

**REPLY BY THE PRESIDENT OF THE COMMITTEE *FOR THE*
ENVIRONMENT & INFRASTRUCTURE
TO QUESTIONS ASKED PURSUANT TO RULE 14 OF THE
RULES OF PROCEDURE BY DEPUTY HELYAR**

Comment 1

E&I issued a press statement in relation to Open Market Part A inscriptions dated 22nd December 2023 in which it indicated it has suspended the process of application for inscriptions pending considerations of amendments to housing policy.

Response

The Committee has not “suspended the process of application for inscriptions pending considerations of amendments to housing policy.” Housing policy in relation to Part A of the Open Market is not being amended or reviewed. Rather, the Committee is reviewing its operational policy on inscriptions to Part A of the Open Market Housing Register, as formally noted by the States in October 2022. This operational policy will make the administration of the existing legislation in relation to inscriptions to Part A of the Open Market fairer, more transparent, and more consistent, better protecting both the Open Market and the Local Market. Based on legal advice that the Committee sought and followed from the Law Officers of the Crown, the provision to apply for a new inscription remains available, in accordance and compliance with the Open Market Housing Register (Guernsey) Law, 2016 (“the Law”). In accordance with legal advice from St. James’ Chambers so as to ensure compliance with the Law, the Committee notified potential applicants prominently on the [Open Market Register website](#) and on the [application form](#) itself that “Following the States’ endorsement of the Population & Immigration Policy Review, the Committee for the Environment & Infrastructure is reviewing its Open Market Part A inscription policy and will not be considering applications until the policy is agreed.” Screenshots included in Appendix 1 at the end of these questions and answers show this advice in situ.]

Comment 2

Under section 3 of the Open Market Housing Register (Guernsey) Law, 2016 (the “Law”), the Committee for the Environment & Infrastructure has powers to inscribe in the Housing Register properties which are not currently part of Section A – in other words to alter the Open Market status or to transfer local market to Open Market. Form HR1, previously the route for such applications, has also recently disappeared from the States of Guernsey website, thereby suspending any means of members of the public exercising their legal rights.

Response

This is not correct. Form HR1 is still available on the website and has been available throughout. The public can still exercise their legal rights in exactly this way. A screengrab is included in Appendix 1 to show where on the webpage the link (circled) is located. The Committee updated the form at the same time as the website to include the same advice cited above, which is evident from the version information in the top right-hand corner of the form (also circled), as shown in Appendix 1.

The relevant section of Law is as follows:

“3. (1) Subject to subsection (2), the Committee may, on application being made to it in a form prescribed by the Committee by regulations and on payment being made of any fee so prescribed, inscribe in the Register a property that is currently not so inscribed.

(2) A property may only be inscribed in the Register under subsection (1) if the Committee is satisfied that – (a) the inscription would be in accordance with States population policies, and (b) in the case of an inscription in Part D – (i) the property is a house in multiple occupation, and (ii) the number of properties inscribed in Part D at the time the inscription is made is less than the Part D cap”.

Question 1

When precisely did E&I decide to cease to process applications under section 3(1)?

Answer

As explained above, the premise of this question is not accurate. However, as is evident from the version information included on the HR1 form available on the website, the decision to notify potential applicants that applications would not be considered until a new inscriptions policy had been agreed was made on 3rd April 2023 and made public via the prominent notification on the website and application form within a few working days of that date. At the time of the publication of the notification, there were no outstanding applications for any new inscriptions to Part A of the Open Market Register, meaning any applicant from then onward would have applied in the full knowledge and expectation that their application would not be considered until the new inscriptions policy had been agreed and put in place. It is reasonable to assume that some potential applicants, on seeing that clear advice, refrained from applying in order to first consider the new inscriptions policy.

In addition to the specific answer provided above, the Committee is happy to provide further background information to explain not just when the decision was made and implemented, but why.

During the work on the Population & Immigration Policy Review (“PIPR”), it became clear that, while the law allowed for inscriptions to Part A of the Open Market Register to be made, there was no detailed policy in place to guide the Committee (who have the authority to make such inscriptions) as to which properties of what type and standard should or should not be inscribed and (importantly) how many inscriptions should be made.

