



SELECT COMMITTEE ON THE KIRK MICHAEL SCHOOL LAND EXCHANGE AGREEMENT

AGENDA

**Monday 10th February 2014
10am in Committee Room 2**

1. Apologies for absence

2. Minutes of the last meeting (2nd December 2013)

3. Matters arising

Queries to Attorney General's Chambers (item 5(a) on 2nd December) – the queries were sent to HMAAG on 2nd January 2014. He replied on 8th January 2014 saying he would respond by 31st January 2014. A chaser e-mail was sent on 3rd February 2014.

4. Papers received

See attached:

- a. Letter dated 3rd December 2013 from Mr C S Lewin
- b. Letter dated 10th December 2013, and attachment, from Mr C S Lewin
- c. Letter dated 16th January 2014 from Dr and Mrs Naylor

5. Draft Report

To consider the attached draft dated 3rd February 2014

6. Next steps/date(s) of future meeting(s)

Jonathan King
3rd February 2014



**MINUTES OF A MEETING OF THE SELECT COMMITTEE OF TYNWALD ON THE
KIRK MICHAEL SCHOOL LAND EXCHANGE AGREEMENT
HELD ON MONDAY 2ND DECEMBER 2013**

Present: Mr Speaker (Chairman)
Mrs Cannell
Mr Turner

In attendance: Clerk of Tynwald
Deputy Clerk of Tynwald

1. Apologies

None

2. Minutes of the last meeting (7th November 2013)

Agreed and signed.

3. Matters arising

None.

IN PUBLIC

4. Oral evidence of Heritage Homes

Oral evidence was heard in public and recorded by *Hansard*.

IN PRIVATE

5. Next steps/date(s) of future meeting(s)

- a. It was agreed to ask the Attorney General's Chambers whether they had become aware of the "Naylor rights" through the disclosure of the "Creasey conveyance" described in oral evidence by Mr Kirkpatrick; and what if any advice they had given to the DEC about those rights, and when.

- b. The Clerk was asked to prepare and circulate a draft Report, at which point a further meeting would be convened.

Chairman: Date:

4(a)

C. S. Hewitt
20340
IOM Prison
Jury
3rd December 2013

FAO Mr J. King.

Dear Sir,

Re Select Committee - Kirk Michael Land.

I listened with interest to the Manx Radio broadcast and coverage of the alleged evidence to the Select Committee by Mr Seamus Nugent and Mr Graham Thruspatrick of Dandera.

It was reported that Mr. Nugent gave evidence that I had been dismissed for gross misconduct due to a bogus land deal.

If he did state this, then this is totally untrue, and Mr Nugent would know this.

The truth is that I did resign from Dandera for a number of reasons, one of which was that I was not being paid by Dandera, who were my employers according to my Contract of Employment.

I did raise this matter to the Employment Tribunal, and despite Dandera attempting with a "strike out application", their advocates and case did not succeed, and the Employment Tribunal found in my favour.

I appreciate a person giving evidence to a Select Committee is "protected," but does such protection extend to a witness being affirmed and the record to stand, when there has been

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a clear misleading statement of fact which in this case is clearly to my detriment, as people will believe I was sacked for gross misconduct which is not true, and the Honsord will remain as as a true record of what is not true facts forever.

I can provide a letter and correspondence to prove the above, but in the first instance I would appreciate your advice as to what action the Select Committee can take to make amends, in particular in the Honsord record, and in the public domain.

As I don't have access to the website, would it be possible for you to provide a copy of the Honsord of the evidence of Mr Nugent and Mr Kornpetruce, together with any evidence they have submitted.

Thanking you in anticipation,

Yours faithfully

Les Herron

C S Lewin

20340

IOM Prison

Jury

18th December 2013

FAO Mr J. King

Dear Mr King,

Re Kian Michael Select Committee.

Further to my letter of last week regarding the evidence given by Seamus Nugent which was reported on Mena Radio and in the IOM Examiner, please find enclosed the letter I referred to.

As you will see from reading the content, it clearly defines that I resigned. This clearly proves that I was not sacked for gross misconduct as stated by Mr Nugent.

Further, I resigned with "immediate effect" so, again, where it is reported "that I didn't go quietly" (I think this was the wording reported, if it is very similar, then resigning with immediate effect is totally contrary to what Mr Nugent stated.

In the final sentence of the ~~first~~^{first} paragraph, it states "we can confirm that no decision has been made at the time of receiving your resignation," therefore this statement once again confirms I was not dismissed for gross misconduct.

By the way it has been reported, the statement made by Mr Nugent is clearly defamatory, and damaging to me, especially as I have a High Court action against Bowdlen Prison Commissioners, where they are defending a very large claim.

for their decision to dismiss me on the grounds of gross misconduct.

The Commissioners have already admitted - that their decision to dismiss me was "unfair" within the Employment Tribunal process, following which the Employment Tribunal made an Order confirming that they had confirmed the dismissal was unfair.

The reason I am having to take them to Court is that my financial claim exceeds the maximum ~~that~~ financial limit the Employment Tribunal can award. Bradford Commissioners did pay damages, but required the amount of money paid to be subject to a confidential clause.

I am sure you will see that Bradford Commissioners will now introduce the audience into my case with them, in order in their opinion to at a minimum a pattern of behaviour.

Can you please advise as to what action the Committee can take to ensure amends are made as a result of this defamatory statement.

Could you please provide a copy of my previous letter, this letter, and the Dandera Holdings Ltd letter dated 12 April 2011, to Mr Alf Cannon MBE.

I can confirm that my previous letter and this letter are open so can be reproduced and circulated as public documents, but I don't know what the legal position is of the Dandera Holdings Ltd letter, as it is marked "Private - Confidential".

Thanking you in anticipation,

Leslie

dandara



holdings limited

Dandara Group Head Office
Isle of Man Business Park
Cool Road, Braddan
Isle of Man
IM2 2SA

telephone 01624 693300
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web www.dandara.com

Our Ref: CH/Y/11-268

12 April 2011

Private & Confidential

Mr C S Lewin
Highcroft
Ballavitchel Road
Crosby
Isle of Man
IM4 2DN

Dear Buster

Re: Resignation

Thank you for your email of 11 April 2011 at 08:14. We note that you have resigned with immediate effect (i.e. from close of business on Friday 8th April). Your immediate resignation is accepted with regret. We are sorry to hear of your decision to leave the Company as the Company has made every effort to facilitate your Disciplinary Hearing in a fair and respectful manner and we can confirm that no decision had been made at the time of receiving your resignation.

