Christian will have identified those, anyway.

Mr Cannan: The significance of this inquiry is that there were amended plans to a planning application.

Mr McCauley: I am sorry, I have been noting down the words that have been used this morning, and the signal point about this whole thing is whether or not they are amended plans or further details.

If in my judgement they had been amended plans, then I would have required a new planning application. In my judgement, they were not amended plans and in the judgement of the case officer who prepared the report that I dealt with – which is in amongst your papers – you will see that she came to the same conclusion, as well.

I think it is also important in terms of the terms of reference of the Select Committee. It is a point that I will come back to later.

The Chairman: If we can, perhaps, just step back a stage, we will revert to what we were just talking about here. You have described how you deal with applications, whether they are fresh applications or whether they are new applications for amended plans.

In the case of conditions to a previous application, before 2005 all those conditions go to the Planning Committee for approval and not to the Director. In going to the Planning Committee for approval, depending on the nature and detail contained within them, would other parties have been notified?

Mr McCauley: That would not be normal practice.

The Chairman: Not be normal. In the case of condition 19, the decision was made to notify other parties.

Mr McCauley: Yes.

The Chairman: Why was that?

Mr McCauley: I do not know.

The Chairman: Who made the decision?

Mr McCauley: I think that was a decision that was probably made by the Secretary of the Planning Committee.

The Chairman: As Director of Planning, does the Secretary to the Planning Committee then have the discretion to decide whether such conditions should be notified or not? Is there a delegation from yourself to that effect?

Mr McCauley: There is not a delegation to that effect, no. I think the situation has fluctuated over the years as to whether or not people have been advised of the receipt of plans pursuant to a condition.

The Chairman: If people are notified of such changes for a purpose, what would be the purpose in notifying in this case?

Mr McCauley: I presume the purpose was, knowing that the application had been contentious, to advise them of the receipt of those plans.

The Chairman: And if the other parties reacted adversely to this information that they had been given, what course was open to them?

Mr McCauley: Well, any comment would be considered when a decision was made on whether or not to agree the details that had been submitted pursuant to that condition.

Mr Cannan: And these decisions would have been taken by you and you alone.

Mr McCauley: In this case, yes.

The Chairman: Did views come in from other parties after they had been notified of the condition?

Mr McCauley: Yes, they did.

The Chairman: And did those views, in your professional opinion, reflect the contentious nature of the previous application?

Mr McCauley: Yes, they reflected the contentious nature of the previous application. As the report that I agreed concluded, they did not demonstrate what the substantial amendments were that were being claimed.

The Chairman: Do you agree that the objectors, in responding, contended that the information that they had been given by the Secretary of the Planning Committee, in their view represented a substantial difference from what was ultimately approved at appeal and, in their view, they considered that they would have wished to have an input to contest elements of the proposals to implement the condition?

Mr McCauley: They made their comments on the details

that had been submitted and some of those comments were along the lines that it should be the subject of a separate application. The point had actually been made at the inquiry to the Inspector and the Inspector actually comments on it in his report. I think the reference is paragraph 165 of his report.

So there was a discussion at the inquiry as to whether or not the details of this required a separate application. The Inspector concluded that he did not feel that it did and that is why condition 19 was attached. He felt there was sufficient information available to be able to make the decision on whether or not the protection works in principle were acceptable and required further details.

The Chairman: How significant – ?

Mr McCauley: Now if somebody is arguing afterwards that they felt – continued to state – that, in their opinion, a new planning application was required, that was not the conclusion that the Inspector came to.

The Chairman: But if objectors made that suggestion, in your view, how...? Are you saying that the differences between what was originally suggested and what was in the detail submitted by the developer were not significant, even though the objectors thought they were?

Mr McCauley: In the round, yes, because we consulted with the Department of Transport about the efficacy of what was being proposed and they said that, in their opinion, having taken over main river drainage responsibility for that, with the supervision that they were undertaking, they would be acceptable and therefore that the other changes were not material changes.

I know there is a matter with the other parties about the removal of the bentonite wall: that is a matter of engineering detail that does not affect the overall appearance of the development.

The Chairman: But given that the objectors believed otherwise, were they not entitled to test, before a fresh consideration, their case and to test the Department of Transport's case?

Mr McCauley: In my opinion, no, they were not.

The Chairman: Thank you. Mr Turner.

Mr Turner: There has been much talk of the amended plan containing properties that were to be built at a different base height from the original plan. Do you know what the difference is between the original and what has been described as the amended plan?

Mr McCauley: That issue... Because at the time, I am trying to get the timing of it correct... Because there were issues around, about my use of delegated authority. There was correspondence going backwards and forwards with the Chief Executive, and I took the decision, at that stage, it would be inappropriate for me to continue to deal with arguments about the decision that I had made. So, in fact, from then onwards, the Senior Planning Officer, Mrs Mullen, was involved with the Chief Executive on that correspondence.

I know the conclusion that she has reached, and I have no reason to doubt the conclusion that she has reached. There are some changes, yes. Whether or not those changes are 'something quite different', 'fundamental changes', or 'a completely amended plan' – those are the three quotes I heard this morning – is actually a matter of fact and degree, and I think it is quite important that the Committee, in taking evidence, gets it very clear from all parties as to what they think the substantial amendments are, and, if I may suggest, takes an independent assessment as to whether or not that is correct.

The Chairman: Just on that point, our remit is quite clear, and it is not to assess the planning merits of a particular proposal; only a properly constituted forum – the Planning Authority – can do that. Our remit is to consider the processes that were employed.

Could I put it to you that, given the claims being made by objectors and other parties that the proposal was sufficiently different in detail to what was approved at the Inquiry, whether, in your professional judgement, it complied with the requirements of the original decision or not, the very fact that claim was made otherwise... On that basis, did you seek an opinion from the Attorney General's Chambers on whether the revised plans submitted by the developer to fulfil condition 19 warranted a separate planning application?

Mr McCauley: No, I would not need to, because I have had the discussion with the Attorney General before, and it is very much a question of fact and degree. It is an assessment as to what the difference is and whether or not that is a material change from what was provided.

Again, I go back to the terms of reference: the reference is made to 'various amendments'. If I considered that the details that were submitted constituted considerable amendments to the approved plans, then I would have asked for a fresh application. In my judgement, they did not. I am sorry, I should also say in the judgement of the officer who made the initial assessment and reported that to me.

The Chairman: We, as a Committee, are interpreting our remit, which was set by Tynwald – it is not our wording – that 'the failure of the Department to advertise various amendments to the main application relate to the amending plans submitted to fulfil condition 19.'

Mr McCauley: As I say, though, Chairman, that is the fundamental point about it: are those plans amending the details that were submitted with the original application? It is clearly a point of contention between the parties.

The Chairman: And given it was a point of contention, which you noted, you nonetheless went ahead to make the decision, under your delegated powers, without considering that perhaps it should go to the Planning Committee for a broader view, given that their role is assessing and mediating between contending parties.

Mr McCauley: I took the view, at the time, that the changes were not substantial that required a fresh application.

The Chairman: I will just revert to my colleagues in a moment, if we can just complete this point. When the Petition

of Doleance was being considered by the Department, a legal opinion was presented that condition 19 should have been the subject of a fresh planning application. Did you agree with that view, or did you not?

Mr McCauley: Are you saying that within the Petition of Doleance that was submitted?

The Chairman: No, I am saying that when the Petition was being considered by the Department of Local Government and the Environment, we have evidence that the Department sought legal advice, and that advice was that condition 19 should have been the subject of a fresh planning application. This was as the Department was considering its response to the Petition of Doleance.

Mr McCauley: I am aware of that advice, yes.

The Chairman: And do you agree with it?

Mr McCauley: No.

The Chairman: Thank you.
Mr Turner.

Mr McCauley: Can I give an explanation to that, Chairman? It seems quite a blank answer to give.

The Chairman: I will give you that opportunity just in a moment.
Mr Turner.

Mr Turner: Yes. I would just like to focus on the... For some clarity here, going back to the notification which went out, I believe I said earlier to Mrs Christian that residents received a letter. I have since discovered all parties received the same letter, including the Highways Division – just to clarify that. The letter, although signed by ‘Administrative Officer’, is stated as E J Callow on the letterhead, but it does clearly say ‘amended plan received’. It then stated that ‘the plans will not be re-advertised’, but invited additional comments.

There were a considerable number of additional comments sent in, pointing out quite a number of what the parties considered to be fundamental changes.

