No.320

In the Court of Appeal of Guernsey

(**Civil** Division)

The 20th day of September, 2002 before The Hon. Michael Jacob Beloff, Q.C., presiding, Elizabeth Gloster, Q.C. and Jonathan Philip Chadwick Sumption, Q.C.

ISLAND DEVELOPMENT COMMITTEE

The Committee

v.

PORTHOLME PROPERTIES LIMITED

The Respondent

In the appeal of the above Committee from the decision of the Royal Court on the 28th day of May, 2002;

WHEREAS on 18th September, 2002 THE COURT heard Advocates R. J. McMahon and R.J. Collas for the respective parties thereon;

THE COURT this day issued Judgment in the terms attached hereto and ALLOWED the Appeal, having HELD:-

1) That it had jurisdiction to determine the appeal;

2) That Policy CE9, contained in the Written Statement to the Rural Area Plan, summarises in advance the more detailed policies in H10, H12 and H13; that the particular (which Policies H10 –H13 represent) must, consistent with general legal principle, trump the general, and that Policies CE9 and H10 –13 must be read as a coherent whole;

3) That if a Plan allows for development only in certain identified circumstances, by necessary inference development outwith those circumstances is not to be allowed;

4) That the Committee was never invited to consider the proposal as a 'minor departure' from the Rural Area Plan and that it would not have viewed it as minor if invited to do so; and

AWARDED COSTS to the Committee in this Court and in the Royal Court.

~~Deputy~~ Registrar of the Court of Appeal.

A **OFFICIAL TRANSCRIPT** PortholmeCofA20.9.02
Amended1.11.02

FRIDAY 20TH SEPTEMBER 2002

B **COURT OF APPEAL**

Before

C **Miss Elizabeth Gloster, QC; presiding**
Jonathan Philip Chadwick Sumption, Esq., QC
The Hon. Michael Jacob Beloff, QC

ISLAND DEVELOPMENT COMMITTEE v. PORTHOLME PROPERTIES LIMITED
D **(Civil Appeal No. 320)**

Judgment delivered by Beloff, JA

E BELOFF, JA: Portholme Properties Limited ("Portholme"), the Respondent to this appeal, wish to demolish the Hotel Houmet du Nord at Grand Havre and replace it with ten units of residential accommodation: ("the proposal"). It is common ground that (i) the site in question is within a built-up area, but is not (a) a site specially designated for housing or (b) one for which planning approval has already been granted (ii) the proposal cannot be described as one for a small scale infill. On 25th February 2000 the Island Development Committee of Guernsey ("the Committee"), the Appellant, F rejected Portholme's application (properly put on the basis that this was new residential development): and on 5th October 2000, after reconsideration, confirmed its rejection.

It is against the latter decision that Portholme appealed to the Royal Court sitting as a Full Court. On 28th May 2002 the Bailiff allowed its appeal and ordered that the application must be considered by the Committee on its merits against the general G criteria for development in a built-up area. The Committee has now appealed to this Court on the basis that the Bailiff erred in law by, in essence, erroneous construction of the Rural Area Plan. ("RAP") ("the planning issue").

A preliminary point was taken as to whether this Court had jurisdiction to determine the appeal ("the jurisdiction issue").

H The Island Development (Guernsey) Law, 1966 (as amended), ("the 1966 Law"), provides at Section 26(1):

> "26. (1) Any person aggrieved by any decision of the Committee under any of the provisions of this Law may, within the four months next following the date of the said decision, appeal therefrom to the Royal Court sitting as a Full Court

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> on the grounds that the decision of the Committee was ultra vires or was an unreasonable exercise of its powers."

This not only allows an appeal on a ground (i.e. ultra vires) which could otherwise be raised in an application for judicial review, but also on a wider ground of reasonableness (see Walters v. Housing Authority (1996) 24 GLJ 32).

The 1966 Law does not, however, provide for a further appeal to this Court. The source of our appellate jurisdiction, if it exists, must be sought elsewhere.

The natural candidate for such a source is the Court of Appeal (Guernsey) Law, 1961 ("the 1961 Law"):

> "13. (1) On such day as shall be appointed in that behalf by Ordinance of the States there shall be vested in the Court of Appeal the appellate jurisdiction in civil matters which immediately before that day was vested in the Royal Court, sitting as a 'Cour des Jugements et Records'.
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> (2) Any civil matter pending in the Royal Court, sitting as a 'Cour des Jugements et Records', immediately before the day appointed under subsection (1) of this section shall on such day be transferred to the Court of Appeal and, subject to such directions as the Court of Appeal may think fit to give in relation thereto, proceedings thereon shall be continued as if the matter had originated in and the previous proceedings had been taken in the Court of Appeal.
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> 14. For all the purposes of and incidental to the hearing and determination of any appeal and the amendment, execution and enforcement of any judgment or order made thereon, the Court of Appeal shall have all the power, authority and jurisdiction which vested in the Royal Court sitting as a 'Cour des Jugements et Records' and shall have power, if it appears to the Court of Appeal that a new trial ought to be had, to order, if it thinks fit, that the verdict and judgment be set aside and that a new trial be had."

