



Northern Ireland Audit Office

NIAO review of NI Water's sale of Portavoe Reservoir



REPORT BY THE COMPTROLLER AND AUDITOR GENERAL
21 July 2022

Abbreviations

The Council	Ards and North Down Borough Council The Urban District Council of Donaghadee was operational from 1905 to 1972. Ards Borough Council was then formed and later merged with North Down Borough Council in 2015 under local government reorganisation in Northern Ireland as Ards and North Down Borough Council.
DAERA	Department of Agriculture, Environment and Rural Affairs
The Department	Department for Infrastructure Following restructuring of Northern Ireland Departments in 2016 the responsibilities of the former Department for Regional Development, along with several other functions, transferred into the Department for Infrastructure.
DoE	Department of the Environment (1974 to 1999)
DRD	Department for Regional Development (1999 to 2016)
Forest Service	Northern Ireland Forest Service, an Agency of DAERA
LPS	Land & Property Services
NI	Northern Ireland
NI Water	Northern Ireland Water Limited, created in April 2007, formerly the Water Service
SLA	Service Level Agreement
Water Service	Northern Ireland Water Service, an Agency of the Department of the Environment (1974 to 1999) and then of the Department for Regional Development (1999 to 2007)

Timeline



NIAO review of NI Water's sale of Portavoe reservoir

Introduction

- 1.1 Northern Ireland Water Limited (NI Water) is a Government Owned Company, set up in April 2007 to provide the water and sewerage services in Northern Ireland, supplying 600 million litres of clean water a day for almost 1.8 million people, as well as, treating 320 million litres of wastewater a day from 663,000 households.
- 1.2 Portavoe Reservoir was surplus to NI Water requirements and was sold for £67,575 in June 2020. The sale resulted in much interest in the media; the Assembly; and a concern was raised with the NI Audit Office. This report sets out the background to Portavoe Reservoir and our review of the processes followed by NI water which resulted in the sale.

Background to Portavoe Reservoir

- 1.3 During 1933 six plots of land at Portavoe were acquired by the Urban District Council of Donaghadee¹ for £2,200, under the Donaghadee Urban District Council (Northern Ireland) 1931 Act and subject to the provisions incorporated under the Land Clauses Consolidation Act 1845. Following the acquisition, the flowing water was impounded using a 135 metre long straight embankment, encasing a concrete core wall 0.3 metres thick, at a cost of £22,000. Eventually Portavoe Reservoir had a surface area of 12.75 hectares with a capacity of 269 megalitres at top water level. The Council constructed various works on the site for the operation of the reservoir, including: inlet and outlet pipes and valves; spill weir; pumping station; inspection platform; a house; and two small car parks. Portavoe Reservoir was used for the supply of drinking water to the local area. Following changes brought about by the Local Government Act (Northern Ireland) 1972, Portavoe Reservoir was transferred to the Ministry of Development and then to the Water Service within the Department of the Environment².

¹ The Urban District Council of Donaghadee was operational from 1905 to 1972. Ards Borough Council was then formed and later merged with North Down Borough Council in 2015 under local government reorganisation in Northern Ireland as Ards and North Down Borough Council.

² Northern Ireland Water Service was an Agency of the Department of the Environment (1974 to 1999) and then of the Department for Regional Development (1999 to 2007). In April 2007 Northern Ireland Water Limited was formed.

Portavoe Reservoir fell into disuse during the 1990's and the use of the land evolved

- 1.4 The abstraction of raw water ceased at Portavoe Reservoir during the 1980s and it fell into disuse in 1992 when its water quality was considered to not meet the necessary standard. It was determined that it was uneconomical to upgrade Portavoe Reservoir to ensure compliance with the EC Drinking Water Directive³. NI Water told us that it was retained as an emergency supply while a new Water Resource Strategy was being considered. During this time Portavoe Reservoir continued to be subject to inspection, monitoring and maintenance in accordance with the Reservoirs Act 1975⁴.
- 1.5 The NI Water Estate Management Plan 2010 – 2018, identified Portavoe Reservoir as being surplus to operational requirements and suitable for disposal. The Plan was shared with the Department for Regional Development⁵.
- 1.6 During 2012, NI Water launched its Recreation and Access Policy which allowed the public permitted access to NI Water's land for specific listed activities including fishing (via an affiliated club with the relevant rod licence); dog walking; hiking; running; walking; and bird watching. This policy applied to Portavoe Reservoir and the use of the land evolved over the years, from a reservoir to local beauty spot.
- 1.7 NI Water estimated that costs in the region of £278,000 were incurred in the inspection and maintenance of the reservoir between it falling into disuse in 1992 and disposal in 2020.