You are contractually obliged to provide one month's written contractual notice of termination. However, on this occasion, we accept your immediate resignation and agree to waive the notice that you are contractually bound to provide. Therefore, we can confirm that, in accordance with your email of 11th April, the Company accepts that your employment terminated on 8 April 2011.

As the Company's holiday year runs from 1 January 2011 to 31 December 2011, your pro rata holiday entitlement for 2011 up to your last day, based on full months worked, is 5 days. As we have not received any holiday request forms from you for this holiday year, our records show that you have taken nil days so far this year, therefore payment for 5 days will be included in your final salary which will be processed as normal.

Please ensure that you return any Company property, i.e. Office keys, car park fob, swipe card etc to Human Resources by close of business on Friday 15 April. Further to our letters dated 6 September 2011 and 10 February 2011, please note that we also still retain some of your personal papers which can be collected when returning the Company property. Please contact the Human Resources department to make the necessary arrangements.

directors
Daniel Tynan
James Nugent
Martin Clancy
Gary Leeming

Incorporated in the Isle of Man Registered Number 50247C
Registered office Dandara Group Head Office,
Isle of Man Business Park, Cool Road, Braddan, IM2 2SA

We are very sorry to hear of your decision to leave, however may I take this opportunity to thank you for all your efforts during your time with the Company, and may we wish you every success and happiness in your future endeavours.

Yours sincerely

CH

Human Resources Department
Dandara Holdings Ltd

4(c)

LITTLE ACRES
BALTIC ROAD
KIRK MICHAEL
ISLE OF MAN
IM6 1EF
16/1/14

JONATHAN KING
SECRETARY
SELECT COMMITTEE, LAND SWAP KIRK MICHAEL
LEGISLATIVE BUILDINGS
DOUGLAS

Dear Mr King,

We were unable to attend the Select Committee of 2/12/113 but we read with interest the Hansard transcript. Gow nyn leshtal nagh vel yn screeuyn shoh ayns y Ghaelg. (Forgive us that this letter is not in Manx.)

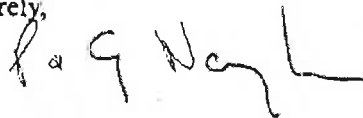
Though we are sure the Select Committee is well aware of the many consequences of the evidence from Heritage Homes, we thought we should make the following brief comments.

Mr Kirkpatrick indicated that moving our right of way without our consent could have serious legal and financial consequences for Heritage Homes. He stated that the only way round this was that, if Heritage Homes (or the Lewis family) obtained planning consent and if we refused to allow the right of way to be displaced, Heritage Homes would ask a court to overrule our wishes and rights. Mr Kirkpatrick admits that the outcome of such a court hearing would be uncertain and unquestionably it would be unknown until the court had made its decision. If Mr Kirkpatrick's description of the legal process is correct:

1. Our statement in our letters to Mr Teare (copies enclosed; 9/5/11 & 17/5/11) that our rights might block the availability of the alternative access was unquestionably correct.
2. It was entirely incorrect of anyone to claim that Heritage Homes had obtained complete control of the alternative Lhergy Vreck access.
3. It was equally incorrect to describe the availability of the Lhergy Vreck access as a "done deal"
4. It was incorrect of Mr Nugent to reply "Absolutely not" when asked if we (Dr & Mrs Naylor) were in a position to veto the alternative access (Hansard 613 & 616). According to Mr Kirkpatrick no one knows whether we should or should not be in a position to veto the access.

It is quite uncertain whether Mr Kirkpatrick's description of the Manx legal process is correct since no such mechanism was described by Mr Wright in his advice to the Select Committee. In the Clarkson case, the judge clearly stated that the court did not have the power to alter the route of a public right of way. Mr Kirkpatrick is saying that Mr Lewis, having created a right of way in order to sell Lhergy Vreck can now change his mind and ask a court to change the route of that right of way and impose that on the purchasers of Lhergy Vreck. We are consulting on this problem and we will write again if we get any useful or definitive information.

Yours sincerely,



Dr & Mrs NAYLOR

CC Mr A Cannan MHK

P.S. Hard copy in pool.



Draft dated
3 February 2014

**SELECT COMMITTEE ON THE
KIRK MICHAEL SCHOOL
LAND EXCHANGE AGREEMENT
SECOND REPORT
2013-2014**

**SECOND REPORT OF THE SELECT COMMITTEE ON THE
KIRK MICHAEL SCHOOL LAND EXCHANGE AGREEMENT
2013-14**

Resolved on 22nd February 2012 –

That Tynwald appoints a Committee of three Members with powers to take written and oral evidence pursuant to sections 3 and 4 of the Tynwald Proceedings Act 1876, as amended, to investigate the Kirk Michael School Land Exchange Agreement between Heritage Homes, Pinecrest Investments Ltd and the Department of Education and Children; whether by January 2011 access to the land had been secured, as was stated at that time by the Hon. Member for Ayre; the manner in which the negotiations were conducted; and the value for money achieved; and to report with recommendations by May 2012.

Resolved on 20th November 2012 –

That the Report of the Select Committee on the Kirk Michael School Land Exchange Agreement [PP No 0122/12] be not received and: (1) In the light of new evidence received in relation to rights over access routes, that the Committee review all matters pertaining to that evidence; (2) That the Committee seek clarification by way of public hearing of the matters raised from Heritage Homes and associated parties.

The powers, privileges and immunities relating to the work of a committee of Tynwald are those conferred by sections 3 and 4 of the Tynwald Proceedings Act 1876, sections 1 to 4 of the Privileges of Tynwald (Publications) Act 1973 and sections 2 to 4 of the Tynwald Proceedings Act 1984.

Committee Membership

The Hon S C Rodan SHK (Garff) (Chairman)

Mrs B J Cannell MHK (Douglas East)

Mr J R Turner MLC

Copies of this Report may be obtained from the Tynwald Library, Legislative Buildings, Finch Road, Douglas IM1 3PW (Tel 01624 685520, Fax 01624 685522) or may be consulted at www.tynwald.org.im

All correspondence with regard to this Report should be addressed to the Clerk of Tynwald, Legislative Buildings, Finch Road, Douglas IM1 3PW.