It is necessary at this juncture to explain the various roles of the Royal Court so that the jurisdiction issue can be seen in context. I quote from Halsbury's Laws 4th Ed. Vol. 6, para 847:

> "847. **The Bailiwick of Guernsey: judicature.** The Royal Court of Guernsey consists of the Bailiff and 12 Jurats. When sitting as the Full Court (that is as a criminal court for the trial of indictments, as a civil court exercising appellate jurisdiction, or as a court of criminal appeal hearing appeals from the Court of Alderney and from the Court of the Seneschal in Sark) the Bailiff and seven Jurats constitute a quorum. When sitting as the Ordinary Court, that is as a civil court of first instance and for the hearing of civil appeals from Alderney and Sark, the quorum consists of the Bailiff and two Jurats, save that to constitute the *Cour des Plaids d'Heritage* the Bailiff and three Jurats are necessary.
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> There is a Court of Appeal, consisting of the Bailiff and not less than two other persons (5). The Court of Appeal has the whole appellate civil jurisdiction

formerly vested in the Royal Court sitting as the *Cour des Jugements et Records,* and appellate criminal jurisdiction in respect of persons convicted on indictments or summarily convicted in the Royal Court sitting as the Full Court.

Appeal lies from the Court of Appeal to the Judicial Committee of the Privy Council, and of right and without the leave of the Court of Appeal where the value of the matter in dispute is £500 or more. If in any other case leave to appeal is refused by the Court of Appeal, appeal may lie by special leave to the Privy Council or by petition by way of doleance. Appeal lies in criminal cases only by special leave.

Footnote (5): Such other persons are appointed by the Crown as ordinary judges of the Court of Appeal, holding office during good behaviour, and must have held judicial office in the Commonwealth or have been at least ten years in practice at the Bar in Guernsey or England or Wales, Scotland, Northern Ireland or Jersey: Court of Appeal (Guernsey) Law 1961 (Guernsey) ss 2, 3, 4(1), 8."

Prior to the coming into force of the 1961 Law the Royal Court enjoyed a statutory appellate jurisdiction as a Full Court over the decisions of various States Executive Committees (see (a) Billet d'Etat XVII 1946 p.240, (b) Court of Appeal (Channel Islands) Order 1949 Article 12(ii), (c) the Constitution and Law of Guernsey: Sir John Loveridge: Bailiff of Guernsey; The Royal Court sitting as a Full Court B(2), (d) The Preservation of Natural Beauty and Control of Agricultural Land Law, 1959 Section 15(1) - the predecessor of the 1966 Law s. 26(1)).

Prior to the coming into force of the 1961 Law the Royal Court also enjoyed a general civil appellate jurisdiction sitting as a Cour des Jugements et Records. In that capacity, however, it neither did (nor could) exercise such jurisdiction over the Royal Court as a Full Court because it would constitute a blatant breach of the rules of natural justice for it to entertain appeals from a Court whose membership was to all intents and purposes the same as its own. The reason, therefore, why it could not enjoy a second-tier appellate jurisdiction over the administrative decisions previously described, related to person, not subject-matter. The same bar did not exist in respect of the Court of Appeal, which was differently constituted to the Royal Court (Halsbury's para 847 fn 5). In our view, once the reason for the limitation disappeared, the limitation disappeared with it. The second-tier jurisdiction has, in our view, always in principle existed: now it could and can be exercised.

We derive comfort and support for this conclusion from Bassington v. H.M. Procureur, a decision of this Court (1998) 26 GLJ 4, 14, where the procedural issue concerned the availability of the remedy of judicial review both in the Royal Court and in this Court in its appellate capacity. Such a remedy was unknown to the Bailiwick in 1964. This Court said:

"We recognise that this development in England and elsewhere has in substance occurred since this court took over the jurisdiction of the Cour des Jugements et Records. However, the exercise of the powers of the Court of Appeal, although equated by the Appeal Law of 1961 to the Cour des Jugements et Records, cannot be taken to be limited to the state of the law as it stood prior to 1964, the year

> when that Law came into effect; the law must be free to develop both in the Royal Court and in this Court in order to take into account changing circumstances and perceptions. It was not intended to be a museum piece..."

B In short, this Court was saying that Section 13 of the 1961 Law was a so-called "always speaking" provision which had to be construed against contemporary conditions. The absence of judicial review in Guernsey in 1964 (and hence the necessity of an appeal in this Court from the Royal Court in a judicial review matter) was no bar to holding that in 1998 both Courts could exercise their respective jurisdiction in that area.