How did the Department deal with those submissions that came in, following that letter of 7th July, to result in you reaching the decision you did?

Mr McCauley: I reached the decision on the basis of a report that was put to me by the case officer who was dealing with that particular aspect, and that is part of the papers that you will have received. When I made the decision in September, that is the report that I am talking about. That officer undertook the assessment of the details that had been submitted, had the discussions with the Department of Transport about the efficacy of what was proposed, and came to the conclusion that she did.

Mr Turner: But on 27th July, a letter went out, indicating that the question of a new planning application was being assessed, but there was no further communication relayed to the parties to say that it had been assessed and a decision had been reached. Do you feel that that maybe is a breakdown in

the system, that they were not fairly notified that that process had come to an end?

Mr McCauley: I would accept that, yes. If we wrote and said that it was being considered, then we should have told them what the conclusion of the consideration was.

The Chairman: Just reverting to the point that, under the delegated authority which you clearly had, you made a decision on condition 19, following professional assessment of the proposals by the developer, by the planning officer, and you reached your decision. You reached it in the knowledge that other parties who had been notified were contending differently, that the differences were so substantial as to merit a fresh application. You did not specifically take legal advice at the time on that, but following the issue of the Petition of Doleance, the Department did seek a legal view, was given it, and that legal view was one with which you do not agree. Can you give us your reason as to why you did not agree with the legal advice for a fresh application?

Mr McCauley: I have not got the legal advice in front of me that you were given, but if it is the point that is being made, it is an issue about interpretation as to whether or not condition 19 was actually a reserved matter. The legislation, in my opinion, is very clear about what is a reserved matter, and a reserved matter requires a separate planning application. This was details submitted pursuant to a condition and, as such, did not require a separate application.

The Chairman: Thank you. The advice, did it not, raised some question as to whether the condition, while it was not set out as a reserved matter, the Inspector might have acted *ultra vires* and should have treated it as a reserved matter, and that *de facto* it was a reserved matter?

Mr McCauley: The person who gave the advice came to that conclusion. Obviously, I had to deal with the fact that, at the time I was dealing with the matter, it was a decision that had been made on appeal, and therefore the parties, including the applicant, were in a position where they should be able to rely on that permission.

The Chairman: Given the considerable amendments that had been suggested by the parties, that had been made compared with the original, was there no element in your mind that it would be safer to pass the matter to the Planning Committee; that it would have been safer, because clearly this was in retrospect?

Mr McCauley: Not at the time, no.

The Chairman: Not at the time.
Mr Cannan.

Mr Cannan: Two questions, Chairman. One is: you clearly stated that you did not accept the legal advice given to the Department in respect of the Petition of Doleance.

Mr McCauley: I do not think I did not accept it. Can I ask when that legal advice was given, please, Chairman?

The Chairman: On 13th December 2006, to which you responded to the Chief Executive on 19th December 2006.

Mr McCauley: So that legal advice postdates the decision that I made.

The Chairman: Yes, it was in relation, I think, as Mr Cannan said, to the Petition of Doleance; the question being, did you accept that advice? We realise this was all after the event, after your decision.

Mr Cannan: But you clearly said that you did not accept the advice to the Department on the Petition of Doleance. You said that a few minutes ago.

Mr McCauley: I said I did not agree with the –

Mr Cannan: Legal advice.

Mr McCauley: – legal advice on that particular point and for that particular reason. I do not think that particular point has actually been tested at law, and that is why. My experience is that reserved matters applications are very tightly prescribed. The Government Advocate was giving a different opinion.

Mr Cannan: In your opinion.

Mr McCauley: I have said in my opinion, yes. I do not agree with that particular point in that particular opinion. What the Department does with it is a different matter. You are asking for a personal opinion and a professional one, and that is my personal and professional opinion.

Mr Cannan: You do not agree, although you are not a qualified lawyer. You are a qualified town and country planner, but not a qualified lawyer, but you still did not accept the legal opinion given?

Mr McCauley: It is a matter for the Department to decide whether or not it accepts the legal opinion that it is being given. In my opinion, I do not agree with that. Whether or not I accept it is a different matter, Mr Cannan.

Mr Cannan: The other part is that in November last we have learned that the Minister changed the rules for delegation.

Mr McCauley: Yes.

Mr Cannan: Were you consulted before the Minister changed the rules?

Mr McCauley: Actually, I put the point to the Minister before I was consulted. In fact, I wrote to the Chief Executive saying, in the circumstances, I did not feel I could exercise any of my delegated powers in the context of the terms of reference of the Committee and everything else, that I felt it was totally inappropriate until the Department clarified the situation.

Mr Cannan: So you requested the Minister, basically, to change the rules.

Mr McCauley: No. I asked the Minister to look at what the delegation was that I had, and then to decide whether or not, in his opinion, it was appropriate for me, and the Senior

Planning Officer, to continue to deal with matters in the way that the current delegation allowed us to, and until I got a decision from the Minister on that, until the Minister gave me his position on it, then I reverted to only dealing with applications where there were no objections and which were only recommended for approval.

Mr Cannan: That is fine. So you recommended it to the Minister. Did you consult with the Chairman at all about this?

Mr McCauley: I talked to the Chairman about it, because I explained to her the situation I felt I was in.

Mr Cannan: And you had the support of the Chairman?

Mr McCauley: She understood the position, and also that I had asked the Minister to give me clarification about how I used the delegated authority.

Mr Cannan: Thank you.

The Chairman: Thank you.

Can I just go back to the earlier part of Mr Cannan's question, the legal opinion. You have told us you did not seek a legal opinion prior to making the decision. The Department sought a legal opinion later, in relation to the Petition of Doleance, which you do not accept. In retrospect, given that legal opinion, would you have acted differently, had that legal opinion been known to you before making the decision?

Mr McCauley: I would certainly have discussed the legal opinion with the Government Advocate and would probably have discussed it, certainly with the Chief Executive, and probably the Chairman of the Planning Committee, and probably even the Minister, before we decided what to do.

The Chairman: Would it be fair to say that the legal opinion having been expressed, which at least – even if you do not accept the point from a professional point of view – indicated that there was considerable doubt on the part of the Attorney General's Department, and that, in turn, reflected the assertions of the other parties that the matters were so different as to warrant a fresh application... Would it not have been wiser to pass the decision, in retrospect, to the Committee, rather than make it yourself?

Mr McCauley: You asked Mrs Christian the same question about with the benefit of hindsight; with the benefit of hindsight, yes.

The Chairman: Thank you.

Could you explain to us the origins of condition 19, which was placed on the approval when the Minister announced the decision following the Appeal Inspector's report?

Mr McCauley: Yes. Obviously, the issue of flood alleviation and flood mitigation was one that was fairly fundamental to the whole appeal hearing, and there was considerable discussion at the time as to the efficacy of what was proposed, and how it could be implemented and secured and maintained in the longer term. As such, there

was quite a lot of discussion about the information being available, and the Inspector and the various parties... Well, it is not true to say all the various parties, but the Inspector accepted that further details would be required – construction details – but that the information that was available, and the views that he had been given by the different parties, were sufficient, in his mind, to come to the conclusion that what was proposed would be effective, but that there were certain details that needed to be sorted out and resolved. As a consequence, for example, the surface water attenuation tank is altered, from what was proposed to be a tank, to a oversized pipe, and there have been various changes to the construction of the bund wall.

The Chairman: So condition 19 arose from the Planning Department itself, and the detail of that suggested condition was put to the Inspector, who adopted it.

Mr McCauley: Yes. You will have seen, in the Inspector's report, that there was actually quite a lot of discussion about suggested planning conditions, suggested conditions by the Department, as set out on page 43, suggested conditions by the appellants, as set out on page 44. I think the schedule of conditions that are referred to, in terms of document DLGE1, was one that was discussed during the course of the Inquiry, and was altered in the light of comments that were made by various parties.

The Chairman: What part did you play, then, in advising the Planning Committee on the original application? Did you play a part in the review and appeal hearing, and if so, how?

Mr McCauley: I was not the case officer dealing with the applications.

I certainly attended, to the best of my recollection, the Planning Committee when the initial decision was made. There were actually a series of review meetings, and I may not have been at all the review meetings. I would have to go back and check, from the minutes, as to whether or not I attended them all. I have a feeling I may not have been at all of them.

