



Northern Ireland Audit Office

The Governance of Land and Property in the Northern Ireland Housing Executive



REPORT BY THE COMPTROLLER AND AUDITOR GENERAL
7 January 2016



Northern Ireland Audit Office

The Governance of Land and Property in the Northern Ireland Housing Executive

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This report has been prepared under Article 8 of the Audit (Northern Ireland) Order 1987 for presentation to the Northern Ireland Assembly in accordance with Article 11 of the Order.

K J Donnelly

Northern Ireland Audit Office

Comptroller and Auditor General

7 January 2016

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Abbreviations

C&AG	Comptroller and Auditor General
DFP	Department of Finance and Personnel
DoE	Department of the Environment
LPS	Land and Property Services
NIHE	Northern Ireland Housing Executive
NIAO	Northern Ireland Audit Office
PAC	Public Accounts Committee
PPS	Public Prosecution Service for Northern Ireland
PSNI	Police Service of Northern Ireland
ULS	Undeveloped Land Schedule

Executive Summary



©Millmount House and Lands, Dundonald (see Case Example 6)

Executive Summary

Introduction

1. The Northern Ireland Housing Executive (NIHE) is an executive non departmental public body of the Department for Social Development (the Department), originally established in 1971 with responsibility for social housing in Northern Ireland. It is the largest landlord in Northern Ireland and is responsible for the management and maintenance of around 87,200 homes.
2. NIHE is one of Northern Ireland's largest landowners, with significant land and property holdings across Northern Ireland. A proportion of this land is considered as undeveloped land and is either used to support the building of new social homes, retained for potential future use, or declared surplus to requirements and offered for sale on the open market. Since 2005 there have been 1,374 land disposals including 161 to registered housing associations for new build schemes.
3. During the early part of the period covered by this report (2004 to 2010), there was an extremely buoyant property market in Northern Ireland. This led to developers proactively seeking to acquire land owned by NIHE. The property market collapsed in 2007- 08.
4. In 2009 significant concerns were raised by whistleblowers, MLAs and the media. These focused on NIHE's procurement processes, in particular the management of response maintenance contracts. In 2010 further concerns were raised by three NIHE Directors and the Northern Ireland Commissioner for Complaints involving NIHE's role in two land transactions at Nelson Street and Hardcastle Street in Belfast. NIHE and the Department carried out a number of reviews to investigate land deals and NIHE governance (see paragraphs 1.15 to 1.23 and 3.8 to 3.9). These reviews highlighted a number of weaknesses and failings in the governance of NIHE.
5. In 2012 the Comptroller and Auditor General (C&AG) issued a report to the Northern Ireland Assembly highlighting serious weaknesses in NIHE's management of response maintenance contracts¹. Following this, in 2013, the Public Accounts Committee concluded² that the weaknesses and failings apparent in the management of NIHE response maintenance contracts also extended into other areas of NIHE activity, such as land deals, which largely fell within the remit of NIHE's Housing and Regeneration Division.
6. In 2011³ the C&AG undertook to provide a detailed report on NIHE's management of land disposals to the NI Assembly, pending the outcome of ongoing Police Service of Northern Ireland (PSNI) investigations. The PSNI passed a file to the Public Prosecution Service for Northern Ireland (PPS) and in 2013 the PPS concluded that the

Background

4. In 2009 significant concerns were raised by whistleblowers, MLAs and

1 NIHE Management of Response Maintenance Contracts, Report by the Comptroller and Auditor General, 4 September 2012.

2 Report on the Northern Ireland Housing Executive: Management of Response Maintenance Contracts, 20 February 2013 Public Accounts Committee, NIA 99/11-15.

3 Northern Ireland Housing Executive, Report by the Comptroller and Auditor General on the 2010- 11 Accounts, 30 June 2011.

test for prosecution was not met as insufficient evidence existed to provide a reasonable prospect of obtaining a conviction.

their view, they were not given the opportunity to participate fully in the NIHE reviews referred to in this report (paragraph 1.23).