The absence of a detailed policy left the Open Market vulnerable: should the Committee reject an application for an inscription, that decision could be subject to appeal or potential judicial review and, because of that lack of a detailed policy (making the decision-making more subjective and less procedurally/legally defensible), could potentially be overturned should the finding be that the application had indeed had sufficient merit. The legal provision to newly inscribe properties onto Part A of the Open Market Register combined with the absence of a sufficiently detailed policy against which to objectively assess applications therefore left the Open Market vulnerable to a potentially uncontrollable number of new inscriptions. This scenario, if realised, could be highly destabilising and damaging to the Open Market, as theoretically it could “open the floodgates” and in extremis lead to a significant reduction in the value of existing Open Market properties, with a potential destabilising effect on the Local Market as well.

The PIPR policy letter – in which the need for an inscriptions policy was highlighted, and through which the States formally noted that “the Committee for the Environment & Infrastructure is in the process of developing proposals for an Open Market inscriptions policy” – was debated in October 2022. In February 2023, the States debated the Tax Review: Phase 2, which also highlighted this ongoing work and its potential to raise additional revenue (potentially in the region of £5m annually) for the States.

On 3 October 2022, the Committee was made aware (by inclusion in its meeting papers for a decision) that an application for new inscription onto Part A of the Open Market Register had been received on 3rd November 2021, obviously well prior to the PIPR debate. (The Committee was unaware of the existence of any application prior to its inclusion in the committee meeting papers.) Because the work to develop the inscriptions policy was ongoing and not yet complete, the Committee did not think it appropriate to consider this (or any other such) application at that time, and agreed to defer a decision until it could be assessed against the new inscriptions policy, once finalised.

However, the item was returned to the Committee at a meeting on 5th December 2022, with legal advice from the Law Officers that because the application had been submitted in 2021 (notably before the PIPR policy letter had been published or debated) it was not an option to not make a decision. The legal advice highlighted the risk of Judicial Review or other legal challenge should a decision not be made, with a consequent risk of the potential associated cost to the States of such a process. Because the legal advice was that the decision could not be deferred, the Committee considered the application on its own merits and in alignment with the Law (with due regard to population policy and the working high-level policy principles used in the development of the new inscriptions policy), and the application was granted. Work to develop the inscriptions policy continued with added impetus.

In March 2023, the Committee was alerted by multiple sources over a short space of time that the application that had been made in November 2021 resulting in a new inscription to Part A of the Open Market Register was being regarded by some as having set a precedent, and that there was (it was alleged by these sources) a co-ordinated effort underway by a group of people to exploit what they perceived to be a “loophole”, whereby a new inscription would likely be approved, because the Law provided for new inscriptions but a detailed policy to limit, shape, regulate and control that provision was yet to be finalised. The Committee was informed by these sources that the potential applicants understood that, under the new policy, a fee or levy proportionate to the significant uplift in value would be applied. The extant cost for such an application was £500, which – in the context of the very significant uplift in property value that an Open Market inscription typically confers (sometimes multiple millions of pounds) – would have created a very large profit margin for the successful applicant, to the possible detriment of existing Open Market Part A property owners, whose own property values may (in extremis) have been threatened because of the potential or perceived risk of uncontrollable numbers of new inscriptions flooding the market.

Having been alerted to this alleged imminent threat, the Committee acted swiftly. The Law Officers of the Crown were consulted on the matter and the Committee was advised that, while it would not be legally compliant to prevent applications from being submitted, it could notify potential applicants that it would not be considering any applications until the inscriptions policy is agreed. This was legally defensible because the fact that the inscriptions policy was being developed had been formally noted by the States in October 2022, no applications had been submitted since then, and therefore anyone applying after the Committee had advised that it would not be considering applications until the policy had been finalised would apply fully in the knowledge and expectation that that would be the case. That is the course of action that the Committee therefore took: a clear and prominent notification was added to the Open Market Register website and new inscriptions application form (form HR1)

respectively so that any potential applicant would be under no doubt that, should they choose to submit an application, it would be considered under the forthcoming new policy.

Question 2

Given that no committee of the States has the delegated power or legal authority to alter, vary or suspend private legal rights which are enshrined in primary legislation, what, if any, was the legal basis and authority for the unilateral suspension of citizens' legal rights by E&I under the Law?

Answer

As explained in the answers contained within the Background preamble and to Question 1, the Committee took advice from Law Officers of the Crown as to the best legally compliant course of action. This advice was carefully followed. The specific wording of the notification on the website and application form was shared with and approved by the Law Officers beforehand to ensure its legal compliance.