At the Inquiry, I represented the Department. Mrs Mullen, who was then the case officer, actually gave the evidence on behalf of the Planning Committee. I also tried to assist the Inspector by co-ordinating the input from the various other Government Departments, including the Department of Transport.

The Chairman: So you presented the Committee and the Department's case. You were responsible for doing that at the appeal?

Mr McCauley: Yes.

The Chairman: Therefore, the suggested wording of the condition from within the Department, you were responsible for that?

Mr McCauley: I could not actually say that I drafted it. I would have to go back and see whether or not I can establish that from the appeal papers. The conditions – certainly the final set of conditions – are different to the conditions that were attached on the review decision notice.

As I say, that was to respond to some of the issues that came up, particularly the one about the designation of the main river, because that was an issue that we spent quite a lot of time discussing at the Inquiry: what the implications were; how it could be carried out; whether or not it was the sort of thing that could be covered by condition, or whether or not it should be subject to a separate legal agreement.

The Chairman: Having supported the Committee's case and the Department's suggested conditions, do you think it is appropriate that afterwards you should have used your delegated powers to approve a condition of planning approval, when previously you had advised the Planning Committee as Director, and advised the Inquiry on the application?

Mr McCauley: In that particular case, yes, for the simple reason that I was not the case officer with the original planning application, and the matter of the conditions – discharge of conditions – I did not deal with that personally. It was like any matter that I deal with: the subject was looked into by another planning officer, who made a recommendation, and then I determined it on the basis of the recommendation.

The Chairman: If, for the sake of argument, you had advised the Committee personally, or advocated a particular condition at the appeal, in that situation, would you have used delegated powers to make a decision subsequently?

Mr McCauley: I suppose it would depend on the nature of the matter.

The Chairman: Would there be a possibility, in your view, of a perception of bias?

Mr McCauley: I did not think so at the time, but clearly there is now.

The Chairman: And that would be the reason for the Minister's decision, in November 2007, to stipulate that

'where conditions relate to applications where the Director, or a senior planner, has represented the Department at any planning inquiry'

– and you have agreed that you did represent the Department –

'or where any other conflict or perception of bias might be argued, then the delegated powers should not be exercised.'

Does that recent decision flow from the perception of bias issue that arose in this case?

Mr McCauley: I raised the issue with the Chief Executive and the Minister to get clarification as to whether or not, and in what circumstances, I should continue to exercise the delegation. Clearly, in their mind, those were the sort of issues that were raised by the correspondence, both prior to the Tynwald motion and resolution, and subsequent to it. So, from that point of view, I can understand them including it, because they are matters that are live at the moment and current at the moment. So, when I asked for clarification as to how to exercise my delegation, it was to ensure that the Department would not be criticised for ignoring what the current issues are.

The Chairman: Thank you, you have put that very clearly.

Mr Turner, a final point?

Mr Turner: No, I have nothing.

The Chairman: Mr Cannan?

I would like to thank you very much. I would like to give you the opportunity, Mr McCauley... If there is anything you wish to add and state to the Committee, that you feel perhaps has not been adequately covered by questioning, please feel free to do so.

Mr McCauley: I think, Chairman, I come back to the point that I made before, that the terms of reference... I have not actually been asked many questions specifically directed to the terms of reference, and there are a number of issues in that that I find quite confusing in the way that it has been worded. I accept the point that you have made, that you have been appointed by Tynwald to look into this matter in terms of those terms of reference, but...

For example, I accept that, in this case, the matter turns very much on whether or not there were major changes. From my point of view, if the details that had been submitted had major changes within them, and if, in the opinion of the planning officer who looked at them, there had been major changes, then we would have required a further planning application. That is one issue that is highlighted.

Also, in the terms of reference, it is claimed that those should have been the subject of formal and advertised application. I think, again, I would direct you back to the point that was made by the Inspector in his conclusion, that this was a point that was actually debated at some length at the Inquiry, and the Inspector concluded that the details that were required did not require a separate application.

So there are a number of issues here that the Committee will need to look at. It is very much a case of fact and degree as to establishing whether or not the differences that are being alluded to are differences which are substantial and which, quite rightly, would require a fresh planning application.

I think there is also another matter as well, which you have to bear in mind, that... I am not sure if you have had any representations at all from the applicant, but there is actually another party to all of this. Certainly, for example, just to say that it should be another fresh planning application... It is quite alright to say that you need to – and I think the reference was made – require the applicant to submit a fresh planning application. Well, actually, the applicant is entitled to work on the planning application that they have got, and to submit details pursuant to that application. There could be a situation arising where – if the Planning Committee, or the Department, or whoever made the decision on this, decided that the details were not correct – in fact, that person has a right of appeal.

So I think there is a balance to be struck here, and a lot of what is being directed at the moment is about what are claimed to be major changes, and it is why I said, myself, earlier on that, at the end of the day, it is important to be clear whether or not they are major and substantial changes. As I have said, if they were, in my opinion, they would have required a planning application. In my opinion, they were not, and therefore did not require a planning application, but that will remain a bone of contention between myself and the other parties.

The Chairman: In other words, you exercised your professional judgement in the matter, that the differences were not substantial, as was being alleged, and therefore did not require a fresh planning application.

Mr McCauley: Not just my professional opinion, Chairman, but another planner's professional opinion, and that of the Department of Transport as well, because, at the end of the day, they are advising us on the efficacy of the construction that is being talked about.

The Chairman: Thank you very much, Mr McCauley. We appreciate your input.

Mr Kinrade was called at 12.32 p.m.

EVIDENCE OF MR K KINRADE

The Chairman: If I could now call Mr Ken Kinrade, Chief Executive of the Department of Local Government.

Good morning, Mr Kinrade, and thank you for joining us this morning.

Just for the record – you were not here right at the start of the hearing – Mr Cannan and Mr Turner are my colleagues on the Committee, and we are being recorded by *Hansard*.

Can I ask you first: are you aware of the delegation of functions to the Director of Planning and Building Control and the Delegation of Functions (Development Procedure) of November 2005?

Mr Kinrade: Yes, I am, Chairman.

The Chairman: When did you take up your post in the Department, Mr Kinrade?

Mr Kinrade: 8th November 2006.

The Chairman: What internal procedures and guidelines did your Department have in place regarding the use of these delegated powers in 2006?

Mr Kinrade: The Order, if I can refer to it, was the 2005 Order, effectively giving the delegated powers to the Director of Planning and Building Control. That was essentially the basis of the delegated powers at that time. The Member with responsibility for the Directorate of Planning and Building Control also has a delegation from the Minister, which goes alongside of that.

The Chairman: Were there any other guidelines in place, which determined how and the circumstances of the Director of Planning using delegated powers?

Mr Kinrade: I am not aware of any others.

The Chairman: Does your Department have any procedures to monitor how the Director exercises the powers? Is that monitored, and are statistics kept of decisions referred to him, which are subsequently referred to the Planning Committee, for example?

Mr Kinrade: The practice within the Department... The

functions are delegated to the Member responsible. The process that they adopt is down to the... Applications come in, they are discussed with Mrs Christian, in this particular case, and they would then decide which ones may be delegated and which ones have to go to the Committee.

The Chairman: Mr Cannan.

Mr Cannan: When did you first become aware of this contentious planning application at Ballasalla?

Mr Kinrade: I think there was a letter waiting for me on my first day in the chair. I cannot remember –

Mr Cannan: A letter from whom?

Mr Kinrade: I think it was probably from Ballasalla and District Residents Association and/or their legal advisers.

Mr Cannan: So, from day one of your appointment, in November 2006, you became aware that this was a contentious issue?

Mr Kinrade: Yes.

Mr Cannan: Did you independently investigate the matter, or did you rely on the advice of the Director of Planning?

Mr Kinrade: I relied on the Director of Planning and other correspondence that was on the file. As you have probably seen, it is quite a hefty bundle of papers.

Mr Cannan: You did not determine your own opinion on it? You accepted advice?

Mr Kinrade: I accepted advice, including legal advice, which is on the file, which you have seen.

Mr Cannan: Yes, but that was not answering it.

Mr Kinrade: I did not revisit the opinion or the decision taken by –

Mr Cannan: Did you determine an opinion of your own on the matter, other than just reading it? I can read lots of advice here, but, at the end of the day, I am going to have to determine an opinion on it, aren't I? Did you determine an opinion, going through, as it has proceeded for the last –

Mr Kinrade: With the benefit of hindsight, with all the information there in front of me, I take the opinion that it would have been better handled as a new application, but that was not what was before the Director at the time.