Scope and methodology of this report

7. The C&AG is the head of the Northern Ireland Audit Office (NIAO). He, and the NIAO are totally independent of Government. He has statutory authority⁴ to report to the Assembly on the economy, efficiency and effectiveness with which departments and their bodies have used their resources.
8. This report provides a review of work undertaken by NIHE to investigate a number of land deals and the interaction of some senior NIHE officials with private sector developers. In addition, to inform our report we:
 - examined evidence provided by the NIHE land disposals investigation team and other relevant documentation held by the Department and NIHE;
 - considered whistleblowing concerns relating to the management of land and property within NIHE; and
 - held meetings with officials from the Department and NIHE.
9. NIAO consulted with third parties referred to in this report. However, during the course of our audit work, some third parties told us that, in
10. **Part One** of our report provides an overview of the findings from reviews and investigations within NIHE since 2010.
11. At **Part Two** we highlight a number of specific NIHE land dealings with or disposals to private developers which were not compliant with NIHE's basic internal controls.
12. **Part Three** covers the weaknesses in the Department's oversight of NIHE which meant that opportunities to tackle failings in internal controls and governance were not fully exploited. **Part Four** outlines improvements in oversight, NIHE governance arrangements and land and property management processes in NIHE. We also highlight further improvements that could be made.

Overall conclusion

13. Our review of a number of NIHE land dealings revealed recurring weaknesses across a number of disposals and transactions in the period between 2004 and 2010. These weaknesses led to a breakdown in NIHE's internal controls. As a result, NIHE could not always demonstrate value for money and probity, particularly when disposing of land to private developers.

⁴ This report has been prepared under Article 8 of the Audit (Northern Ireland) Order 1987 for presentation to the Northern Ireland Assembly in accordance with Article 11 of the Order.

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14. The management of land and property is an area that is inherently vulnerable and it is concerning that a number of well established safeguards to ensure probity and value for money were not in place. However, weaknesses in NIHE's governance and an inadequate internal control environment prevented NIHE from protecting its own interests when dealing with private sector developers.
15. The cumulative effect of the weaknesses in governance and control was to allow the Housing and Regeneration Division to operate with a minimum of oversight and challenge. NIHE investigators concluded that it appeared that in several land disposals the interests of NIHE were not paramount. We concur with this view. The Public Accounts Committee concluded in 2013 that "the Housing Executive's Housing and Regeneration Division had been, for many years, out of control."⁵ Our examination of the Housing and Regeneration Division's management of land transactions from 2004 up to 2010 clearly supports the Committee's conclusion.
16. In our opinion, the Department and NIHE did not fully exploit opportunities to tackle serious governance and control weaknesses relating to land disposals. In 2004, the Local Government Auditor highlighted control weaknesses to the Department. In 2007, both NIHE and the Department's own Internal Audit found significant inadequacies in the governance and controls over land disposals. Despite follow-up action to these reports, governance weaknesses in NIHE land disposals continued to occur. In 2010, the Department commissioned a full-scale investigation into governance weaknesses in NIHE.
17. Since 2010 both the Department and NIHE have taken action to strengthen their controls surrounding land and property disposals. NIHE leadership has changed. New systems of control and governance have been introduced and the NIHE Board exercises much better oversight of the organisation.
18. It is important that the wider public service learns from the experience of the NIHE over the last 10 years (see **Figure 1**). This report illustrates the risks that public bodies face if their systems of governance are ineffective; conflicts of interest are not properly managed; delegated authority limits are by-passed; and the normal checks and balances essential for good decision-making are not in place. Governance regimes require a culture of compliance if they are to be effective and those entrusted with the leadership of the organisation must give the lead on this.

5 Report on the Northern Ireland Housing Executive: Management of Response Maintenance Contracts, 20 February 2013 Public Accounts Committee, NIA 99/11-15.