C A recent and authoritative exposition of this approach to construction is to be found in the House of Lords case of Fitzpatrick v. Stirling Association (2001) 1 AC 27, where Lord Nicolls of Birkenhead said at page 45:

> "A statute must necessarily be interpreted as having regard to the state of affairs existing when it was enacted. It is a fair presumption that Parliament's intention was directed to that state of affairs. When circumstances change a Court has to consider whether they fall within the Parliamentary intention. They may do so if there can be detected a clear purpose in the legislation which can only be fulfilled if an extension is made. How liberally these principles may be applied must depend on the nature of the enactment, and the strictness or otherwise of the words in which it is expressed." (See also Cross Statutory Interpretation 3rd Ed. at pages 51-53).

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E In Attorney General for Ontario v. Attorney General for Canada (1947) AC 127, when the issue was whether the British North America Act 1869 empowered the Canadian legislature to abolish the right of appeal from Canadian Courts to the Privy Council, Lord Jowitt, LC, said at page 154:-

> F "It is ... irrelevant that the question is one which might have seemed unusual at the date of the British North America Act. To such an organic statute the flexible interpretation must be given that changing circumstances require."

The same flexible interpretation may be used to locate a right of appeal as well as to remove it.

G We reach this conclusion without regret. We can see no good reason why the decisions of the Royal Court under Section 26(1) of the 1966 Law should be subject to appeal direct to the Privy Council, as Portholme submits: (compare appeals from Magistrate's Courts prior to 1988: Sherry v. R (1989) 1 WLR 341 and the passage already cited from Halsbury's Laws). The subject matter, i.e. planning, is more rather than less appropriate to domestic judicial digestion.

H In Jersey the Court of Appeal exercised an appellate jurisdiction over the Royal Court in two planning appeals about decisions of States Committees concerned with planning, (Island Development Committee v. Fairfield Farm Limited (1996) JLR 306, and Le Maistre v. The Planning and Environmental Committee of the States of Jersey CA 129 of this year), although there is no special right of appeal to that Court under the Island Planning (Jersey) Law 1964.

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The inherited civil jurisdiction of the Jersey Court of Appeal bears a marked similarity to that of this Court (See Halsbury's Laws 4th Ed. Vol. 6, para 843 and the Court of Appeal (Jersey) Law 1961, Article 12). We understand that no issue as to jurisdiction of the present kind has arisen in that Bailiwick. The second-tier appellate jurisdiction in planning matters appears then to have been assumed to arise from that inherited jurisdiction (See also Housing Committee v. Phantasie Investments Limited (1985-6) JLR 96).

In the circumstances of this case when the point raised is essentially one of vires (misconstruction of an imperative policy document), and the Bailiff by consent sat without Jurats, this Court would undoubtedly have had jurisdiction had the matter proceeded by way of judicial review (even if the Royal Court might have had to consider an argument that Section 26 of the 1966 Law provided a suitable alternative remedy): We might, in order to become seized of an important issue of general planning law, have followed an unorthodox but permissible route of the kind exemplified in Foster v. Chief Adjudication Officer (1991) 3 All ER 84, a decision of the English Court of Appeal, and treated this appeal as in substance, if not in form, a judicial review matter. We do not, however, find it necessary to do so since we are confident of our jurisdiction for the reasons already deployed.

It was urged on us by Portholme that the existence of express statutory rights of appeal from decisions of a Committee of the States of Guernsey in other areas covered by particular legislation was inconsistent with its existence in the general provisions of Sections 13-15 of the 1966 Law.

We were invited to consider the evolution of the Island's Housing Laws, which we identify as follows:

> The appeal provisions in Section 24 of The Housing Control (Guernsey) Law, 1969, were similar to Section 26 of the 1966 Law save that the right of appeal in respect of the Housing Law was to the Ordinary Court, not the Full Court.
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> Section 19(4) of The Housing (Control of Occupation) (Guernsey) Law, 1975, expressly declared that 'The decision of the Royal Court in any appeal under this Section shall be final and conclusive.'
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> Section 40(4) of The Housing (Control of Occupation) (Guernsey) Law, 1982, introduced a right of appeal on any question of law to the Court of Appeal from a decision of the Royal Court.
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> Section 10(1) of The Housing (Control of Occupation) (Amendment) (Guernsey) Law, 1988, retained the right of appeal on a question of law to the Court of Appeal.
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> Section 56(4) of The Housing (Control of Occupation) (Guernsey) Law, 1994, also retained the right of appeal on a question of law to the Court of Appeal.

We do not find this counter-argument in any way compelling. First, at most it illustrates an assumption by the legislative body of the pre-existing state of law, which carried no particular force, Kirkness v. John Hudson (1955) AC 696, per Lord Reid at

pages 733-5. Secondly, even if (from 1982 onwards) that body was purported to create or to confirm a right of appeal, it could be doing so ex abundanti cautela. Thirdly, the 1982 Act and its successors could sensibly be construed as limiting what might otherwise have been a larger appellate jurisdiction.