Mr Cannan: And you went along with it?

Mr Kinrade: I have no other avenue. I cannot overturn that decision – neither can the Minister – once it has been determined.

The Chairman: When you took up post – just to clarify – the decision had been taken –

Mr Kinrade: Yes.

The Chairman: – and the letter from the Ballasalla Residents Association was in relation to their legally contesting that decision.

Mr Kinrade: Yes.

The Chairman: I think Mr Cannan has asked now, did you form your own opinion on the case which was being contested. I think you answered that, in your opinion, it would have been better to have delegated the decision. Is that what you just said?

Mr Kinrade: I think it would have been better for the whole flood alleviation issue to have been made by way of another application, but that was not what the Planning Inspector recommended, or the Minister of the day actually decided when he issued the approval.

The Chairman: On what basis did you form the opinion that it would have been better to have made, or ordered, a fresh application to deliver condition 19?

Mr Kinrade: In view of the contentious nature of that particular condition, and the subject matter involved in it... It seemed to go to the heart of the original application. It had been fought quite vociferously by the objectors in the area. In my opinion, it was a significant element that required more detail, but I am not a planning officer. I have no training.

The Chairman: Did you take any independent or outside planning advice, then, in forming that opinion?

Mr Kinrade: No. At the time, the Director was particular concerned, and actually did want to go and get external legal advice on that question, but we chose not to at that time.

The Chairman: So your opinion that it would have been better to have been the subject of a fresh application was based on the contentious nature – I think you just said it was contentious – and the fact there had been a large number of objections.

Mr Kinrade: And the fact that the condition almost went to the heart of the original application, and it was a major issue.

The Chairman: So, a question of degree. So this was your opinion... If you had had the authority, or were in a position to exercise the authority at the time, would your advice have been, to the Director – accepting it is not your place to give professional advice – that in view of the contentious nature, it goes to the heart of the original application, a lot of objections, it would be better to make it a fresh application?

Mr Kinrade: If that would have been in my gift, but that decision, I think, would have been taken on the basis of the legal advice that we received at that time, and it was... I think the advice, although... it is questionable, and I still think today that the court has yet to determine who was right.

The Chairman: Legal advice was not sought at the time, was it? It was only when the possibility of legal action was raised.

Mr Kinrade: Which was, I think, in December, which was a few weeks later.

The Chairman: Would it have been better to have sought a legal opinion on the part of the Director at the time?

Mr Kinrade: We did not have the power – or we do not have the power – to change what has already been determined, so it would have made no difference. The decision had already been taken, in my opinion.

The Chairman: Yes, but if legal advice had been sought and accepted prior to making the decision that fresh application should have been made, would it have been followed?

Mr Kinrade: If I had known about it, I would have certainly made sure that it was, but the Director probably handles something like 2,000 applications every year; I do not oversee every one of those. I take responsibility for it, and I accept that, but I cannot oversee everything that he does.

Mr Cannan: You were just the new boy on the patch. You had just been appointed in November, in December, and, with respect, for all of us, we hardly know the terms of our brief in such a short period.

Mr Kinrade: It is difficult, but –

Mr Cannan: I am saying that you could not possibly –

Mr Kinrade: You have to accept that the minute you take over the responsibility, you have it. Whether you know anything about it, or not, is a different matter.

I think most of you have had some involvement in planning at one time or another. It is not an easy subject. It is not easy, and I suspect it is seldom the occasion when all parties are happy to any decision that Planning would take. There will always be somebody who objects.

Mr Cannan: Did the Minister refer to you, or discuss with you in any detail, the decision he made in November last about changing the delegated powers?

Mr Kinrade: This is something that developed, probably, through a number of conversations that I had with the Director, who was concerned at the ramping-up of criticism that he seemed to be facing about the use of his delegated powers. He wanted additional guidelines and guidance as to how far he should go, or should not go.

I developed the recommendations for the Minister to cover the points that I, looking back through the file, had identified. I thought it was appropriate that we gave him that support, so that he knew that, where there was likely to be some contention, where he had perhaps acted as advocate for the Department, he would be able to delegate his delegation back to the Committee.

The Chairman: Did you draft those guidelines, or the amended criteria?

Mr Kinrade: I did, Chairman, yes.

The Chairman: Was that in consultation with the Director?

Mr Kinrade: Yes. That was really to ensure that the processes that were already in place were not going to conflict with what we were recommending.

The Chairman: As far as condition 19 is concerned – which originated within the Department as a flood alleviation measure – the Committee has noted the Minister's decision, after the hearing, to attach a number of conditions, condition 19 being one of them, with the wording that it was to be approved by the 'Planning Committee', whereas the original drafting of condition 19 by the Department referred to the phrase 'Planning Authority'. What was the reason for the change in terminology from 'Planning Authority' to 'Planning Committee'?

Mr Kinrade: There is, in fact, no legal definition of 'Planning Authority'. It is the terminology used by the planning Inspectors, who are used to the UK system. 'Planning Authority' has generally been picked up, as I understand it, to describe the departmental responsibilities, apart from the Minister's final appellate responsibility. So, when it says 'Planning Authority', it really means Planning Director and Member responsible and/or the Committee.

Obviously, is quite clearly stated within the legislation what that Committee means, and when the Inspector's report comes in, the Inspector's recommendation has to be viewed by the Minister, and he will then determine whether or not he wishes to accept it and/or add additional conditions etc.

In this particular case, I understand that when the condition 19 was transcribed into the Minister's decision notice, it was purely an error that they reverted back to the old system of making it subject to the approval of the Committee.

The Chairman: How was the error made, and who would have made the error?

Mr Kinrade: It has been custom for Mr Sinden, who was the ex Senior Planning Officer, to assist the Member to draft necessary letters, and such like. I have spoken to him, and he has confirmed that it must have been an error on his part.

The Chairman: By way of being a slip of the pen –

Mr Kinrade: Yes, very much so.

The Chairman: – to use the words 'Planning Committee' instead of 'Planning Authority'?

Mr Kinrade: He would have tried to have corrected that error, because there is not a Planning Authority, and he would have inserted 'the Committee'.

The Chairman: You know, and we know, that the terms 'Planning Authority' and 'Planning Committee' are, in effect, the same thing, because of the system of delegation.

Mr Kinrade: Yes.

The Chairman: However, other parties, in looking at the decision, very clearly saw the reference to the Planning Committee. Would you accept, then, that they were entitled to believe that anything to implement condition 19, any proposal, would have gone to the Planning Committee for decision?

Mr Kinrade: There may have been an expectation. Obviously, the wording of such a condition which says 'Committee', yes, you would expect it to go to Committee. Having said that, the functions of that Committee are delegated, in effect, by the Department, and the Department can determine how it wants to deal with those particular conditions.

The Chairman: Yes. So, in an academic sense, although it said go to the Committee, depending on its nature, it might well have been directed to the Director for a decision?

Mr Kinrade: It could have been, yes.

The Chairman: Nonetheless, the wording did say 'Planning Committee', and lay people and other parties would not appreciate the distinction between 'Planning Committee' and 'local authority'.

Mr Kinrade: The Planning Authority, you mean.

The Chairman: Sorry, Planning Authority.

Mr Kinrade: I think it is an unfortunate error; I cannot say any more than that.

The Chairman: When people see that – requiring condition 19 to be approved by the Planning Committee – given that the nature of the Planning Committee's work is generally the determination of planning applications, do you have some sympathy with those notified by the Secretary of the Planning Committee of the proposal for condition 19, for them then to be told that, in fact, they had no rights to make representations to the Planning Committee, as they might have expected?

Mr Kinrade: I suppose it goes back to the original drafting of that particular condition. If the Inspector had thought it appropriate for it to be dealt with by way of a new application, it would have said so. I think I can remember cases subsequently where that has actually been one of the conditions: that further matters will require a new application.

The Chairman:

'Prior to the commencement of any building works, further details – including, where appropriate, precise location, construction, elevation and cross sectional details of the proposed flood protection bunded wall and surface water attenuation tank – must be submitted for approval by the Planning Committee.'

Anybody reading that, I think, would assume that those details would be submitted in the form of a planning application; rightly or wrongly, they might assume that.

Mr Kinrade: They might be able to assume that, yes. Those people working within the Planning area probably would know otherwise.