An adjoining land owner repeatedly expressed an interest in buying part of the land

- 1.8 Portavo Estates Limited⁶, an owner of property adjacent to Portavoe Reservoir expressed an interest in buying part of the land and incorporating it into its estate. During 2008 Portavo Estates Limited, entered into correspondence with NI Water indicating that pre-

³ The EC Drinking Water Directive concerns the quality of water intended for human consumption and to protect human health from adverse effects of any contamination of water intended for human consumption by ensuring that it is wholesome and clean.

⁴ The Reservoirs Act 1975 does not apply in NI but NI Water follows the spirit of the Act.

⁵ Following restructuring of Northern Ireland Departments in 2016 the responsibilities of the former Department for Regional Development, along with several other functions, transferred into the Department for Infrastructure.

⁶ Portavo Estates Limited, is a private limited company incorporated August 2009. The main nature of the business is the letting and operating of owned or leased real estate.

emption rights⁷ would be asserted if, and when any of the land was put forward for sale. NI Water advised that there were no immediate plans to dispose of Portavoe Reservoir. In February 2010 Portavo Estates Limited put NI Water on notice that it intended to claim pre-emption rights in respect of Portavoe Reservoir and requested that it be offered first refusal at purchasing the reservoir. NI Water responded in March 2010 that there was no evidence of pre-emption rights. Portavo Estates Limited wrote to NI Water on several occasions throughout 2010 and 2011 repeating the claim for pre-emption rights. In January 2012 Portavo Estates Limited's solicitor also wrote to the Minister, of the Department for Regional Development, informing him that as the successor in Title to the property known as the Portavo Estate, Portavo Estates Limited was claiming the right of pre-emption over some lands.

NI Water sought advice on the way forward

- 1.9 NI Water sought and received advice on a number of matters including the requirement to offer surplus land, previously vested, back to the former owners. Portavo Estates Limited is the successor in title, to the former owners, of a substantial portion of the reservoir lands including approximately 80 percent of the reservoir. The Land and Property Services (LPS) guidance entitled "*Disposal of Surplus Public Property in Northern Ireland*" states that there is no requirement to offer surplus land back to the former owner if the land has been declared surplus more than 25 years after the date of acquisition, except where the Land Clauses Consolidation Act 1845 provisions apply. Our review confirmed that both the relevant public sector guidance and appropriate legislation had been considered by NI Water and advice had been sought from LPS. On the basis of the advice received NI Water concluded that it did not need to offer the land to Portavo Estates Limited and pre-emption rights did not apply.

NI Water offered Portavoe Reservoir to other public sector organisations

- 1.10 In October 2013 the Department for Regional Development confirmed that NI Water should proceed with the disposal of surplus reservoirs, including Portavoe Reservoir, on the basis of guidelines set out in the "*Disposal of Surplus Public Property in Northern Ireland*". The guidance required that NI Water conduct a public sector trawl to determine any

⁷ Pre-emption rights or first option to buy is a contractual right to acquire certain property newly coming in to existence before it can be offered to any other person or entity.

interest in the purchase of the Reservoir. The trawl was conducted in May 2014 and identified an expression of interest from both Ards Borough Council and North Down Borough Council.

Portavo Estates Limited issued High Court proceedings against NI Water

- 1.11 Two months after the trawl, in July 2014, Portavo Estates Limited issued High Court proceedings against NI Water. The legal advice received by NI Water concluded that the claim could be defended but the outcome was difficult to predict with absolute certainty as there was considerable room for judicial interpretation. No decision on the future of the reservoir could be taken until the legal proceedings completed.

The High Court judgement requires NI Water to offer the land to the original owners or their predecessors in the event of disposal

- 1.12 The case was heard in the High Court on 14 and 15 December 2016. The High Court judgement noted two central issues:
- First issue – Portavo Estates Limited claimed to be entitled to rely on section 128 of the Land Clauses Consolidation Act 1845 as giving it a right to pre-emption in respect of a substantial section of Portavoe Reservoir lands, now superfluous to NI Water's requirement. NI Water denied Portavo Estates Limited enjoyed any right to pre-emption and the opportunity to purchase the reservoir lands had long since passed.
 - Second issue – NI Water claimed that even if section 128 did apply, Portavo Estates Limited could not rely upon it because NI Water considered the lands built upon, including, a reservoir, associated works, embankment and spill weir.
- 1.13 The High Court judgement was passed on 19 January 2017 and determined in respect of the first issue that Portavo Estates Limited did have a right of pre-emption of the lands of its predecessors in Title. In respect of the second issue, the judge determined that the lands were not built upon.
- 1.14 Following the January 2017 High Court judgement, NI Water sought legal advice on the possibility of challenging the decision. The legal advice concluded that it would prove

difficult to bring an appeal as the basis of any such appeal would need to establish that the judge made an error in law and would essentially be challenging the judge's discretion in applying the facts of the case to the legal principles engaged. Following receipt of this advice, NI Water proceeded to offer the Reservoir to Portavo Estates Limited and the other adjoining land owners, as required by the High Court ruling.