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I turn then to the planning issue.

The Committee in reaching its decision was acting under Sections 14-18 of the 1966 Law (although it referred only to Section 17). The relevant Sections provide so far as is material, as follows:

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> "14. (1) A person shall not, without the permission in writing in that behalf of the Committee-
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> (a) carry out development of any land;
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> (b) place, erect or re-erect on any site, or make any structural alternation to the exterior of any movable or immovable structure whether or not visible from any public or other place to which the public has access;
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> (c) place, erect or re-erect on any site any structure which, when so placed, erected or re-erected, will be visible from any part
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> of the territorial waters adjacent to the Island;
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> (d) place, erect or re-erect on any site, or make any structural alteration to the exterior of, any movable or immovable structures on the cliffs, or on land adjacent to the foreshores, of the Island;
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> (e) demolish, in whole or in part, any wall, hedge, bank or fence which is visible from any public or other place to which the public has access;
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> (f) place on any site or attach to the exterior of any movable or immovable structure any sign (which expression shall in this
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> Law include any poster, bill, notice or advertising banner or flag) whether temporary or permanent which can be seen from any public or other place to which the public has access;
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> (g) paint on or otherwise exhibit on the exterior of any movable or immovable structure, any sign, whether temporary or permanent, which can be seen from any public or other place
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> to which the public has access where such sign bears references either directly or indirectly to any commercial or industrial undertaking.
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> (2) A person shall not require permission in pursuance of the provisions of this Part of the Law to place, or re-erect on any site-

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(a) any movable structure other than a caravan, or

(b) any immovable structure,

which cannot be seen from any public or other place to which the public has access and of which the cubic capacity does not exceed four hundred feet.

15. (1) Any person desirous of obtaining permission to carry out any development or work or doing anything referred to in the last preceding section shall make applicaton in that behalf to the Committee and such application shall be in such form and accompanied by such information, including specifications, plans, elevations and site plans, as the Committee may, from time to time, require.

(2) Upon receipt of an application under the provisions of the last preceding subsection, or at any time thereafter, the Committee may require an applicant to supply such further information, including further specifications, plans, elevations and site plans, as the Committee may consider desirable.

16. (1) Upon receipt of an application under the provisions of the last preceding section, the Committee may either-

(a) grant the permission applied for;
(b) refuse such permission; or
(c) grant such permission subject to-

(i) conditions relating to the dimensions, design, structure or external appearance of any building, or the materials to be used in its construction;

(ii) conditions relating to the use of any buildings or other land;

(iii) such other conditions as the Committee may think it necessary or expedient to impose.

(2) The Committee may, from time to time, revoke or vary any condition attached to any permission granted in pursuance of the provisions of the last preceding subsection upon application being made to it in writing in that behalf by the person to whom such permission was granted.

(3) Any permission granted in pursuance of the provisions of this section shall remain valid for three years from the date on which it was granted.

17. In exercising its powers under the provisions of the last preceding section the Committee shall take into account-

(a) the Strategic and Corporate Plan when approved by the States and any relevant Detailed Development Plans when so approved;

(b) the effect of the development or other work on the natural beauty of the area;

(c) whether the movable or immovable structure or other work in relation to which permission is applied for, would be incongruous with its surroundings because of its siting, design, exterior appearance or of the materials to be used;

(d) in the case of an application for permission to carry out any development of agricultural land or land designated in any Plan for agricultural use, the degree of suitability of the land as agricultural land;

(e) the extent to which the development or other work would detract from the character or the amenity of the locality concerned; and

(f) the effect of the development or other work on roads, traffic, services, public health, parks, playing fields and other open spaces and the effect on adjoining properties.

18. (1) Notwithstanding the provisions of paragraph (a) of the last preceding section the Committee may grant permission to carry out development or work involving a departure from a Detailed Development Plan if, in the opinion of the Committee, it is a departure of a minor nature not warranting specific reference to the States under the provisions of section eight of this Law.

(2) Where the Committee is disposed to approve of an application for permission to carry out development or work involving a departure from a Detailed Development Plan which may not be granted under the preceding provisions of this section the Committee may request the States Advisory and Finance Committee to appoint an Inspector to hold a Planning Inquiry and the provisions of sections nine, ten, eleven, twelve and thirteen of this Law shall thereupon apply as if the application was a proposal by the Committee for an alteration or addition to the Detailed Development Plan."

[I would add that by Section 14(1)(a) and 35 of the 1966 Law it is a criminal offence to carry out development of any kind without permission in writing from the Committee. The term "development" is defined in Section 40 and embraces the proposal].