Figure 1: Lessons for the Wider Public Sector

1. Boards should instil a governance compliance culture throughout their organisations and look to senior officers to safeguard and nurture that culture and provide regular assurance on its application.
2. Staff should only take decisions to the extent that their authority to do so is delegated by the Board. Boards should ensure compliance with their scheme of delegation.
3. Governance systems consist of a range of checks and balances. Those charged with governance have a responsibility to ensure that these are working effectively and are not overridden or circumvented by others in authority. Staff have a responsibility to ensure that they fully comply with these checks.
4. Public bodies should ensure that the conclusions and recommendations of governance and internal audit reviews in specific business areas are read across to all other relevant business activities.
5. Departments' sponsorship arrangements should include a regular assessment of Arms Length Bodies compliance with their governance framework.

Key findings

Events in 2010 focused attention on governance in the Northern Ireland Housing Executive

19. In January 2010, alleged irregularities were raised by internal complainants in respect of the NIHE's dealings with a site (owned by a third party) at Nelson Street in Belfast. Following an internal NIHE investigation, the Nelson Street case was referred to the PSNI for their consideration of a criminal investigation. The PSNI submitted a file to the PPS in July 2011. The PPS concluded, on 10 July 2013, that "following very careful consideration of all the available evidence and circumstances surrounding the case, the test for prosecution was not met as insufficient evidence existed to provide a reasonable prospect of obtaining a conviction of any individual of any offence" (paragraphs 1.8 to 1.10).
20. The Northern Ireland Commissioner for Complaints issued a report in September 2010 on the disposal of NIHE land at Hardcastle Street in Belfast. The Commissioner found in favour of a complainant who had been denied the opportunity to bid for the land on the open market and recommended that he should receive a payment of £20,000 and a letter of apology from the Chief Executive of NIHE. The complainant did not accept this award and initiated legal action which resulted in an out of court settlement of £75,200 against NIHE (paragraphs 1.11 to 1.12).

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21. In response to concerns arising from the Nelson Street and Hardcastle Street sites, NIHE launched the Land Disposals Review Project in January 2011. After lengthy internal investigations, evidential packs relating to four NIHE land disposals at three locations (Hardcastle Street, Skegoneill Avenue and two land disposals at Glenalpin Street) were referred to the PSNI during 2012 for further investigation (paragraphs 1.15 to 1.24).
22. A timeline of key events is at **Figure 2**.

Figure 2: The key events timeline for NIHE land disposals issues

Date	Key Event
September 2001	The Department commissioned the Local Government Auditor to undertake a review of NIHE Houses for Land schemes.
February 2004	The Local Government Auditor issued a report to the Department and NIHE on the Houses for Land schemes.
November 2006	Media coverage of the Hardcastle Street land disposal, including a current affairs TV programme feature.
February 2008	The Department requested its Internal Audit to review the Department's arrangements for monitoring NIHE land disposals.
February 2008 to February 2010	The Department, with NIHE, took forward the recommendations in its Internal Audit report. These included amending its Control Documents, considering NIHE land disposals at Monthly Performance meetings and the provision of quarterly disposal schedules.
February 2010	NIHE commenced a formal investigation into the Nelson Street case, in response to concerns raised by members of Senior Management.
March 2010	NIHE reported on concerns over the Nelson Street site. Case referred to PSNI.
March 2010	The Director of Housing and Regeneration Division (Colm McCaughley) went on sick leave.
April 2010	NIHE's Land and Commercial Property department transferred from Housing and Regeneration Division to Corporate Services Division, as an interim measure pending a review.
September 2010	The Northern Ireland Commissioner for Complaints issued a report on NIHE's maladministration over the Hardcastle Street sale.
September 2010	The Director of Housing and Regeneration Division (Colm McCaughley) was suspended by NIHE following the Nelson Street investigation.