The Chairman: If, having been given sight of those details – which, in your words, went to the very heart of the original application – and given the contentious nature of that original application – the large number of views – do you think it would have been reasonable for the application

to have been treated as a new application – the proposal to be treated as a new application?

Mr Kinrade: Knowing everything that we know now, I suspect yes, it would have been better for it to have been treated as a new application.

The Chairman: Thank you.
Mr Turner.

Mr Turner: We have identified the slip of the pen, slip of the keyboard, in the terms 'Authority' and 'Committee', which has established that lay people would assume it goes back to the Committee.

Would you not agree that this thought was further enhanced by the term 'amended plan received' in the letter which went out, inviting further comments, representations, however you would like to put it? So, the chain of events have further given the impression that this was going to be dealt with by the Committee, and they were not points relating to condition 19, but there were, in fact, new plans – amended plans, I should say – received by the Department, thus building up a picture that there was further opportunity for input.

Mr Kinrade: I am not aware of whether that would have been standard at the time. I have to be honest; obviously, it is before my time.

Mr Turner: Would you agree, though, that, certainly from that evidence, the impression is that there was ample opportunity there for people to make representation, and this was not merely a condition that was being met; it was actually an amended plan?

Mr Kinrade: If it was an amended plan... Whether we were required to do that, I do not know. You would have to ask the Director, unfortunately. That would seem to be very open. We get numerous conditions which come in, saying that the colour of brickwork has to be approved, access has to be approved, whatever it might be. As far as I am aware, there is no communication with other interested parties to see whether they have any comments on those particular issues.

Mr Turner: I understand that that vehicle is not available, and you did say at the start that the opportunity for you to overturn, quash, is not there, and neither is it there for the Minister.

What I am just trying to ascertain is that, from what has been published in the documentation, it is quite clear that the changing of the word, which, although a mistake, gave one impression, that impression was further backed up by the fact a letter went out stating 'amended plan received'.

Mr Kinrade: You might want to congratulate us that we were that open, and we did not just go ahead and approve it without any further consultation. That, in itself, is, I think, a good sign.

It is not unreasonable for us to ask for additional comments, and there are probably other areas within the Department where that happens, where we are not obliged to. That has, in another scenario, actually caused difficulties, because if we are not required to do it and, for whatever

reason, we fail to notify somebody else, we can find ourselves in court also.

The Chairman: So conditions are not normally subject to the invitation of further comment, but, in this case, that decision was made. What was your expectation of what would happen to those comments, and what –

Mr Kinrade: I am sorry, Chairman, that is before my time, when that decision was taken, wasn't it?

The Chairman: If I could ask you, then: the new procedure, which was adopted in November, and which you were instrumental in drafting for –

Mr Kinrade: November just gone, 2007.

The Chairman: November 2007, November just gone... which you were instrumental in putting to the Minister, to address the difficulties that have been thrown up. One of the circumstances where delegated powers should not be exercised is where conditions require approval to elements which were of significant concern to objectors at the Committee or inquiry stage. Had that provision been in force previously, would condition 19 fall into that particular category?

Mr Kinrade: Yes, I think so.

The Chairman: On the basis that it was of significant concern?

Mr Kinrade: Yes.

The Chairman: And the fact of being of significant concern to a number of objectors is sufficient criteria for the Director not to make the decision.

Mr Kinrade: There is always going to be an element of subjectivity, but I think, in this case, it would have qualified, I am sure.

The Chairman: I accept that how you define 'significant concern' is subjective –

Mr Kinrade: Yes.

The Chairman: – but, in this particular case, I think we can all agree – even those making the decision – that the matter was of significant concern.

Mr Kinrade: Yes.

The Chairman: The decision was made on the basis that, notwithstanding it was of significant concern, what was being proposed was not substantially different in detail from what was approved at the inquiry, and therefore there was an entitlement to make the decision based on that professional judgement.

Mr Kinrade: The argument would be, I think, that the effect of what has now been proposed was to stop floods, and we understand from the experts – from the Department of Transport etc – that it is quite an efficient way of doing

it. So it had the same effect. I think the manner in which it was done was substantially different, because the type of construction, as I understand it, is different.

The Chairman: Just to be clear: had this new delegation, new circumstances, been in force then, the matter would not have been decided by the Director, but would have been the subject of a new application – or would simply the decision have been passed to the Planning Committee?

Mr Kinrade: It would have been passed to the Planning Committee.

The Chairman: Because what it says, of course, is the Director should seek the advice of the Chairman of the Planning Committee.

Mr Kinrade: Yes, and it would be for her to decide, in this case, whether it should have been continued to be dealt with as a delegated authority, or passed to the Committee.

The Chairman: Or been subject to a completely new planning application.

Mr Kinrade: I am unclear as to whether that is actually legally possible at this late stage. Once the decision has been made that it can be dealt with by condition, then I think it has to be dealt with by condition, but may well be the determination taken by the Committee.

The Chairman: Yes, but it would be open to the Chairman to assess that, yes, it is of significant concern to a number of people. The planning view that would otherwise be taken is that the differences of detail were not of significant concern to warrant a fresh application. But the Chairman took other planning advice that it might be – or, indeed, legal advice –

Mr Kinrade: I was just going to say legal advice, yes.

The Chairman: – and the legal advice, as we know, subsequently that was given, rightly or wrongly, was that it should have been the subject of a fresh application –

Mr Kinrade: Yes.

The Chairman: – so you would expect the Planning Committee Chairman, where there was doubt of that sort, to seek legal advice –

Mr Kinrade: Seek legal advice, yes.

The Chairman: – and in this particular case, that legal advice would have been given prior to the decision, and we know what that legal advice would have been.

Mr Kinrade: Yes.

The Chairman: Thank you very much.
Mr Cannan.

Mr Cannan: First of all, I would like to congratulate whoever it was that they advised the objectors of the plans for condition 19, because... Will you agree with me that, had

the objectors not been given those plans, or known anything about it, the approval could have been given by the Director and the works undertaken without any knowledge of the objectors?

Mr Kinrade: Yes.

Mr Cannan: So, unless that person had sent the plans, the Director could have given his decision, as he did, and the work could have gone ahead without the knowledge of the objectors.

Mr Kinrade: Yes.

Mr Cannan: Now that you have got this new directive, from November, on delegation, will you inform the panel – notwithstanding that the Planning Committee will now determine them – will the objectors determining a condition on approval also advise the objectors that this is being determined by the Planning Committee?

Mr Kinrade: We –

Mr Cannan: Because otherwise they will not know.

Mr Kinrade: Again, do we do that for every colour of brick that we choose, or have to approve, and such like? How far do we go? Or, are you saying this is only for the major contentious issues that go to the Committee?

Mr Cannan: I am asking you; you are the salaried official.

Mr Kinrade: The Department has given a commitment to review the impact of the introduction of the Development Procedure Order 2005. That has just commenced. This is to do not with the overall review of planning, but to do with purely the introduction of these regulations. What you are talking about now will form part of that, because this has been one of the issues that has been identified since the new procedures came in. So it will be addressed in time, but I cannot give you that commitment today.

The Chairman: Mr Turner, have you any further questions?

Mr Turner: Just a final point I would like to just raise with Mr Kinrade.

Would you say, then, that the wording change, the wording 'amended plans', the letter stating that there was to be an assessment of whether this was a new application and the fact there was no further notification of the outcome were absolutely instrumental in completely misleading the objectors?

I am not suggesting it was intentional –

Mr Kinrade: I am glad about that!

Mr Turner: – I am saying it was more a process of poor administration that has resulted in that. It has been a catalogue of errors that has resulted in totally misleading the objectors.

Mr Kinrade: It may have had that effect.

At the end of the day, as I say, I am not sure what the process was at that particular time that the information was passed out. Whether that was part of the requirements of the day, if it was then I presume there should have been an outcome and it should have been followed through.

Now whether that was a breakdown of procedure or whether that element of notification should never have happened in the first place, I honestly do not know. The Director would have been able to answer that better than I.

Mr Turner: Do you think this maybe has highlighted some procedures that could be put in place to avoid this?

Mr Kinrade: The whole introduction of the 2005... We gave the commitment, after two years we would review what had gone on. We have a number of issues which have been identified, well outside the Poacher's Pocket issue, which we think we can improve – not that they are defective at the moment, but because there is now a greater expectation from the public and everybody who deals with Government, across the board, to have a greater say and to be made more aware of what is actually happening.