From this group of sections I distill the following propositions-

a. The Committee's permission is a sine qua non of a development envisaged in an application (including the proposal).

b. The Committee, seized of an application for such permission, may either grant it outright or on terms, or reject it.

c. In deciding which option to select out of the forgoing the Committee must take into account the considerations listed (a) [relevant development plans with one proviso] - (f) in Section 17.

d. The proviso is that the Committee may grant permission to carry out development involving a departure from the Detailed Development Plan, if in the Committee's opinion it is of a minor nature. Otherwise, for such departure a Planning Inquiry under an Inspector is mandatory.

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Were it not for Section 18(1), I would construe the Committee's obligation as being to "take account of" the listed considerations, i.e. to bear them in mind, not to be bound by them. How the Committee applied such considerations (if engaged) to any particular applications for permission would, subject to its conclusion not being flawed by perversity, be a matter for it. The language of Section 18(1) seems, however, to C constrain the Committee to depart from a relevant plan only when the departure would be minor; otherwise it enjoys no discretion to make such departure. (For the avoidance of doubt I note that the other considerations listed demand exercise of appreciation and judgment only).

I now come to the Committee's decision of which complaint is made, and I quote in full the decision letter of 5th October:

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"5th October 2000

Dear Sir,

The Island Development (Guernsey) Laws, 1966-1990

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Demolish Hotel Houmet du Nord and construct ten units of permanent residential accommodation with associated parking areas and communal grounds (reconsideration) at Route de Picquerel/Houmet Lane, Vale, for Portholme Properties Limited

F I refer to your application received on 20th April 2000 regarding the above proposal which the Committee considered on 3rd October 2000.

The Committee carefully reconsidered your proposal in the light of the representations which you made, but still decided to reject it for the following reasons under the provisions of Section 17 of the Island Development (Guernsey) Laws 1966-1990:-

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(a) Rural Area Plan (Phase 1), as approved by the States;

In reaching its decision the Committee has taken into account all relevant policies in the above Plan. Particular attention is drawn to Policies H11, H13 and CE9.

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(c) the proposal would be incongruous with its surroundings because of its design and exterior appearance;

(e) the extent to which the proposal would detract from the character and amenity of the locality concerned;

I (f) the effect of the proposal on adjoining properties.

Having carefully reconsidered the application in the light of all material planning considerations, including the points made in your letter of 18th April 2000 and in the enclosed letter from Advocates Collas Day dated 6th April 2000, and with the benefit of advice from the Law Officers of the Crown, the Committee resolved to reject the proposal for the reasons set out above.

The Committee remains firmly of the view that the proposed redevelopment of the site for ten new units of accommodation would go beyond what can be considered as limited infill housing development and that, given that this is not a site specifically designated within the Detailed Development Plan for new residential development, the proposal would conflict with the relevant policies and objectives of Rural Area Plan (Phase 1).

In this respect, Policy H13 allows only for limited infill residential development within the Built-up Areas of the Plan. The explanation for Policy H13 (paragraph 3.16) states that there will be a limited number of opportunities for small scale infill development in Built-up Areas and clarifies that proposals will normally be expected to be for single dwellings or, exceptionally, for two dwellings.

With regard to the interpretation of Rural Area Plan policy, the Committee has taken the following approach in dealing with this application-

Upon receipt of an application, the Committee is obliged by Section 17(a) of the Law to have regard to "any relevant Detailed Development Plan". The Committee has to identify the zoning of the site for which development permission is being sought and it has to identify any policy which is applicable, whether such policy imposes a bar or some other restriction on the Committee's power to grant the permission sought or whether it positively encourages the Committee to grant permission. The policies in relation to housing are contained in Section 3 of the Rural Area Plan (Phase 1). Following the introduction, the policies are split into two subdivisions, i.e. the group of policies applying to existing dwellings (Policies H1 to H9) and those applying to new residential development (Policies H10 to H14). Your proposal does not relate to an existing dwelling. Consequently, it is an application for new residential development and Policies H1 to H9 can be disregarded.

The first consideration for proposals for new residential development is the zoning of the site. Unless the site is within the Built-up Areas, Policy H14 will apply to prevent the permission being granted. If the proposal is for infill development in a Built-up Area, Policy H13 will apply. If the proposal is for new housing development on a designated site or a site for which planning approval has already been granted, Policy H10 will apply and, in the former case, Policy H12 will also apply.

Policy H11 is perhaps more difficult to construe because it might apply only to proposals for "new housing development" or, theoretically, it might also apply to any infill development for three or more dwellings. The problem with the second possibility, however, is that explanation in paragraph 3.16 which refers to "small scale infill development" and expects that proposals will "normally" be

for "single dwellings or, exceptionally, for two dwellings". The Committee considers that there is a strong argument that this limits proposals for infill development to a maximum of two dwellings, thereby rendering Policy H11 inapplicable to infill development. As such, the proposal for ten dwellings is more than "limited infill development" and Policy H13 is inapplicable.