The Committee is still accepting applications in accordance with section 3 of the Open Market Housing Register (Guernsey) Law, 2016. Legal advice from the Law Officers confirmed that there is no time limit prescribed in the Law on when such applications shall be dealt with. It confirmed further that public law principles would require the Committee to act 'reasonably' and not frustrate the intent of the legislation, but it is appropriate that such applications are dealt with consistently by reference to a policy. In light of that, the advice received was that, so long as work on a policy is actively being progressed it can be argued that it is reasonable for the Committee to say that no new applications will be determined until that policy is in place and can be implemented.

Therefore, while the policy is being developed, in the interests of fairness, equity and transparency, the Committee has made it known publicly that it will not be considering any applications submitted for Part A inscriptions until it has the required policy in place and the legislation to implement it.

Through the PIPR in October 2022, the States Assembly approved relevant policy objectives, and an inscriptions policy is being developed to help to fulfill those objectives. Neither the Committee nor indeed the legislation supports the potential undermining of the stability of the housing market (both Open Market and Local Market) – which is a serious risk should applications be considered whilst the policy is still being developed. The Committee is acting reasonably to protect the stability of the housing market while the new inscriptions policy is being developed. Once a

detailed policy is in place, new applications can be considered in a way that is consistent with the States' approved objectives.

Question 3

Has E&I received any form of legal challenge to this position at this date, or has any been threatened or communicated?

Answer

The Committee has not received any formal legal challenge, and nor has any been threatened or communicated.

On 9th October 2023, an officer advised that two letters querying the legal position had been received and processed at operational level. The replies to the letters had included legal advice from the Civil Litigation team at St. James' Chambers, providing the clarity that had been sought, and the Committee is advised that no further contact has been made by the correspondent(s) since.

Because the subject of legal recourse was raised at this meeting, the Committee discussed the matter, covering the following points and observations:

- Legal advice had been sought and followed with respect to the action taken to notify potential applicants that applications would not be considered until the new policy was agreed. This followed two States debates in which the development of the inscriptions policy and its potential to raise significant additional revenue compared with the status quo was noted, putting this information in the public domain. As explained in the answer to Question 2, the Committee is acting reasonably and in compliance with the Law.
- Officers advised that any legal action was likely to focus on whether the time between applying and having the application considered was considered reasonable. As explained in the answer to Question 2, there is no time limit for this process stipulated in the Law, and as the Committee can demonstrate the active progression of this piece of policy development, reasonableness – especially in the context of the need for a relevant policy and the intent of the legislation – could be strongly argued.
- More pertinently, however, the Committee considered it unlikely that any developer would want to risk the reputational damage associated with taking legal action over what the Committee considered would be widely seen as an unethical move, given that it would probably be viewed as an attempt to “play the system” to avoid paying a fair contribution of the significant uplift in

value conferred by an Open Market inscription, and in doing so, threaten the stability of the Open Market.

Question 4

Has E&I estimated the potential cost to the States of Guernsey in relation to any successful claims for compensation for failing to process applications in accordance with the law since its decision?

Answer

Yes. As described in the answer to Question 3, the Committee considered the matter in detail. The advice from the Law Officers, detailed above, suggests that the Committee is acting reasonably and in compliance with the Law.

The Committee also considered the potential revenue that would be lost to the States if it capitulated at any threat of legal action, as the extant fee is only £500, whereas – as is publicly known – the levy or fee for an inscription under the new policy is likely to be a far more accurate reflection of the significant uplift in value that an Open Market inscription confers.

Question 5

Does E&I propose to set up any form of claims line or list for compensation as a result of ceasing to process applications under section 3(1) and has it made any estimate of potential losses to the States arising from any such claims, which could clearly be substantial?

Answer

No. The Committee has acted in accordance with the Law Officers' advice.

Question 6

Have any potential losses to the States of Guernsey as a result of litigation/claims for compensation been passed on to Treasury or the Policy and Resources Committee so that provisions can be made in the accounts of the States of Guernsey?

Answer

Yes, as detailed in the answers to Questions 3, 4 and 5. The Committee considers the potential avoidance of the much more significant levy that will likely be applied under the new policy to be a material loss to the Treasury, especially in light of the fact that – since the Committee made public its intention to consider applications only after the new inscriptions policy is agreed – a total of 11 applications have now

been submitted. For the avoidance of doubt, there were no applications pending prior to the publication of that notification.