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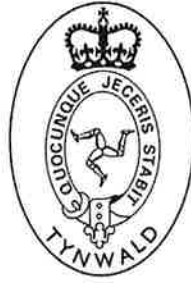
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To: The Hon Clare M Christian, President of Tynwald,
and the Hon Council and Keys in Tynwald assembled

**SECOND REPORT OF THE SELECT COMMITTEE ON THE
KIRK MICHAEL SCHOOL LAND EXCHANGE AGREEMENT
2013-2014**

I. BACKGROUND: THE COMMITTEE AND THE INVESTIGATION

1. The Committee was established by the following Tynwald resolution of 22nd February 2012:

That Tynwald appoints a Committee of three Members with powers to take written and oral evidence pursuant to sections 3 and 4 of the Tynwald Proceedings Act 1876, as amended, to investigate the Kirk Michael School Land Exchange Agreement between Heritage Homes, Pinecrest Investments Ltd and the Department of Education and Children; whether by January 2011 access to the land had been secured, as was stated at that time by the Hon. Member for Ayre; the manner in which the negotiations were conducted; and the value for money achieved; and to report with recommendations by May 2012.

2. In November 2012 we completed our first Report (PP 0122/12). In line with normal timescales, the Report was issued to Tynwald Members on Monday 5th November 2012 and published on Thursday 8th November 2012. On Sunday 18th November 2012 Mr Charles Lewin sent an e-mail to Mr Alfred Cannan MHK querying the

conclusions of our Report.¹ On Monday 19th November 2012 Mr Cannan circulated the e-mail to all Tynwald Members and on Tuesday 20th November the e-mail was debated along with the Report.

3. Mr Cannan tabled an amendment that the Report be not received and that the Committee undertake three further tasks. The first two of these proposals were accepted, resulting in the following resolution:

That the Report of the Select Committee on the Kirk Michael School Land Exchange Agreement [PP No 0122/12] be not received and: (1) In the light of new evidence received in relation to rights over access routes, that the Committee review all matters pertaining to that evidence; (2) That the Committee seek clarification by way of public hearing of the matters raised from Heritage Homes and associated parties.

The third element of Mr Cannan's amendment, "That the Committee reaffirm the legal position pertaining to the rights of Dr and Mrs Naylor", was rejected by Tynwald.

4. Shortly after the debate we gave Mr Lewin the opportunity to make any further written submission, an offer to which he responded by submitting his e-mail dated 28th November 2012.² This e-mail and his original e-mail of 18th November 2012 contained accusations of a potential criminal nature. In order to ensure that our investigation did not obstruct any potential criminal investigation, we therefore referred the e-mails to the police. Once we were assured that there would be no such investigation, our next step was to hear oral evidence from Mr Lewin. At the time of this hearing, in May 2013, Mr Lewin was serving a custodial sentence for offences of dishonesty. We are grateful to the Prison Governor and her staff for making possible Mr Lewin's appearance in person before us.
5. When we had analysed the claims made by Mr Lewin both in writing and orally, we invited written responses from the affected individuals and organisations. In compliance with the second element of our new remit we also took oral evidence in public from Heritage Homes. The written and oral evidence is published within this Report.

¹ Appendix 1

² Appendix 2

6. For our first Report we obtained and published independent legal advice from Mr John Wright, advocate. In February 2013 we sought Mr Wright's advice on Mr Lewin's e-mail of 18th November 2012 and on three letters we had received from Dr and Mrs Naylor in November and December 2012. Mr Wright's supplemental opinion is published within the present Report.
7. In Dr and Mrs Naylor's letter of 24th December 2012 they mention that in our first Report we did not publish their earlier letter to us of 22nd May 2012. This was an error for which we apologise. To complete the record we are publishing their letter of 22nd May 2012 now as part of this Report.³

II. MR CHARLES "BUSTER" LEWIN

8. Mr Charles "Buster" Lewin is a former Clerk of Braddan Commissioners. His involvement in the period from 1st August 1999 until 30th June 2006 concerning the draft Braddan Area Plan was examined in detail by a previous Select Committee, whose Report (PP 78/08) was debated on 16th June 2009. That Select Committee commented:⁴

As a general conclusion from our investigations of allegations, we would suggest that the Clerk was a strong character, with vast experience of local authority matters...

9. In April 2007 Mr Lewin was employed by the Dandara Group. In written evidence to this Committee, Mr Dan Tynan, Chairman of the Group, said:⁵

Mr Lewin was only engaged by the Company in the capacity of providing ancillary support as and where he could be best placed from time to time across the Company and came to us with no particular special professional skills or other qualifications.

10. In oral evidence Mr Nugent, Managing Director of Heritage Homes Limited (a company within the Dandara Group) explained further:⁶

Initially, he [Mr Lewin] was asked to have a look around the Island to see if there were any little parcels of land or little opportunities that we might have missed over the years. He was at that for a while. Then he was asked to help

³ Appendix 7

⁴ PP 78/08, page 80

⁵ Appendix 20

⁶ Q 296

out in the lettings office. That did not work out at all; we could not let him near private individuals. He was almost like a 'gofer' then, for a while after that...

11. By April 2011 Mr Lewin was no longer employed by the Dandara Group.⁷ The circumstances of his departure are actually or potentially the subject of legal proceedings and we therefore make no further comment.
12. In October 2012 Mr Lewin was convicted of conspiracy to effect legal purposes by improper means, conspiracy to steal and conspiracy to forge. These three offences were committed in the context of the 2010 Douglas East by-election. Deemster David Turner, who presided over the trial, described Mr Lewin as a "skilled conman".⁸
13. In December 2012 Mr Lewin was sentenced to three-and-a-half years' imprisonment.⁹

III. INVESTIGATION OF THE AGREEMENT ITSELF

14. The first element of our original remit was "to investigate the Kirk Michael School Land Exchange Agreement between Heritage Homes, Pinecrest Investments Ltd and the Department of Education and Children". In paragraphs 29 to 50 of our first Report we considered whether there was a need to protect the interests of the school; if so, whether a land exchange was an appropriate way to seek to protect those interests; how the needs of the school, the community and the taxpayer might be balanced; whether the Agreement was competently put together; and whether the Agreement was properly entered into.
15. Our original conclusions in relation to the Agreement itself are unaffected by anything Mr Lewin has said and we stand by them.