The Chairman: When you arrived in the Department, you have told us that your first matter you had to address was the letter from the Ballasalla residents, on the same day –

Mr Kinrade: I do not think it was the first one! It was one of the things waiting there.

The Chairman: – on the legal decision. What was the initial response of your Department to the draft Petition of Doleance from three local residents?

Mr Kinrade: Well, the draft petition, it is fairly standard practice that it immediately gets transferred to the Attorney General's for advice.

Obviously, I was unaware of the total history of this particular site prior to receiving the letter, initially, and then the draft petition.

The Chairman: On the 5th November 2007, the advocate acting for your Department advised the petitioners to issue the petition within 14 days. What was the basis of that decision?

Mr Kinrade: Again, once the file had been reviewed, it was clear that this matter had dragged on for quite some time.

It is fairly normal, I think, for a Petition of Doleance to be issued within six months of the act being complained of or the decision being taken, so it obviously was important to get this moved forward.

The Chairman: Mr Turner.

Mr Turner: I had the same question, Mr Chairman.

The Chairman: Had the Petition of Doleance not been withdrawn, can you advise us what the Department's view was, how it was going to approach this in the courts?

Mr Kinrade: In the courts, I think we would have asked the court to determine whether or not it was a requirement

for a new application, whether this was such a matter that required a new application, whether it should have been treated as the so-called 'reserved matters'.

The Chairman: That is how the Department was going to approach it in the court.

Mr Kinrade: Well, I think we would have had to have defended our decision, basically on the basis that we would have obtained an opinion, I suppose, from the court, a final... which we still do not have. We would have defended our decision as a Department: I think we are obliged to.

The Chairman: The decision that was made. (**Mr Kinrade:** Yes.) Yes, that is fine. Thank you very much.

Are there any other specific changes that you would like to see adopted in the planning process as a result of the Poacher's Pocket episode, other than the change in delegation of last November.

Mr Kinrade: There are – not as a result of the Poacher's Pocket, I have to say – other things that we think we could improve. There may well be some machinery needed that we could review decisions.

At the moment, we understand, it is virtually impossible... Once the Department has taken a decision, it has no way of going back, even if it made a serious mistake. It has no way of going back. Whether that can be addressed – I am not sure it can be legally – without going through the Petition of Doleance procedure. I will be looking to see if we can do something to perhaps give us an opportunity to avoid having to go to court.

The Chairman: Just as an element of the system that you will have been obliged to become fully conversant with is the appeals stage after the inquiry, when the Minister decides whether or not to accept the Inspector's recommendation. Where does the Minister receive legal planning advice? Where does he receive his planning advice?

Mr Kinrade: We have, as you are probably aware, Mr Brian Sinden, who was a senior planning officer with the Department before he retired. He is now brought back for one day a week, where he provides that advice to me, and then I relay that through to the Minister, along with any policy advice that may be relevant.

I have to point out that, pretty much since the decision in relation to the Manx National Heritage case in Cregneash, very much the planning advice is seldom required, because the Minister is bound to accept the local situation with regard to any planning recommendations made by the Inspector. The Minister's hands are somewhat tied to those matters which may be regarded as planning policy. I think that is –

The Chairman: He can overturn an Inspector's recommendation, though, can he not?

Mr Kinrade: At his peril. There has to be a planning policy reason for doing so. He cannot overturn it because of anything to do with the local situation. So the scale of the building, the position of the building, type of building: he has to accept the planning Inspector's view.

The Chairman: He is entitled to overturn if he sets out

his reason for doing so – and you are saying those reasons have to be sustainable reasons.

Mr Kinrade: Sustainable and policy issues, as it were.

The Chairman: I think in the UK you are aware it is a similar situation with the Secretary of State: it is not the Inspectors that make the decision, they merely recommend.

Mr Kinrade: Those would be on major applications.

The Chairman: So that is an important principle, is it not?

Mr Kinrade: I understand the decision is taken much lower down, obviously, for local planning issues: it is local authorities who make those decisions.

The Chairman: But appeals –

Mr Kinrade: For major schemes it would be, yes.

The Chairman: Mr Turner, you had a point.

Mr Turner: Just I do find it... not incredible, that is too strong a word, that the Minister should be asked to ultimately make a decision, but he is obliged to almost do as he is told. I think there seems little point in it – why ask him at all? Surely, he should be in a position to give his judgement, obviously taking the advice – but, ultimately, I do not think it should be at his peril, if he goes against the Inspector.

Mr Kinrade: I think I said fairly early on that it is seldom that we manage to achieve agreement between all the parties to any application, and one party will be aggrieved or not. So if the Inspector has said one thing and the Minister chooses to go against it, he does leave himself open to a Petition of Doleance on that decision, so –

The Chairman: And perceptions of bias were very much part of the MNH case –

Mr Kinrade: In the MNH case.

The Chairman: Just on a final point, the conditions which, in totality, had to go to the Planning Committee before 2005 for a decision: by this amended procedure, only conditions which were of significant concern – however that is defined to objectors – should be referred to the Chairman of the Planning Committee as to how they should be handled. Would you like to go back to the pre-2005 system, for the avoidance of doubt as to what was of significant concern or not, that all conditions went to the Planning Committee for decision?

Mr Kinrade: I think that would be unnecessary, because some of the planning conditions are so minor. They really are about the colour of paintwork or stonework and such like, so I cannot see that it would be necessary for those to go.

The Chairman: What would happen: would it simply clog up the system?

Mr Kinrade: I think it would have that effect and I think

the Planning Committee could...

If you are asking the Committee to decide on such minor matters as those, then you would have no other decisions delegated either. There would be no point: they might as well do the whole job.

The Chairman: Clearly, there is an important role for the Director or someone with delegated authority to make those decisions. Would you accept that what this particular inquiry has highlighted is that the making and the determination of those decisions can be fraught with difficulty?

Mr Kinrade: Very much. I would not swap jobs with the Director. I respect him for being able to handle, as I said before, something like 2,000 decisions each year, of which many are quite considerable decisions to make.

The Chairman: Thank you. Right, well thank you very much, Mr Kinrade, for giving us the benefit of your evidence. I would therefore declare that this public session is now closed. I thank the members of the public and the media for their attendance and we will now sit in private session. Thank you very much.

*The Committee sat in private at 1.06 p.m.
and resumed its sitting at 2.30 p.m.
when Mr Allsebrook was called.*

EVIDENCE OF MR D ALLSEBROOK

The Chairman: Good afternoon, ladies and gentlemen.

At lunchtime, we adjourned the hearing, and we are now reconvening at 2.30 p.m. to take evidence from Mr Allsebrook.

It is my pleasure to welcome you before the Committee. Everything you say will be recorded and published, in due course, as part of the written evidence. So thank you for appearing before us today.

Could I just, for the record, ask you to state your name and which group you represent?

Mr Allsebrook: My name is David Allsebrook. I represent BADRA – the Ballasalla and District Residents' Association – and I am the Secretary of that body.

The Chairman: Thank you very much.

Can I begin by asking you, in respect of this application that we are looking into, whether the original suggestions regarding flood protection measures, made by URS, would have provided adequate flood protection?

Mr Allsebrook: Originally, they suggested no flood protection. They did not consider it a flood plain. They went as far as the review hearing, still protesting it was not a flood plain and did not need any flood protection.

At that particular review... It overran, and people had to go and catch planes, so it had to be rescheduled. At the rescheduled review, they had suddenly discovered it was a flood plain, and came with all sorts of wonderful ideas, largely not on the Poacher's Pocket land, but on my land.

So from the word go, everything they did was worse than amateur.

The Chairman: Thank you.

After the appeal hearing, a condition – condition 19 of the approval – was imposed, relating to flood protection measures. What, in your opinion, was condition 19 of that planning approval intended and designed to achieve?

Mr Allsebrook: It was to try to ensure that what was agreed before the Inspector, in terms of a flood barrier and related... I say that advisedly, because there are many factors which have not even been mentioned here, which are related to any one of these planning decisions. What was intended was to make sure that what was built was done satisfactorily to everybody concerned.

The Chairman: So you accepted that condition 19 was put there to alleviate concerns that you and others had about the development and its impact on the potential flooding situation?

Mr Allsebrook: Exactly, yes.

The Chairman: What was your understanding, from the Appeal Inspector's Report, as to how approval for condition 19 should be granted?

Mr Allsebrook: He made a very clear... This is a picture of what was approved, and what has actually happened is entirely different, which, regardless of its merits, flood-wise, has deleterious effects on a number of important side considerations.