Question 7

Have any applications been processed since the decision made by E&I in question 7 above, if so how many and when were the application(s) received by E&I, processed and the last approved?

Answer

As detailed in the answer to Question 1, the only application for a new inscription to Part A of the Open Market Register that the Committee has considered was submitted in 2021 – well in advance of the publication and debate of the PIPR policy letter. (One other application, also submitted in 2021, was considered, but that was for a swap rather than a new inscription.) No applications submitted since October 2022 have been considered or determined, as per the clear advice published on the Open Market Register website and the new inscriptions application form, HR1.

Question 8

If the answer to question 6 is that any such applications have been processed after the decision to otherwise suspend the public legal rights under the Law, can E&I please explain the reasons for so doing.

Answer

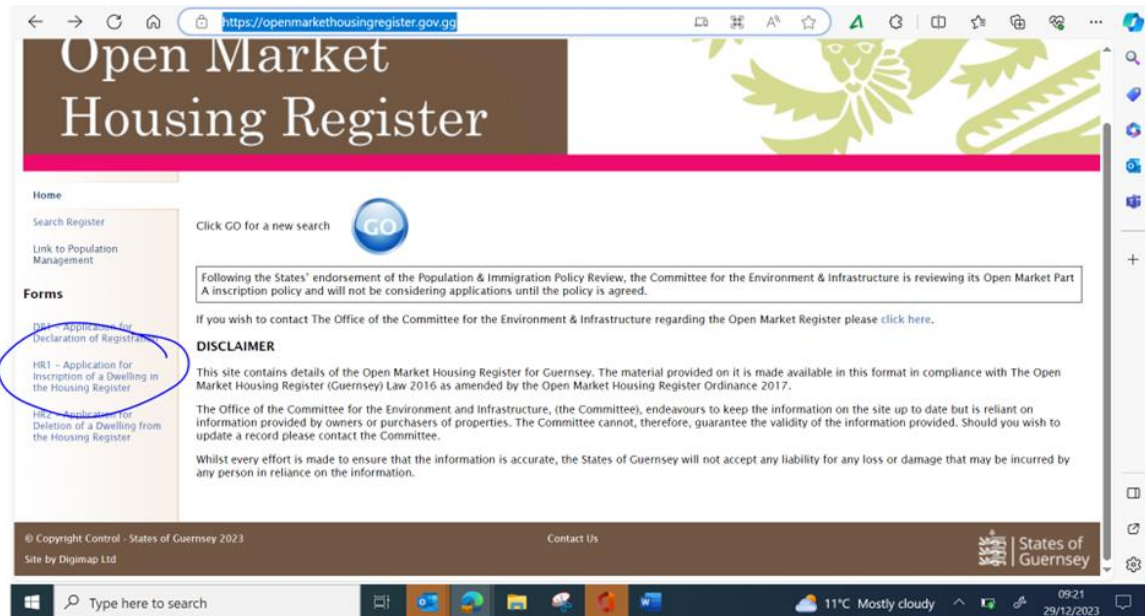
This has already been covered in the answer to Question 1. The Committee would like to express its thanks to Deputy Helyar for his questions which have provided this opportunity to clarify this situation.

Date of Receipt of the Question: 22 December 2023

Date of Reply: 5 January 2024

Appendix 1

Screengrab showing link to form HR1 ([HR1.pdf \(gov.gg\)](#)) on the Open Market Housing Register website (<https://openmarkethousingregister.gov.gg>):



Screengrab showing the top of the HR1 form, including the version number showing it was updated on 3rd April 2023:

The screenshot shows the top portion of the HR1 form. On the left, there is the logo of 'The Office of the Committee for the Environment & Infrastructure'. On the right, there is a box containing the text 'The Open Market Housing Register (Guernsey), Law 2016'. A box in the top right corner contains the version number 'HR 1_(v4_03.04,23)', which is circled in blue. Below this, a large box contains the following text: 'Following the States' endorsement of the Population & Immigration Policy Review, the Committee for the Environment & Infrastructure is reviewing its Open Market Part A inscription policy and will not be considering applications until the policy is agreed.' Below this, the title 'APPLICATION FOR INSCRIPTION OF A DWELLING IN THE HOUSING REGISTER' is centered. The form then lists two numbered items: '1. Name of applicant', '2. Address of applicant', followed by several lines of redacted text.