IV. WHETHER BY JANUARY 2011 ACCESS TO THE LAND HAD BEEN SECURED

16. The second element of our original remit was to investigate "whether by January 2011 access to the land had been secured, as was stated at that time by the Hon. Member for Ayre". This was a reference to the "alternative access", an access

⁷ Q 293; see also Appendix 6

⁸ Appendix 25

⁹ Appendix 25

which is also referred to in the written evidence as either the “Lhergy Vreck access” or the “High Tilt access”.

17. In our first Report we broke this element down into sub-Questions and we maintain this structure for our present Report.

Sub-Question 1. Did the developer acquire properties around the Lhergy Vreck Farm Road before January 2011 and did the Department do enough to verify this?

18. Heritage Homes stated in their written evidence to our first Report that they have:
- an option agreement over a portion of Cass A Lergy dated 19th December 2007
 - the freehold of Westlands, purchased on 1st July 2008
 - the freehold of Knock-e-Tholt, purchased on 21st March 2007
 - the freehold of a portion of Greystones, purchased on 15th April 2008.
19. We concluded in our first Report as follows:

Independent confirmation is readily available from the Land Registry that by January 2011 the developer had bought the freeholds of Westlands, Knock-e-Tholt and a portion of Greystones. An option to buy does not need to be registered so this element of Heritage’s claim could not have been independently verified in the same way either before or after the Tynwald debate in January 2011. It was nevertheless reasonable for the Minister to approach the Tynwald debate on the basis that Heritage had control over the land needed for the Lhergy Vreck access.

Allegation (i): “horrendous mistake” regarding registration of option

20. In his e-mails Mr Lewin described the background to the purchase of the option at Cass A Lergy and the freeholds of the other properties.¹⁰ He did not dispute the fact that by January 2011 Heritage had made these purchases. He did, however, object to our discussion of the option at Cass A Lergy. He suggested that there was a contradiction between, on the one hand, the statement quoted above that an option does not need to be registered, and on the other, a statement in Mr Teare’s written evidence to our first Report that the existence of the option had been registered.¹¹ On that basis he alleged that our Report contained “horrendous mistakes”.¹²

¹⁰ Appendix 1, paragraph 6; Appendix 2, paragraphs 9 to 13

¹¹ Q 214, QQ 220–227 and Q 273.

21. We stand by our original statement that an option does not need to be registered, which remains correct.¹³ We acknowledge, however, that a Caveat Deed relating to the option in question (although not the option itself) was filed at the Deeds Registry (not the Land Registry) in January 2008.¹⁴ We also acknowledge that Mr Teare was aware of this when he provided written evidence in March 2012 and oral evidence in June 2012.¹⁵
22. We asked Mr Teare when he had become aware that the existence of the option had been registered. He was unable to say.¹⁶ We asked the Department whether it had consulted the Land Registry. It confirmed that it had not done this, but that it had obtained via Heritage Homes a copy of the Caveat Deed; but it did not say when it had obtained this.¹⁷ We cannot therefore say definitively when Mr Teare and Departmental officers became aware of the Caveat Deed.
23. Our original conclusion was that it was reasonable for the Minister to approach the Tynwald debate on the basis that Heritage had control over the land needed for the Lhergy Vreck access. The point to which Mr Lewin has drawn attention – Mr Teare’s evidence as to the filing of the Caveat Deed in the Deeds Registry – if anything adds further support to this conclusion.

We conclude that Mr Lewin’s allegation that we made a “horrendous mistake” about the registration of the option is unfounded.

Sub-Question 2. Were the properties acquired by Heritage Homes sufficient to provide adequate visibility splays and did the Department do enough to verify this?

24. We concluded in our first Report as follows:

The viability of the Lhergy Vreck access in terms of visibility splays is ultimately a planning matter and will only be finally determined if ever a planning application is put forward which relies on it.

¹² Q 273

¹³ Appendix 19

¹⁴ Independently confirmed to us by Registries: see Appendix 19

¹⁵ For Mr Teare’s letter see page 185 of our original Report; for his oral evidence see QQ 121 and 123 on pages 82 to 83 of that Report.

¹⁶ Appendix 14, Question 1

¹⁷ Appendix 15, Question 1

The Minister's statements in Tynwald in January 2011 were based on unwritten assurances from the Highways Division which were subsequently vindicated when he rightly sought written confirmation.

The Highways Division confirmed in writing in April 2011 that the Lhergy Vreck access was suitable for a development of up to 100 houses. The Minister was entitled to rely on this confirmation for the purposes of finalising the Agreement.

25. Mr Lewin in his e-mails appeared to confirm that Heritage had produced a design for the alternative access which would have accommodated the requirements for visibility splays.¹⁸ However, in his oral evidence he queried this.

Allegation (ii): visibility requirements

26. Mr Lewin alleged that at some unspecified period during the negotiations, it appeared to him that no development would have been allowed using the alternative access unless the Highways Division had been prepared to calculate the visibility requirements based on the 30mph speed limit rather than the actual speed of traffic.¹⁹
27. Mr Nick Black of the Department of Infrastructure provided us with an explanation of the Department's long-standing policy on visibility requirements. He wrote:²⁰

This allows for the use of either known vehicular speeds (Table A) or, where speeds are not known, the speed limit currently in place (Table B).

28. Mr Black's colleague Mr Derek Sewell has provided written evidence that in November 2010 he had highlighted to colleagues the requirements to use the actual speed of traffic rather than the speed limit, and mentions that the Department of Infrastructure had before that date undertaken a speed survey including the Douglas Road at Kirk Michael showing speeds significantly greater than the 30 mph limit.²¹
29. The analysis of the alternative access prepared in March 2011 by Mr Bryan Hall for Heritage Homes provides an illustration of the impact of Tables A and B. It says:²²

¹⁸ Appendix 1, paragraphs 7-8; Appendix 2, paragraph 14

¹⁹ Appendix 1, paragraph 7; Appendix 2, paragraph 14; Q 259.