In his letter Advocate Collas states that Policy "H10 is not linked with H11", reasoning that there is a further explanatory paragraph between the two policies. The Committee disagrees with this interpretation. In paragraph 3.13, there is reference to "new housing schemes" (my emphasis) and the word "schemes" also appears in the final sentence. In paragraph 3.14, there is a repetition of the word "schemes". One may also refer to the middle two sentences of Policy CE9 which link "(p)roposals for new housing developments on designated residential land" and "(a)ll such proposals" (my emphasis) requiring a comprehensive development brief. The Committee takes the view that the two policies should be read in conjunction, because the pattern of the policies in this section demonstrates that a proposal must either be for limited infill development or be for new housing development on designated sites for which planning approval has already been granted. Although there is nothing explicit saying that any other proposals for the erection of new housing in Built-up Areas will not be permitted, the Committee considers that the argument that such a conclusion must be inferred is stronger than the argument seemingly advanced by Advocate Collas that any such proposal would have to be dealt with by reference only to Policy H11.

The Committee supports this conclusion by reference to the fact that Policy H11 does not contain a "test" to be applied to proposals for residential development of more than two dwellings. In other words, it does not state that they will normally be permitted or will be treated on their merits, etc. Policy H11 does no more than impose a requirement on anything other than proposals for limited infill development to supply a comprehensive development brief. This, it is contended, derives from the fact that if the proposal for new housing development on designated sites and sites for which planning approval has already been granted "will be permitted in principle" (Policy H10), the next stage for the Committee is to consider the detail of the proposal by reference to the matters which must be dealt within the comprehensive development brief. Until the applicant complies with the detailed requirements of Policy H11, the Committee is at liberty not to grant final permission. In other words, the initial decision about whether a housing scheme should be granted permission in principle if it relates to a designated site or a site for which planning approval has already been granted has already been taken and all the Committee is concerned with is being satisfied as to the propriety of the details set out in Policy H11 which are to be contained in a comprehensive brief.

In addition to the above issues, the application site is particularly prominent in the landscape, and includes Areas of Landscape Value (Green Zone 2). It also borders an Area of Special Environmental Importance (Green Zone 1). The design and exterior appearance of the proposed buildings, and the increase in height and massing indicated would increase the dominance of the built form so

as to appear incongruous in the locality. The nature and scale of the residential buildings is also considered to adversely affect the character and amenity of the area, particularly in terms of its contribution to the quality and character of the landscape and also to adversely affect the amenity of neighbouring residential properties.

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The Committee advises that whilst the exterior design and appearance of the envisaged development might be amended to produce a more acceptable scale, massing and design, the principle of the redevelopment as proposed is contrary to the policies and objectives of Rural Area Plan (Phase 1) as described above.

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In the light of the above, you may wish to give further consideration to the potential for conversion of the existing main hotel buildings. Alternatively, the review of Rural Area Plan (Phase 1) will present an opportunity for representations to be made in support of redevelopment of this site for residential development, which would be considered by an independent Inspector at a Planning Inquiry in the normal way.

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I appreciate that you will be disappointed by this decision, but hope that the above explanation is of assistance in clarifying the Committee's position in the matter.

A.J. Rowles

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Development Control Manager."

It will thus be seen that the Committee rejected the application on the basis of its assessment of factors (c) (e) and (f) in the Section 17 list: as summarised in the first page of their decision letter, and elaborated in the last paragraph of page 3. It also placed primary emphasis on the RAP - the relevant plan under Section 17(a) of the 1966 Law: Since this Committee does not state that it would have reached the same decision by reference to factors (c) (e) and (f) alone, irrespective of whether it thought the application conformable with the RAP, I shall assume that it might have reached a different one and that the consequence of if it were, (as the Bailiff held) an inappropriate reliance on the plan would be sufficient to flaw their decision.

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G It therefore appears that the key issue is what the RAP provides, and whether, on its true construction, it would allow the development, permission for which is sought by Portholme. On the approach to construction I guide myself by reference to CP Developments Ltd. v. Secretary of State for the Environment and Salisbury District Council (1997) JPL 930 at p.938, where Robin Purchas QC sitting as a Deputy High Court Judge, distilled previous case law to this effect.

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"It is axiomatic that for a decision maker to have regard to or indeed to determine an application in accordance with it the policy must have been properly understood ... In approach to the construction of a policy in a development plan, as with the construction of any other document, it is important to have regard to the policy in context and as part of the development plan as a whole. In that sense planning policies can be distinguished from statutes or contracts as intended to provide a framework for decision or proposals when made in the planning

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sphere. Notwithstanding this, however, I accept that a development plan falls to be construed on the basis of its finally approved or adopted terms... The guiding principle should be that the policies should be construed on a commonsense and straightforward basis, having regard both to context and underlying purpose..."