- 1.15 Portavoe Reservoir, totalling 76.23 acres, was offered to six successors in land Title but two did not wish to acquire the land. This resulted in those portions of land being offered to the other four.

Land and Property Services determined the value of Portavoe Reservoir

- 1.16 In January 2018 NI Water instructed LPS to progress the disposal of Portavoe Reservoir. LPS inspected Portavoe Reservoir and subsequently sought background information on a number of matters including boundaries, responsibilities and potential liabilities.

- 1.17 During the valuation process LPS considered the values which could be achieved on the individual plots to be significantly constrained by a number of material factors, including:

- The plots were within a designated Site of Local Nature Conservation, which is a planning restriction on its future potential;
- The reservoir manager responsibility, under the Reservoirs Act 2015⁸, would pass over to the new purchasers;
- The requirements of the Environmental Impact assessment (Forestry) Regulations (NI) 2006 require an Environmental Impact Assessment to be undertaken should planning permission be sought for development of the site;
- Over 50 per cent (45 acres) of the site is planted with forest to which the Department of Agriculture, Environment and Rural Affairs (DAERA) would retain rights as part of a 1978 Forestry Agreement with NI Water and any new owner would assume NI Water's responsibilities under the agreement;
- The Forestry Act (NI) 2010 requires felling licences on forested land transferred to a third party from DAERA's management, including the requirement for recovery of public costs associated with the forestry investment;

⁸ The Reservoirs Act (NI) 2015 covers many of the same issues as the Reservoirs Act 1975 (see paragraph 1.4) and provides for the regulation of reservoir safety. Although the 2015 Act is not fully commenced the sections relevant to this case Section 1 (definition of a controlled reservoir) and Section 6 (reservoir manager) have commenced.

- Portavoe Reservoir was one of the waterways offered by DAERA⁹ for fishing, subject to a Service Level Agreement (SLA), signed in December 2014 with NI Water. Transfers would be subject to the terms of the existing SLA which remain in force until at least 18 December 2024.

- 1.18 In determining the value of the reservoir, LPS considered the sales and agreed sale values of seven other former reservoirs, ranging from approximately £660 to £6,000 per acre. The highest value achieved for any reservoir was for the Knockbracken site, on the edge of Belfast, which transferred for £351,000 equating to £6,063 per acre, following an open market disposal.
- 1.19 LPS valued the land at Portavoe Reservoir at £850 per acre for the largest plot and £925 per acre for the other five plots, and reached an agreement on a sale price for each of the six plots, totalling £67,575. NI Water's Capital Investment Panel, agreed the sale price based on the advice from LPS.
- 1.20 In 2012, NI Water had commissioned a valuation from an independent property consultant. The valuation at that time suggested a market value of £75,000. However, I note that the 2012 valuation was for the entire site, as one entity, and in addition the valuation was made on the assumption that the obligations contained in the Forestry Agreement and the Fisheries Agreement would not pass to the new owner if the site was sold on the open market. Those assumptions may have resulted in a more favourable market value.
- 1.21 It has been suggested that a higher price should have been achieved for the sale of this land and comparators have been made in the context of the price that can be achieved for agricultural freehold land, or the hypothetical value of the land should the reservoir be drained. I note that LPS does not consider agricultural type values to be a suitable comparison for this site where, due to the water coverage and plantation of trees, no agricultural activity is possible. In relation to the potential value should the reservoir be drained, LPS have advised that it is not possible to comment and additional investigations would be required.

⁹ Department of Agriculture, Environment and Rural Affairs (DAERA) Inland Fisheries is responsible for the management of the public angling estate and the sustainable management of the fishery resource.

- 1.22 I considered if there would have been merit in seeking an additional valuation. Both NI Water and LPS told me that this would have incurred additional costs and could have reduced the net proceeds of the sale.

NI Water sold Portavoe Reservoir on the 11 June 2020 and transferred the Titles with covenants attached

- 1.23 The sale of the six plots of land to four purchasers completed on 11 June 2020 (see Figure 1).