²⁰ Appendix 16

²¹ Appendix 18

²² See pages 163-165 of our first Report

This section of road is also subject to a 30mph speed limit and in accordance with the advice contained in PPG13, Transport, March 1994, visibility splays with major road dimensions of 90.0 metres should be provided in both directions at a junction in this location. I have, however, carried out surveys of the speed of traffic at the extremities of its visibility splays, as it approaches the proposed junction... They show that the major road dimension of the visibility splay towards the village, to the north, is correct at 90.0 metres but that to the south, towards the derestricted section of the road, should be 120.0 metres in accordance with the guidance based on measured speeds.

30. It is clear that under the policy set out by Mr Black and Mr Sewell a calculation based on speed limit is only to be used in circumstances where actual speeds are not known. This could never have been a realistic prospect in relation to the stretch of road in question.
31. In the event, Heritage Homes had no difficulty in designing a junction meeting the visibility requirements based on actual speeds, as reported in our first Report and as acknowledged by Mr Lewin in one of his e-mails.²³ It may well be that in order to do this, Heritage Homes had to redesign the road layout in such a way as to divert the Naylor's right of way but that does not mean that the visibility splays could not be achieved. The issue of the Naylor's right of way is considered further below.

We conclude that Mr Lewin's allegation relating to the method of calculating visibility requirements is unfounded.

Allegation (iii): two plans

32. Mr Lewin alleged that after January 2011, when Heritage Homes had been asked to produce irrefutable proof of the viability of the alternative access, it submitted to the Highways Division a plan dated December 2009 (page 169 of the Committee's first Report) rather than an apparently more recent plan dating from August 2010 (page 147 and 399);²⁴ and that Heritage Homes did this because they knew the more recent plan would not work.²⁵
33. Heritage explained that the plan it had submitted, although based on a plan from December 2009, was in fact a revision dated 10th March 2011.²⁶ This date is visible

²³ See our first Report, paragraph 64; and Appendix 1, paragraph 14

²⁴ Q 213

²⁵ Q 229

²⁶ Appendix 21, Question 2

on page 169 of our first Report albeit in very small print. The plan submitted to the Highways Division was therefore not older than the August 2010 but newer. The Highways Division has also confirmed that the August 2010 plan had insufficient detail for a full technical appraisal.

We conclude that Mr Lewin's allegation relating to the two plans is unfounded.

Allegation (iv): Highways Division "approval"

34. Mr Lewin alleged that in April 2011, when the Highways Division commented on Heritage's design for the alternative access, the "approval" was cast in such a way that it could never be implemented due to the reference to the future development of a by-pass.²⁷
35. The "approval" took the form of an e-mail dated 15th April 2011 from Mr Kevin Almond, reproduced in our previous Report.²⁸ It said:

The Department considers that the proposed junction could serve the 100 dwellings as previously considered by the Department in relation to the proposed junction adjacent to Kirk Michael School.

The Department is willing to accept a reduction the 'x' distance to the north from 4.5m to 3.5m on assumption that it serves only the 100 dwellings as previously considered.

It should be noted that the design and layout of the development if accessed from this point shall not constrain the future development of a by-pass and its junction with the A3 & A4.

36. In response to Mr Lewin's allegation, the Department of Infrastructure has explained that:

No details of the internal layout and extent of the estate roads were shown on Drawing 09/34B/TR 002 and no other information regarding the above was submitted with Mr Bryan G Hall's letter of the 14th March 2011. Thus, Mr Almond's comments in his email dated the 15th April 2011 in response to Mr Bryan G Hall's letter of the 14th March 2011 simply restated the requirements of the Kirk Michael Area Plan Order 1994.

²⁷ QQ 227 and 229

²⁸ At page 207

We conclude that Mr Lewin’s allegation relating to the “approval” given by the Highways Division is unfounded.

Allegation (v): Response to planning inspector’s report

37. Mr Lewin alleged that in February 2012, when the Inspector’s report commented in relation to the alternative access that the visibility requirements could not be met, Heritage Homes responded by way of press release because they believed their case was weak. If the company had had a strong case then, according to Mr Lewin, it would have challenged the Inspector’s report by way of petition of doleance.²⁹
38. Heritage Homes responded to this allegation as follows:³⁰

Mr Lewin’s oral evidence given to the Select Committee on 20th May 2013 tried to create an impression that HHL routinely engages in litigation and would resort to the use of a petition of doleance (a Court judicial review process of an administrative or executive decision) almost as if it was a matter of first course and nature (see lines 255 to 259 and 958 to 964 of the aforesaid oral evidence).

In reality the Dandara Group has never in its entire history issued a single petition of doleance against the outcome of any individual planning application made by it and has only on a handful of occasions even given consideration to doing so. It has on one occasion successfully defended a petition of doleance brought by a third party. It is an extremely expensive legal remedy only available in limited bespoke circumstances and the comments of the Inspector at paragraph 114 of the Report was most certainly not such a circumstance.

We conclude that Mr Lewin’s allegation relating to the response of Heritage Homes to the planning inspector’s report is unfounded.

Allegation (vi): what the Minister could have done, and when

39. Mr Lewin alleged that the Minister of Education and Children could have done more at an earlier stage to get independent advice as to the viability of the alternative access.³¹ We considered this issue carefully in our first Report before reaching the conclusions quoted above. We are at a loss to understand what specific steps Mr Lewin thinks the Minister might have taken, and when, and how these might have resulted in a different outcome.

²⁹ Q 213

³⁰ Appendix 21, Question 3; see also QQ 336 to 348

³¹ Q 214

We conclude that Mr Lewin's allegation relating to the Minister doing more at an earlier stage is unfounded.

Sub-Question 3. Was the Lhergy Vreck Farm Road itself unencumbered and did the Department do enough to verify this?

40. In this section of our first Report we examined certain claims put forward by Dr and Mrs Naylor relating to the alternative access. We concluded as follows:

The Minister's response to the correspondence he received from the Naylor's is defensible. In an ideal world it might have been interesting for the Department to investigate the Naylor's concerns in more depth, had time and resources been no object. However, in the light of our legal advice it seems highly unlikely that such an investigation would have had any impact on the Department's negotiating position.