The Chairman: So the basis of what was intended was represented by the drawing you have just pointed out, with the addition of the wording of condition 19, that prior to the commencement, further details, where appropriate – precise location, construction, cross-sectional details of the protection bund and wall etc – would be submitted for approval by the Planning Committee.

Can I just perhaps phrase my question in another way: when you read condition 19, what did you think was going to happen?

Mr Allsebrook: I thought that they were going to come with a detailed thing of *this* and satisfy us that it was right, come back to us, and then... It was certainly come with something entirely different, which has all sorts of major shortcomings in other areas.

This, as you can see, goes up and down: it is a ridge, and it has clay in the middle, and it does not affect the heights of the land on either side.

The Chairman: When you said you expected 'them' to come back to 'us', do you mean the applicant to come to yourself, as an interested party, or to the – ?

Mr Allsebrook: They would have at least consulted us. I do not say it needed a planning thing. They would have come and had a discussion and tried to satisfy us that it was an appropriate answer to the proposal.

The Chairman: Did you expect that, in due course,

the applicant would go to the Planning Department with a detailed proposal to implement condition 19, and, if you did, how did you expect the Department to deal with that proposal?

Mr Allsebrook: If the proposal was in any way different from what was clearly shown and agreed at all the previous hearings, then we would have expected a new plan and a new planning process.

The Chairman: When the condition said, quite precisely, ‘approval by the Planning Committee’, did you expect the proposal to go to the Planning Committee for approval as a condition – or non-approval as a condition – or did you expect it to go to the Planning Committee as the subject of a fresh planning application, on which you would have the opportunity to make comment?

Mr Allsebrook: We, frankly, did not expect it to be one of such change that it would have needed to be considered for that process.

But given what they eventually proposed and instituted, there is no question it is an entirely new proposition and should have gone before the Planning Committee, gone through the whole process again!

We, as an Association, and, I am sure, the Commissioners’ other person, would probably never accept conditions again.

The Chairman: So, if the condition had been along the lines you expected, and reflected what you understood had been before the inquiry, you would have been quite satisfied for it to have been decided by the Committee, or by the Director?

Mr Allsebrook: Yes.

The Chairman: Thank you very much.

You have indicated that you saw considerable differences between the original plan and the amended plan. Again, which of these was of most concern to you, and why?

Mr Allsebrook: Originally, we looked at it from a structural point of view, because it was not the same structure. But, of course, the fact that you have built up the land all the way behind it makes it fairly sound, but it has so many different side factors, particularly ecologically, because every tree on the site will now die...

The fact that this land is raised... I know that they say it is only raised a little bit more than a foot, in many cases, where the... But the levels were not shown on the planning proposals, and those levels were not shown. A foot and a bit is a lot; it is not *de minimis*, as the Department says.

The fact that you are raising the land over a foot not only will kill every tree on the site – and already they have had to take down more, because they realised that the trees in the bund were going to fall – but, from almost every single point of view, it is a disaster. I cannot even begin to understand it.

The Chairman: Thank you.
Mr Turner.

Mr Turner: You made reference to the drawing there.

When you became aware of the plans, the amendments, you were asked to submit some views, or a variety of people were asked to submit views. What views did you raise with the planning authorities, and what did you expect to happen after you submitted your views on this situation?

Mr Allsebrook: We were not actually asked to submit views – we were asked *not* to submit views – but we did submit views. We went to our lawyer and he particularly submitted views on our behalf. He received an acknowledgement, but no reply.

Mr Turner: Just for clarity on that: certain parties were asked if they wished to make additional comments. Did you receive notification as such, can you recall?

Mr Allsebrook: I dare say it happened – it was happening all the time – and certainly the comment we made was through our advocate.

Mr Turner: So once you had submitted those comments, what impression did you receive as to the process that was going to follow?

In other words: how did you think it was going to then proceed?

Mr Allsebrook: I hoped they were going to have another hearing, because this is of such import that all the things should be aired. You cannot just make a dramatic change like this, which has so many side effects, without having another hearing. It is an entirely different proposition.

The Chairman: When you say ‘another hearing’, do you mean – ?

Mr Allsebrook: Another planning process, which –

The Chairman: To advertise a new planning application –

Mr Allsebrook: That is right, yes.

The Chairman: – inviting people to comment (**Mr Allsebrook:** Yes.) which, in turn, would go to the Planning Committee, and possibly to appeal? (**Mr Allsebrook:** Yes.) Thank you.

I will let you finish your point. Thank you.

Mr Turner: Following on from that, were you privy to the correspondence from Miss Callow, stating that the question of a new planning application was being assessed?

Mr Allsebrook: Yes, I saw that, and again, I passed everything to our advocate, because this is, in a way, strange ground – it is not written in the book – and clearly, he had to protest it.

Mr Turner: On receiving that news, what did you think was then going to happen? Did you feel there would be more consultation, or...?

Mr Allsebrook: I hoped that when... It did not look like it, because we did not get the right responses and right noises back. I thought that, in the end, this would have to

be settled in the courts.

The Chairman: Thank you.
Mr Cannan.

Mr Cannan: You and your Committee will appreciate that, had not Miss Callow written and informed you, you would never have known the decision of the Director of Planning. He could have given his approval, and the works would have started without your knowledge.

Mr Allsebrook: I think we knew about it because some plans were sent to the Commissioners, and those of us who are connected with the Commissioners would have seen those plans and would have then carried the news.

But, of course, without Miss Callow's advice, we would have been even more upset.

Mr Cannan: But, could I say that, from this morning's questioning, the Director did not even need to send those plans to the Commissioners.

Mr Allsebrook: I think he did. I think that any one of these at least has to be sent to the Commissioners. I think so.

Mr Cannan: Not that we understood.

Mr Allsebrook: You are talking from a legal point of view, are you?

Mr Cannan: Yes. I am saying that from what Mr McCauley said – and later on, what Mr Kinrade said – Mr McCauley had the power to make the decision through delegation, and that was it.

Fortunately, Miss Callow sent the plans to you and the Commissioners.

Mr Allsebrook: Yes, alright. I accept what you say, if you say they did not have a legal obligation.

All I can say is if that is the case, it just makes the picture worse.

Mr Cannan: Correct, and that is why, if you were here – you were here this morning – I said to Mr Kinrade, 'Are they going to, in future, send the plans?' and, even then, he was not very forthcoming, because he did not know whether to send the small amended plans, or big amended plans.

Would you be satisfied in future if amended plans are sent to all objectors?

Mr Allsebrook: I think we are not going to be satisfied ever again with conditions.

Mr Cannan: With conditions?

Mr Allsebrook: Do I mean 'conditions'? The Inspector made certain conditions –

Mr Cannan: That is right.

Mr Allsebrook: – and we had one interpretation of that, and the planners had another interpretation of what were the conditions and, if they were going to change

things fundamentally, we would always expect it to be a new plan.

If we went before, we would ask for it to be reserved matters, and we would fight for that. Have I got the language right?

The Chairman: Yes.

Mr Allsebrook: It would be under reserved matters, so that we could not go ahead without a new planning –

The Chairman: Reserved matters are automatically the subject of a fresh planning application; that is the definition of 'reserved matters'.

Mr Allsebrook: That is what I am saying that we would insist on now, because of this experience: that conditions set by an Inspector, which he clearly intended was one thing, would then be subsequently subverted into a different interpretation and, having had this experience, I do not think the Commissioners, or the residents, would accept conditions again.

Mr Cannan: Except in a minor nature –

Mr Allsebrook: Except in a minor nature, of course, yes.

Mr Cannan: – because it has been said, at the start, that we can trivialise the colour of the tiles on the roof.

Mr Allsebrook: Yes, of course, but in something which is so fundamental and has such wide implications – much wider than what we have discussed so far...

Mr Cannan: Thank you.

The Chairman: If a condition to an application is progressed, and there are proposals made in order to implement the condition, do you accept that it is quite proper, under delegated authority, for the Director of Planning himself to approve that condition without reference to the Planning Committee?

Mr Allsebrook: I have no argument with the theory – that is fine – but in a matter like this, which has so many interconnections... This is not just a question of flood control, as raising the height and so forth has implications to the neighbouring properties; it has implications environmentally; it has implications on the...