Figure 1: Sale of Portavoe Reservoir

	Amount of land Acres	Purchase price £
Purchaser 1 (accepted three parcels of land)	46.35	39,900
Purchaser 2	19.21	17,800
Purchaser 3	6.32	5,850
Purchaser 4	4.35	4,025
Total	76.23	67,575

Source: NIAO based on AQWs (16767/17-22 and 16770/17-22)

- 1.24 The transfer of the land to all four purchasers included two covenants relating to the Forestry Agreement and the Fisheries Agreement. One of the purchasers, Portavo Estates Limited, had an additional covenant inserted into the land transfer, to ensure that it took responsibility for the upkeep of Portavoe Reservoir in accordance with the Reservoirs Act (NI) 2015.
- 1.25 NI Water told me that it would not be appropriate to include any form of clawback clause¹⁰ in the contract for sale in respect of any participation in future increases in value. NI Water advised that to do so would be inconsistent with the rights of pre-emption where the guiding principle is that the former landowner should be put in the same position as if his land had not been taken from him. This was supported by retrospective legal advice received by NI Water during the course of my review. I also note the significant constraints outlined by LPS at **paragraph 1.17** in relation to this site, including that over half of the site is planted with forest and is subject to the long term Forestry Agreement. NI Water

¹⁰ 'Clawback' refers to claims for all or part of windfall gains resulting from, for example, the purchaser obtaining planning permission for a change of use, or a greater volume of development than anticipated by the planning permission obtained prior to disposal. (Guide for the Disposal of Surplus Land, Cabinet Office, March 2017)

considered there to be little prospect of this land ever becoming potential development land within the scope of a clawback.

- 1.26 I am aware that in May 2020, shortly before the completion of sale, the erection of metal gates and fences at the site was brought to the attention of NI Water. NI Water advised that a purchaser would not be allowed to make any alterations to the property prior to the completion of sale, without their consent. NI Water confirmed that it did not give consent, however I did not identify any action taken by NI Water in relation to this matter.

There remain a number of unresolved issues associated with the sale of Portavoe Reservoir

- 1.27 In September 2018, prior to completion of sale, Ards and North Down Borough Council (the Council) wrote to the prospective buyers to ask if they would be willing to agree to a Public Right of Way but none agreed. The Council has since received numerous queries from members of the public, Councillors, 18 evidence forms and a petition containing 850 emails of signature, asking the Council to establish a Public Right of Way. I understand that Council's Chief Executive has written to the new owners again asking them to reconsider their position and enter into discussions with the Council.
- 1.28 As previously noted, NI Water's duties in respect of the Fisheries Agreement transferred to the purchasers under the terms of the sale agreement. However, the new owners wish the site to remain private and not open to the public. I understand that DAERA has engaged with the landowner and LPS and has also sought legal advice regarding access rights for permit holders to fish at the site. Until this has been clarified permit holders have been advised that the site will remain closed for the foreseeable future.
- 1.29 DAERA Forest Service informed NI Water that they did not wish to have any involvement in managing the land at Portavoe Reservoir after disposal by NI Water and requested compensation due to the loss of the trees and the loss of their rights under the 1978 Agreement. NI Water's position is that no compensation is due to DAERA Forest Service. This is on the basis that the Transfers to the various purchasers expressly preserve DAERA Forest Service's pre-existing rights. NI Water told us it has not received any further correspondence from DAERA Forest Service in relation to this matter since the sale completed. DAERA Forest Service has confirmed to me that the ownership of the trees remains with them. I understand that DAERA is liaising with the Departmental Solicitor's

Office regarding any implications for tree management responsibilities following change of ownership.

Conclusion

- 1.30 I have considered the concerns raised in relation to this disposal and the agreed sale price. My review found that NI Water followed the appropriate processes and guidance on the disposal of the reservoir following the High Court judgement which required NI Water to offer the reservoir to the former land owners, or their successors, in the event of disposal. I have considered the rationale provided as to why a higher value could not be achieved. The assumptions underpinning the LPS valuation appear to be reasonable; reflect the constraints associated with the site; and took into consideration the limited comparable property values.
- 1.31 However, I also recognise the upset felt by the local community that had previously enjoyed recreational activities at the reservoir and the disappointment that it could not be transferred to the local Council. This was a somewhat unusual case whereby the value of the asset in monetary terms was considered not to be substantial, however the value to the local community appears to be significant. Whilst the legal requirements and processes were followed by NI Water, it is disappointing that many in the local community feel disadvantaged by the outcome.
- 1.32 My office previously recommended that for major projects at least two independent valuations should be obtained, including one from LPS¹¹. Whilst this disposal does not relate to a major project, this was an unusual asset to value and an asset in which there was considerable public interest. Therefore, in my opinion, there may have been merit in considering a second, up to date, valuation to provide further assurances that the disposal value was satisfactory. I would also remind all public bodies to ensure that due consideration is given to the inclusion of clawback clauses, where appropriate, during the sale process.
- 1.33 I recommend the relevant bodies continue to vigorously pursue the ongoing matters such as fishing access and the responsibilities for the management of the trees on the site.

¹¹ NIAO report on the *Transfer of Surplus Land in the PFI Education Pathfinder Projects*, 11 September 2007



Published and printed by CDS