Allegation (vii): effect of the Naylor rights

41. According to Mr Lewin, between 2008 and 2010 Heritage Homes themselves thought the alternative access could not be constructed without the consent of the Naylor's.³²
42. Following the publication of our first Report and the debate in Tynwald in November 2012, we received further correspondence from the Naylor's.³³ They believe that the alternative access designed by Heritage Homes and published in our first Report cannot be implemented without their agreement, and they draw support for this view from the legal advice of John Wright published in our first Report. We asked the Naylor's to share their own legal advice and we have published their response as part of this Report.³⁴
43. We put the Naylor's further correspondence to John Wright who delivered in response the Supplemental Opinion or Advice which is included within this Report.³⁵ He advised as follows:

It appears probable that there is a proposed minor diversion of Lhergy Vreck Road if the layout shown on plan 2 were adopted. Mr & Mrs Lewis or the developers would have no right to divert the access rights belonging to Mr & Mrs Naylor, however minor the diversion.

³² Appendix 1, paragraph 8; Appendix 2, paragraphs 15 to 18

³³ Appendices 8, 9 and 10

³⁴ Appendix 11

³⁵ Appendix 12

However that is not the whole answer.

As far as I can ascertain I was not provided with Map 2 when giving my original advice. At the end of the day I do not think that my advice would have been any different if I had seen Map 2. I would have commented on the scale and lack of overlay and would have had to indicate that there was a possibility, even a probability, that there was a diversion.

However I note that there is ample land in the ownership of, or under option to, Heritage at Cass a Lhergy, Westlands, and Knock e Tholt to allow an estate access road to be created, and to allow the line of the Lhergy Vreck Road to remain as it is, ie with no diversion.

44. A contrasting view of the legal position was submitted to us by Heritage Homes. They wrote:³⁶

It is a well established principle of common law that any interference with a private right of way will only be actionable if it is substantial and that it will not be substantial if it does not interfere with the reasonable use of the right of way.

HHL has designed all its access schemes taking due account of the Naylor Rights and with a view to seek to avoid a substantial interference with the same and so that such right of way could continue at all material times in as a convenient manner and materially effective form as currently exists.

In their written evidence Heritage Homes cited authority from both Manx and English caselaw for the legal principle referred to above.³⁷ They also set out the legal process by which the issue could be resolved, explained why it would not have been appropriate for them to embark on that legal process unless and until a planning application had been approved for a scheme using the alternative access; and illustrated a number of different ways of implementing the alternative access additional to the design published in our first Report.³⁸

45. After we had heard the oral evidence of Heritage Homes in which these principles were discussed, Dr and Mrs Naylor wrote to us with their comments on what had

³⁶ Appendix 21, Question 4

³⁷ Appendix 22

³⁸ Appendix 23, sections D, E and F. See also QQ 359 to 360.

been said.³⁹ We have considered Dr and Mrs Naylor's comments in reaching our conclusions.

46. The question of whether the particular design published in our first Report could be constructed without the consent of the Naylor's is a legal question which could only ultimately be decided by a court. It would not be appropriate for us to seek to make a determination on this question. To do so would be to breach the separation of powers by trespassing on the preserve of the courts. Moreover, in rejecting the third part of Mr Cannan's amendment in November 2012, Tynwald expressly decided that we should not attempt to "reaffirm the legal position pertaining to the rights of Dr and Mrs Naylor". It is sufficient for our purposes to consider the legal principles involved. We are satisfied that in the event of the Naylor's consent being withheld, Heritage Homes would have at the very least an arguable case that their design was not a "substantial interference" with the Naylor's right and could therefore go ahead.
47. Even if Heritage Homes lost the argument on the specific design published in our first Report, both they and John Wright have provided evidence that there could be other ways of implementing an alternative access at Lhergy Vreck using the land under the developer's control.

We conclude that Mr Lewin's allegation about the effect of the Naylor rights on the alternative access is unfounded.

Allegation (viii): concealment of the Naylor rights

48. Mr Lewin thought that it might have been possible to obtain the Naylor's consent to an alternative access at Lhergy Vreck Lane;⁴⁰ but he said that managers within Heritage Homes forbade him from opening negotiations with the Naylor's on this issue,⁴¹ for fear of undermining the confidence of the other parties to the negotiations in the viability of the alternative access.⁴² Mr Lewin was in no doubt that the company withheld the true position from the Department.⁴³
49. Heritage Homes told us in response:⁴⁴

³⁹ Letter dated 16th January 2014 [to be inserted as new Appendix after Appendix 11]

⁴⁰ Q 281

⁴¹ Appendix 2, paragraph 15

⁴² Appendix 1, paragraph 9; Appendix 2, paragraphs 15 to 21.

⁴³ Appendix 2, paragraph 21

⁴⁴ Appendix 23, section G; see also QQ 300 and 359

The existence of the Naylor Rights of Way has never been sought to be hidden, concealed or denied in any way by Heritage Homes Limited. The deed of conveyance in which the Naylor Rights of Way were created forms a part of the root of title to the land owned by Pinecrest Investments Limited and as such was disclosed to the Department of Education as part of the School Land Exchange Agreement process in the abstract of title provided to the Attorney General's Chambers acting on its behalf.

The Department of Education was also directly aware of the Naylor Rights of Way prior to entering into the School Land Exchange Agreement from their correspondence directly with Dr and Mrs. Naylor.

50. [We checked this with the AG's Chambers and they said...[response awaited]]

51. The Department of Education and Children did not at any time ask Heritage Homes specifically about the viability of the alternative access from the point of view of private rights of way. However, they commented that:⁴⁵

The Minister was aware of the Naylor's concerns, albeit they were unclear as to what their rights were and whether they would or would not possibly prevent Heritage Homes access to the zoned land.

We conclude that Mr Lewin's allegation that Heritage Homes concealed the true position regarding the Naylor rights is unfounded.

V. THE MANNER IN WHICH THE NEGOTIATIONS WERE CONDUCTED

52. We concluded in our first Report as follows:

There is no evidence that the Department pre-judged the outcome of either the Tynwald debate or the planning process.

There is no contradiction between the Department's statements of January 2011 and March 2011.

Given the high degree of political sensitivity surrounding the Kirk Michael land exchange proposal, and given its significance both in financial terms and for the future of Kirk Michael School, it was in our view entirely to be expected that any responsible Minister would take a close personal interest in the progress of the negotiations.