They say that they had a landscape scheme, which has already been wiped out by this. In fact, they did not have a landscape scheme. They had a landscaping scheme which was so irrelevant, it was not even confined to their own site; the landscaping scheme was very largely on my own property.

Mr Cannan: So therefore you are representing – would I get it right – not only the Ballasalla residents, but you have an interest in the thing personally, as well?

Mr Allsebrook: I have an interest in the thing personally –

Mr Cannan: That is alright.

Mr Allsebrook: – because my property is... The planners have not always recognised my interest, but I do happen to be... My property is contiguous with their site on two sides. So yes, I have an interest.

I am also a commissioner, but whenever the matter comes up in the Commissioners, I leave the room and declare an interest. So I have always considered that I have an interest, and have so declared and so absented myself from any of the Commissioners' side of the discussions.

Mr Cannan: So today – nothing wrong in this, but to get the record straight – you are representing not only the Ballasalla residents, but you have your own interest, as representing your own interest, as well.

Mr Allsebrook: That was not the intention. If it was, I would not bother with my own interests in this thing, but I am –

Mr Cannan: No, but it is relevant.

Mr Allsebrook: It is relevant, in the sense... Yes, you are right, in that it must play some role in my feelings.

The Chairman: I think we accept you were a noticed party to the planning, as well as wearing a different hat of another noticed party, the Commissioners. (**Mr Allsebrook:** Yes.) We accept that.

The actual decision that was made... Notwithstanding the differences, as you see them, the Director based his decision on that fact that this proposal represented very little that was different from at the original inquiry, and what the Inspector approved. We have heard evidence that the planning officer who advised the Director was of a similar view, and that the Department of Transport – another noticed party – was similarly in agreement, and found the proposal acceptable to implement condition 19. You would basically argue that they were wrong.

Mr Allsebrook: Not entirely, because the young man in the DoT who was doing this was doing it from just one point of view: will this be flood protection... The reality: it will stop the flooding there, although the reality is everything from start to finish of this was not touching the real problem of a real flood risk.

The real flood risk is elsewhere, at the other end of the property – which they are yet to tackle – because all the floods came down the lower end of the property, and the water will still go down there and still go over into – I forget what number – number 23 of Silverburn. They are tackling that separately, under a recommendation which the Inspector made, 'You should look at that,' and they are tackling that separately. It is not yet being done, but from... That is where the urgent thing was and it was always back-to-front that they were tackling the site area first.

The Chairman: Just so that we understand that: your concern about condition 19, and what was proposed to implement it, is not so much that condition 19 and the creation of the bund wall and what was intended at the inquiry... It is not that that would not happen, but that, looking at the flood alleviation system in totality, condition 19 being approved did not address the bigger picture. Is that what you are saying?

Mr Allsebrook: The Inspector did mention it, and they were about to address it, so by introducing that, I may be confusing the picture.

I just wanted to say that the flood protection of that site is not the most critical point. It is not the most critical issue. Therefore, to have totally destroyed the site, both ecologically and from the point of view of its relationship to the Silverburn, for something which was never... just for the convenience of construction... Because that is what it is: it is a more convenient way of doing it. You can do it all with a bulldozer and you do not have to put in any technical inputs, like bentonite clay and shaping, and things like that.

The Chairman: So the case you are making, Mr Allsebrook, is that while the proposal submitted would have implemented condition 19, in terms of what it was supposed to do, there were other elements within that application which, in your view, went over and above what was necessary or, to put it this way, were not before the inquiry to be tested.

Mr Allsebrook: No, not quite, because the Inspector made a recommendation that this thing be tackled, and it will be tackled.

What I am saying is that DoT never had a proper handle on the problem, because that is where... I am answering the question of... You asked me, I think, something to the effect of whether I thought DoT knew what they were doing. From a strict point of view of whether this would have prevented floods, or been any meaningful... It was not as good as what the Inspector recommended. It was much more convenient to the developer, and the DoT went along with it.

The Chairman: So the DoT approved it, and the professional planners approved it. What was wrong with that?

Mr Allsebrook: What was wrong with that was that you have raised the land, you have destroyed any remaining trees, you have made a nonsense out of a landscaping scheme, and you still have not touched the critical flood problem, after all this.

The Chairman: Therefore, while it might have achieved the objective, the consequences of doing it that way, in your opinion, warranted a fresh look at it, and you would have wished to make your case that this was the wrong way to do it.

Mr Allsebrook: You have put it very well, except that I believe that it warranted that whether it was so or not. The changes are so great that it warranted a new inquiry.

The Chairman: Thank you.
Mr Turner.

Mr Turner: Just for clarity: you mentioned that the problem with the flooding is further down.

Mr Allsebrook: Yes.

Mr Turner: Would the original bund bank have addressed that problem?

Mr Allsebrook: No.

Mr Turner: That would not have addressed that problem either?

Mr Allsebrook: The whole problem was to limit the flooding risk on the area in which these houses were going to be built, but it left exposed the existing weakness, which was down on the existing estate, where the water would have gone down and come behind. That is being addressed separately by the DoT. They have been to people and talked about it, so it presumably will happen.

I am just saying, so that we get a perspective of where the... It is the lesser of the problems and the more damaging of the consequences.

The Chairman: So what was proposed, in your view, was entirely different proposals for a different flood protection scheme?

Mr Allsebrook: Yes, and the reason I have answered it in this rather probably confusing way is because what I am trying to say is I do not think DoT knew too much about what they were doing in the first place.

The Chairman: Thank you.

Do you have any concerns – speaking perhaps more generally – about the Director using legitimate delegated powers to approve the amended plan, in respect of conditions 19 and 16, in fact, one relating to landscaping? In principle, he was entitled to make that decision.

Mr Allsebrook: The principle of the process, I see that it is a workable thing, but in a circumstance which is as complicated and delicate as this, I think he is very unwise, particularly as the bases which he used were irrelevant or wrong – irrelevant in the case of the landscaping, and wrong in the case of the flood protection. This would only be brought out if it had come before another planning thing.

The Chairman: And been treated as a fresh application to be assessed.

Mr Allsebrook: Yes, because it is introducing new criteria.

The Chairman: So, even if his professional assessment was that it did not introduce new criteria, the very fact of having had concerns expressed once the parties had been notified, would that, simply of itself, have warranted a fresh application to give the parties an opportunity to comment?

I think what I am asking is: the Director, having professionally assessed it, believed the condition 19 was met by this proposal, but the very fact that a number of parties had written in, saying, 'Well, we object, we believe it is something entirely different', and – as you have given evidence – 'yes, it may well achieve condition 19, but it is substantially different, in our view,' would be sufficient grounds to say, 'Look, give us the chance to test that –

Mr Allsebrook: That is right.

The Chairman: – 'through having a fresh application'?

Mr Allsebrook: That is absolutely correct. Even if I am entirely wrong, your suggestion is correct.

The Chairman: Thank you very much.

Are there any other issues, Mr Allsebrook, relating to planning regarding the Poacher's Pocket development, you would wish to comment upon that is within our remit? We are looking at the planning process, as applied, with particular reference to conditions 16 and 19.

Mr Allsebrook: There probably is, but it does not come to mind. These are the central things.

What I just cannot understand is how they do not entertain some discussion on it. After one submits various things, they do not even entertain any discussion. I just do not understand that, because –

The Chairman: Would you have expected the applicant, the developer, in view of the contentious nature in 2002, from the start of the application... Would you have welcomed and expected the applicant to make contact with yourself, as an interested party, with the Association, and indeed with the Commissioners?

Mr Allsebrook: I think that the relationship between the developer and the other parties is such that it is not likely to have been very successful.

It is just that I have a feeling here that there should have been some form of... What is wrong here is you have Departments taking narrow decisions, which have far wider implications, and I would have expected to have, therefore, those wider discussions, or room for them, but for these wider implications to be noted and brought before the Committee. It is not just on the subjects that I have mentioned.

My problem is... I am sorry, but I am 80 this year, and I start out thinking something and, before I have finished my sentence, I have forgotten it!

The Chairman: No, you have made your case very well, Mr Allsebrook; do not think otherwise.

Can I ask my colleagues if they have any more questions.

Mr Cannan: No, I am quite happy with what I have heard.

The Chairman: Thank you, Mr Cannan.
Mr Turner?

Mr Turner: I am quite happy, sir.

The Chairman: We will leave it at that, Mr Allsebrook. You have been most helpful, and I do thank you for coming to speak to the Committee.

Thank you very much indeed.

The Committee sat in private.