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Furthermore when a policy in a Detailed Development Plan expressly precludes the Committee from granting the permission sought, the terms of the Plan bind the Committee (Le Noury v. IDC (1986) 3 GLJ 44 and Blue Diamond v. IDC (1995) 20 GLJ 41.

C The RAP provides so far as material as follows:-

"1.7 This Written Statement sets out the policies which will apply in the Plan area. It deals, firstly (Section 2), with conservation and enhancement of the rural environment, as this is the key strategic aim of the Plan, and sets out the principal objectives and policies in each of the planning zones. It then deals separately, in subsequent sections, with each of the main types of land use and development likely to occur in the Plan area, under the following headings:

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Section 3	:	Housing
Section 4	:	Agriculture
Section 5	:	Horticulture
Section 6	:	Tourism
Section 7	:	Outdoor Recreation
Section 8	:	Community, Leisure and Education Facilities
Section 9	:	Retailing
Section 10	:	Industry
Section 11	:	Commerce
Section 12	:	Transport
Section 13	:	Minerals, Waste Disposal and Water Resources

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1.8 In each of these sections the nature of the particular land use in the Plan area is briefly described and, where relevant, the strategic requirements established by the Strategic and Corporate Plan are summarised. This is followed by a statement of the general objectives of the Plan in relation to the particular land use. The actual land use policies are presented as follows:

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(i) **Explanation**: this sets out the rationale and justification for the policy;

(ii) **Policy:** a statement describing the way in which proposals for development will be considered.

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1.9 Certain key phrases are used in many of the policies. It is particularly important to understand their intended meaning.

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(i) **'will generally be permitted'** means that in principle, permission will be given for proposals of the type in question, subject to meeting all relevant planning considerations.

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(ii) **'will not normally be permitted'** means that there is a presumption that permission will not be given for proposals of the type in question.

(iii) **'will be treated on their merits'** means that permission may be given for proposals of the type in question, but that each case will be considered in the light of criteria which are then specified and **all** other relevant planning considerations.

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Where a series of criteria are listed, against which proposals are to be judged, it is intended that proposals should satisfy **all** (or, at the IDC's discretion, the majority) of them, unless otherwise stated.

D

Built-up Areas

Explanation

2.17 This zone defines areas which are largely developed, where the built form predominates over the character of the countryside. They are distinguished from Conservation Areas because they do not have clear groupings of buildings of architectural or historic importance, though individual buildings of this type will often be present. They are mainly characterised by buildings of undistinguished character.

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2.18 The aim is to meet the requirement for new housing in the Built-up Areas. This will be achieved by bringing forward those sites which are previously zoned for residential development and are still considered suitable for such development (see para 2.21), and secondly, in other parts of this zone which:

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(i) offer an environment which is capable of absorbing new development without unacceptable detrimental effects on its character or quality;

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(ii) provide opportunities for new development to contribute to the form and appearance of existing residential areas;

(iii) provide a reasonably even spread of new development opportunities in different parts of the Plan area.

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2.19 .....

2.20 Within the three selected landscape types, areas offering opportunities for new development have been identified on the basis that they are surrounded by existing development and would not involve encroachment onto existing open countryside, which would be contrary to the overall objective of the Plan.

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2.21 In assessing the potential to accommodate new residential development, the same criteria have been used to review existing zoned residential land (i.e. forming part of a current Detailed Development Plan) which has not been developed and which does not have a valid permit for development. Areas which meet the criteria outlined above have been incorporated into the Built-up Areas. Other zoned sites which would have resulted in encroachment of development into existing countryside and created further suburban sprawl have been incorporated into the appropriate category of Green Zone.

2.22 .....

2.23 In additional to the specially designated sites for new residential development there are a limited number of opportunities for small scale infill development in the Built-up Areas. Proposals for such development will be assessed on their merits.

Policy

POLICY CE9

"In Built-up Areas the policy is to maintain the existing pattern of largely residential land use. Proposals for new housing development on designated residential land will, in principle, be permitted. All such proposals will require a comprehensive development brief to be approved by the IDC prior to the consideration of applications for planning permission. Proposals for infill development in appropriate locations will be considered on their merits. Other forms of development may also be permitted provided that in general they do not occupy sites which may otherwise be suitable for housing."

Section 3 of the document deals with Housing. After an introduction, a Description of the Strategic Policy Context, a statement of general objectives and an exposition of policies towards existing dwellings, it deals with policies towards new residential developments (into which category, as noted above, the proposal falls).

The following policies are then set out:

POLICY H10

Proposals for new housing development on designated sites and sites for which planning approval has already been granted within Built-up Areas will be permitted in principle, provided that they address the local need for housing in the rural parishes.