⁴⁵ Appendix 15, Question 3

Given the background and expertise of the particular Minister concerned, it was not entirely unexpected that he would get involved directly in the negotiations themselves, while working closely with Departmental officials throughout.

This case illustrates exactly what is intended to happen under the doctrine that "the Minister is the Department".

Allegation (ix): dishonesty and collusion

53. Mr Lewin confirmed in his first e-mail that in 2010 Heritage approached Mr Teare, not the other way around.⁴⁶ In his second e-mail Mr Lewin implied dishonest behaviour by Heritage Homes and collusion on the part of Mr Teare and Mr Bell. Expanding on these issues in oral evidence, Mr Lewin said that as early as 10th December 2009, Heritage knew it could not use the alternative access;⁴⁷ that Heritage deliberately decided not to tell the truth;⁴⁸ that Heritage was not being honest with the Department;⁴⁹ that any reference to the alternative access in negotiations with the Department was a scam or a bluff and Mr Bell and Mr Teare knew this.⁵⁰

54. Heritage Homes told us:⁵¹

HHL has at no time deliberately sought to deceive or mislead the Department of Education or the Department of Infrastructure regarding the Lhergy Vreck Alternative Access. HHL has at no time sought to seek any political or other favour or to exercise any improper influence on any third party.

55. Mr Bell said:⁵²

I do not have any recollection of discussions about visibility splays or access rights on the relevant development and I seriously doubt the validity of Mr Lewin's assertion that he would confide in me.

56. Mr Teare said:⁵³

⁴⁶ Appendix 1, paragraph 12

⁴⁷ Q 232

⁴⁸ Q 243

⁴⁹ Q 239

⁵⁰ QQ 214, 233 and 261

⁵¹ Appendix 21, Question 1

⁵² Appendix 13

⁵³ Appendix 14, Question 1

I have no reason to believe that the alternative access was a bluff, if indeed it was.

We conclude that Mr Lewin's allegation relating to dishonesty on the part of Heritage Homes and collusion on the part of Mr Bell and Mr Teare is unfounded.

Allegation (x): Mr Bell and Mr Teare

57. Mr Lewin alleged that at the request of Heritage Homes, Mr Bell arranged for Mr Teare to take a personal role in the negotiations towards the land exchange;⁵⁴ and also that Mr Bell conspired with Heritage Homes to "con" Mr Teare.⁵⁵
58. Mr Bell denies these allegations and points out that they conflict with another of Mr Lewin's allegations, namely that Mr Teare knew the full position.⁵⁶ Mr Teare also denies these allegations.⁵⁷

We conclude that Mr Lewin's allegations about Mr Bell and Mr Teare are unfounded.

Allegation (xi): Mr Bell and Mr Sewell

59. Mr Lewin alleged that Mr Bell arranged for DoI officer Mr Derek Sewell to be "taken off the job" in order to ensure that the Highways Division would give an "approval" for the alternative access but would do so in a form which would be unusable.⁵⁸
60. Mr Bell told us he had no recollection of ever discussing Mr Sewell's name in relation to this matter.⁵⁹ Mr Tynan, Chairman of the Dandara Group, specifically rebutted the allegation that he had sought to influence the position of Mr Sewell.⁶⁰ Mr Teare said he had no reason to believe this allegation.⁶¹ Mr Sewell confirmed that he had not been directly involved at any time after a pre-planning meeting at the end of 2010. This was because he was a resident of Kirk Michael and there was therefore a risk of a perceived conflict of interest.⁶²

⁵⁴ Q 214, lines 300 to 304

⁵⁵ Q 229, lines 557 to 561

⁵⁶ Appendix 13

⁵⁷ Appendix 14

⁵⁸ QQ 214, 227 and 255

⁵⁹ Appendix 13

⁶⁰ Appendix 20, paragraph 3(d)

⁶¹ Appendix 14

⁶² Appendix 18

We conclude that Mr Lewin's allegations about Mr Bell and Mr Sewell are unfounded.

VI. THE VALUE FOR MONEY ACHIEVED

61. The fourth element of our original remit is to investigate "the value for money achieved". We concluded in our first Report that:

The Department's negotiating position was strong in January 2007 and considerably weaker in October 2010. Through negotiation the Department succeeded in restoring its position to the extent that the net benefit which the Department could expect under the Agreement of August 2011 was as good as, or better than, that which might have been expected in 2007.

Allegation (xi): the overage clause

62. Within the Agreement of August 2011, part of the value claimed by the DEC, which we took into account in reaching our overall conclusion regarding value for money, was the so-called "overage clause". The Department of Education and Children, in its written evidence quoted in our first Report, described this as follows:⁶³

... under the terms of the agreement there is to be a covenant preventing development of more than 100 dwellings on the zoned land (as DoI Highways agreed limit on the alternative Lhergy Vreck access secured by Heritage Homes), or any development on the land beyond accessed through the zoned land, without our agreement to lift the covenant and an overage payment being determined and payable to us for the same.

63. In his oral evidence Mr Lewin told us this clause would not have delivered further value in the future. He believed that the effect of the clause would be undermined if roads within the housing estate became adopted as public highways.⁶⁴
64. We have examined the form of the "overage clause" as explained to us both by the Department of Education and Children and by Heritage Homes.⁶⁵ We are satisfied that the "overage clause" would not be undermined by the access road becoming a public highway in the future.

We conclude that Mr Lewin's allegation about the overage clause is unfounded.

⁶³ Submission dated 22nd March 2012, quoted at paragraph 99 of our first Report

⁶⁴ Q 250

⁶⁵ For the Department's explanation see Appendix 15, Question 5. For Heritage Homes' explanation see Appendix 23, Question 8 and oral evidence QQ 392 to 393 and 396 to 397

Allegation (xii): loss of £8 million to £10 million

65. As outlined above, Mr Lewin disputed the viability of the alternative access at Lhergy Vreck. He argued that the alternative access was not viable, and that therefore the Department's land at Douglas Road Corner constituted a "ransom strip" deserving a higher valuation than the Department realised. Mr Lewin considered that, by accepting what he alleged to be a "bluff" on the part of Heritage Homes in relation to the alternative access, the Department had made a mistake costing the taxpayer £8 million to £10 million.⁶⁶

66. On the question of land values in general, Heritage Homes commented:⁶⁷

In short each land transaction must be considered on its own facts and upon its particular expert evidence of valuation... In open market conditions parties are free to negotiate the price as they see fit and take account of much wider and unrestricted considerations than those demanded in the statutory straightjacket of a compulsory purchase scenario. If the price cannot be agreed upon in open market conditions then no deal will take place at all and an unrealistic sum demanded for a ransom strip will remain just as an unrealised sum of money and a lost development opportunity.

67. As to the figure of £8 million to £10 million, the developer's written evidence continued:⁶⁸

Such reasoning as Mr Lewin gives for his figures is provided at lines 442 to 452 of his oral evidence on 20th May 2013. He starts by attributing a 30% profit on all house sales purported based in some way upon figures supposedly provided by Mr Collister; we are unaware of any such figures or how indeed they might be calculated. He plucks out of the air with no reasoned judgement or market condition analysis average house price sales on the development and then seeks to conclude it will result in a developer's profit of eight to ten million pounds. Mr Lewin, even when applying his own fantasy figures and valuation methods, significantly miscalculates his own sums to produce a vastly over inflated grand total of sensational size and intended effect which only serves to illustrate the cavalier manner in which he goes about his exercise. He then goes on to speculate about another 140 houses on land that is not even zoned for development or without any thought as to the ownership and control of the land.

⁶⁶ QQ 214, 227 to 228, and 275

⁶⁷ Appendix 21, Question 7

⁶⁸ Appendix 21, Question 7

68. In oral evidence Mr Nugent gave a more succinct analysis of Mr Lewin's calculation:⁶⁹

Absolute nonsense.

69. If Mr Lewin had been right about the viability of the alternative access, there would have been a need to reconsider our original conclusion that the Department's negotiating position was considerably weaker in October 2010 than it had been in 2007. We have already concluded, however, that Mr Lewin was wrong about the viability of the alternative access. Accordingly we stand by our original conclusion as regards the Department's position in October 2010.

70. As for the eventual deal of August 2011: the analysis presented in our original Report demonstrated that this deal was as good as, or better than, the Department might have been expected to achieve even in May 2007 before Heritage had acquired control of the land needed for the Lhergy Vreck access. Far from leaving £8 million to £10 million on the table, we remain of the view that the Department achieved an Agreement which represented value for money.

We conclude that Mr Lewin's allegation that the Department lost £8 million to £10 million is unfounded.

VII. UNPUBLISHED WRITTEN EVIDENCE

71. In our first Report we reproduced the vast majority of the written evidence we had received. The exceptions were the Agreement itself and the detailed valuation figures provided by the Government Valuer, which the Department had asked us not to publish. We agreed to the Department's request at that time because the documents concerned were sensitive for the continuing revised planning application process.

72. The first planning application (11/01250/B) was made on 7th September 2011 and rejected on 23rd February 2012. The second application (12/00573/B) was made on 20th April 2012 and rejected on 24th January 2013.⁷⁰ The Department of Education and Children [and the Attorney General's Chambers] have confirmed to us that the Agreement of 16th August 2011 has now expired.⁷¹

⁶⁹ Q 390

⁷⁰ Dates from Isle of Man Government Online Services Public Access to Planning Applications, accessed on 2nd January 2014.

⁷¹ For DEC see Appendix 15, Question 6. [AG's Chambers asked on 2 Jan for response by 17 Jan.]

73. On the other hand the development site remains zoned but not developed. There remains a possibility, albeit one which currently appears remote, that the three parties to the Agreement might in the future seek to negotiate a fresh Agreement along the same lines.
74. In particular, Heritage Homes do not appear to have given up on the site. They provided us with a copy of their option agreement of 19th December 2007 with the Cassidys. We have decided not to publish this agreement as it is a contract between two private parties and its publication in full is not necessary for the fulfilment of our remit. However, we can advise Tynwald that the option had originally been agreed for a period of five years, expiring in December 2012. It was extendable for a further five years to December 2017 on payment of a further fee; and Heritage informed us that they had paid that further fee.⁷² Heritage also alluded in oral evidence to their plans for the site at Kirk Michael being “in hiatus” and indicated that they had tried, albeit unsuccessfully, to reopen negotiations with the landowner.⁷³
75. In these circumstances, while we remain of the view that it would be in the public interest for the Agreement and valuation figures to be published in due course, we would at this stage reiterate our original recommendation in a slightly updated form, as follows:

Recommendation 1

That as soon as the Kirk Michael Land Exchange Agreement is of historic interest only, the Department of Education and Children should publish in full both the Agreement itself and all associated valuations provided by the Government Valuer during the negotiations which led to the Agreement.

VIII. LESSON LEARNED FROM SECOND INVESTIGATION

76. As noted above, we were instructed by Tynwald in November 2012 to review our original 400-page Report in the light of information which had been supplied at a late stage by Mr Charles “Buster” Lewin. We have dutifully fulfilled the task given us by Tynwald. We have held [eight] meetings, two of them in public. We have called on the good offices of the Prison Service to facilitate the appearance before us of a person serving a custodial sentence. We have obtained written evidence from two Ministers (one of them now serving as Chief Minister, the other as Treasury

⁷² Appendix 24

⁷³ QQ 375 to 376

Minister), two Departments, the Attorney General's Chambers, and the Registries. We have procured further independent legal advice from an independent practitioner. We have obtained written and oral evidence from Heritage Homes. We have considered the evidence and produced this second Report, running to [x00] pages.

77. What have we learned from this? On the substantive issues raised by the Kirk Michael School Land Exchange Agreement: nothing. We have found every one of Mr Lewin's allegations to be unfounded.
78. If there is one lesson to be learned from this experience, it is that an intervention by Mr Charles "Buster" Lewin is capable of creating a large amount of work without generating any benefit to the public. Accordingly we make the following recommendation:

Recommendation 2

That Tynwald should no longer give credence to any proposition made by Mr Charles "Buster" Lewin.

IX. CONSOLIDATED LIST OF CONCLUSIONS AND RECOMMENDATIONS

[to be copied and pasted in at a later stage]

S C Rodan (Chairman)

B J Cannell

J R Turner

[February 2014]