POLICY H11

All proposals for residential development of more than two dwellings will require a comprehensive development brief to be approved by the Committee prior to the consideration of applications for planning permission. The brief must include an assessment of the overall character of the site and its surroundings and show that the proposal will be of a high standard of design in the layout of the buildings and in the buildings themselves and satisfied the following criteria:

(i) be well conceived, of a high standard of design, and be laid out to make the best and most efficient use of the available land while at the same time being of an acceptable density of dwellings;

(ii) respect the character of the setting and protect any existing features of interest within the site including trees, walls, streams, paving, banks, lanes and other features which give character to the landscape;

(iii) make a positive contribution to the surroundings by reflecting the influence of the local landscape, and, where appropriate, the pattern, form and character of nearby buildings or groups of buildings of architectural or vernacular quality;

(iv) be satisfactory in terms of site access, provision of adequate parking and appropriate circulation and, where appropriate, provision of footpath connections;

(v) pay particular attention to the way in which proposed buildings are grouped, and to the inter-relationship between buildings including the quality and character of spaces created between them;

(vi) be in accordance with accepted principles of good design concerning such matters as architectural massing, composition, and pattern of fenestration;

(vii) use materials, finishes and details which are sympathetic to local traditions;

(viii) include a comprehensive scheme for all external works and landscaping, which is suited to the character of the locality.

.....

POLICY H12

Proposals for new housing development on designated sites within Built-up Areas will only be acceptable where they:

(i) represent a comprehensive scheme for the whole site; and

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(ii)	**are well conceived, of a high standard of design and are laid out to make the best and most efficient use of the land available while at the same time being of an appropriate density.**

B

.....

POLICY H13

In Built-up Areas proposals for limited infill development may be permitted provided that they satisfy the following criteria in that they:

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(i)	**do not represent an encroachment into open countryside;**
(ii)	**do not have an adverse effect on the character of the built form;**
iii)	**do not occupy an important local open space or block an important open view or contribute to unacceptable changes in the road scene by filling a gap which, though not individually important, is one of a series of open areas which together add significantly to the character of the locality;**
(iv)	**do not have an unacceptable detrimental effect on neighbouring properties;**

(v) achieve a satisfactory grouping in relation to neighbouring buildings."

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It is accepted by Portholme that none of the policies that are set out there can be relied on by it.

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H10 is immaterial because the proposal is not in a designated site or in a site with prior planning approval.

H11 is mainly procedural.

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H12 again deals with designated sites and is immaterial for the same reasons at H10.

H13 is immaterial because it is concerned with limited infill developments, which this proposal is not.

Portholme are therefore thrown back on two arguments, first that it can positively rely on Policy CE9: second, it can negatively rely on the absence of any prohibition in the RAP on its proposal. In our view, with deference to the Bailiff who took a contrary position, neither argument succeeds.

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As to the first, Policy CE9 seems to me to summarise in advance the more detailed policies in H10 (CE9 second sentence), H12 (CE9 third sentence), H13 (CE9 fourth sentence). The particular, (which policies H10-13 represent), must, consistent with general legal principle, trump the general. Furthermore policies CE9 and H10-13 must

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be read as a coherent whole. If the fourth sentence of policy CE9 is read as suggesting that infill developments (of whatever scale) will be considered on their merits (without a precondition of satisfying certain specific criteria), Policy H13 becomes meaningless.

B As to the second, if a Plan allows for development only in certain identified circumstances, by necessary inference development out with those circumstances is not to be allowed. Portholme pray in aid the absence of prohibition, when what they require is the presence of permission.

Mr. Collas, for Portholme, ventured a last throw of forensic dice by suggesting that this
C was a minor development which could thus be sanctioned even as a departure from the plan. He points out that the hotel, although unoccupied for the best part of a decade, still was classified for residential use. There are two dispositive counters to that, first the Committee was never invited to consider the proposal as a 'minor departure' from the RAP: and under Section 18(1) of the 1966 Law it is its opinion which is initially decisive: secondly the decision letter especially the last two main paragraphs show that it would not have viewed it as minor if invited to do so.

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For these reasons I would allow the appeal by the Committee.

GLOSTER, JA: I agree.

SUMPTION, JA: So do I.

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ADVOCATE McMAHON: Sir in the light of the Court's decision, I would ask for an order for costs for the Appellant before this Court, which was the Respondent below and also for the order for further costs to be referred to the Court below ... (inaudible)...

ADVOCATE OGIER: I cannot resist that sir.

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BELOFF, JA: I don't think you can. No, you may have them- the States may have their costs both in this Court and below. And again can we thank both parties, and perhaps you will convey to Mr. Collas our thanks for a most interesting argument on what- certainly on a jurisdiction point, a point of some general significance.

The Court will rise.

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I, Suzanne Margaret O'Neill, hereby certify the foregoing to be a correct and complete
H extract, prepared to the best of my skill and ability from the tape-recording of the proceedings in this case.

..... Suzanne M. O'Neill
Friday 1st November 2002

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