October 2010	The Department commenced a review of the governance arrangements within NIHE.
December 2010	NIHE Chief Executive (Paddy McIntyre) retired.
December 2010	The Department's review of the governance arrangements in NIHE is published.
January 2011	NIHE Land Disposals Review Project established to investigate allegations concerning land acquisition and disposal.
February 2011	Review into the role of the Chief Executive in light of recent governance failings in NIHE.
July 2011	PSNI passed file to PPS following an investigation into alleged criminal conduct in connection with land at Nelson Street, Belfast.
October 2011 onwards	NIHE Land Disposals Review Project referred four suspect land disposals to PSNI for further investigation.
November 2011	The Director of Housing and Regeneration Division (Colm McCaughley) retired.
March 2012	NIHE Land Disposals Review Project report finalised.
July 2013	<p>The PSNI concluded that there was no likelihood or prospect that it could prove fraud to a criminal standard on three of the referred land disposal cases.</p> <p>In the cases referred to it the PPS concluded that the test for prosecution was not met as insufficient evidence existed to provide a reasonable prospect of obtaining a conviction of any individual for any offence.</p>

There was a breakdown in the controls surrounding land dealings

23. Between 2007 and 2010, NIHE's Director of Housing and Regeneration, Colm McCaughley, had declared in NIHE's Register of Interests that a close family member was an employee of a property development company which invested in Northern Ireland. Despite

these declarations the Director assisted connected property development companies in land transactions with NIHE. This situation represented a conflict of interest and NIHE's internal procedures were disregarded by Colm McCaughley. The NIHE investigation team could not find evidence of any challenge to this situation from other senior NIHE officials (paragraphs

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2.2 to 2.5).

24. The private development companies told us they did not benefit to any extent from the relationship between Colm McCaughley and his close family member. Colm McCaughley does not accept that he deliberately disregarded internal procedures in relation to land disposals.
25. In the period between 2004 and 2010, the NIHE investigation team found a number of cases in which NIHE sold land without open market competition. Disposing of land to a preferred private developer without competition inevitably leads to suspicions as to the motives behind the disposal method, the transparency of the transaction and whether best consideration was achieved (paragraphs 2.6 to 2.9).
26. An undocumented and unapproved policy, known as enabling⁶ was used by Colm McCaughley to retrospectively justify the Hardcastle Street disposal which did not comply with established NIHE policy and procedures. In the course of this review we have encountered divergent views on enabling. Through the Department, NIHE told us that enabling did not exist in the terms presented by Colm McCaughley to the NIHE Board in February 2007. Colm McCaughley, however, told us that the policy of enabling was incorporated across a range of roles in NIHE,
- including planning, needs assessments, regeneration and land management.
27. In our opinion, reliance on something less than a documented policy to facilitate land sales that could be detrimental to NIHE's interests gives rise to major concerns around the governance, leadership and ethical standards in NIHE at the time. The lack of documentary evidence makes it difficult for those staff working in this area to protect themselves from accusations of misconduct (paragraphs 2.10 to 2.23).
28. The delegated approval limits which set out who should approve a land disposal in NIHE were in some instances disregarded by Colm McCaughley. In part, this was because controls were not operating effectively – with no independent valuations obtained until after approval to sell was granted, it was often unclear at what level approval was required. Colm McCaughley told us that in his opinion, overall the system worked satisfactorily, bearing in mind the large number of transactions (paragraphs 2.27 to 2.29).
29. Poor planning and contract management by NIHE in land disposals had the cumulative effect of weakening the position of NIHE and ensured that in a small number of disposals, the balance of risk and reward appeared to lie with private developers. These rewards included contractual delays, extended payment periods and lack of overage (clawback) clauses at a time

⁶ Enabling was defined in a February 2007 NIHE Board paper as “assisting the private sector with land assembly where access or title problems are preventing or constraining development”.

when the property market was booming in Northern Ireland. There were also instances where NIHE conducted land sales without legal representation (paragraphs 2.32 to 2.40).

30. The failure to adhere to the existing control framework in land transaction processes should have been identified by the NIHE Board and improvements sought. However, we have seen no evidence that the Board, prior to 2010, was aware of, or took any actions to address, the significant control issues in the Housing and Regeneration Division. In our view, part of the reason for this failure was caused by deficiencies in the information that the Board was receiving from NIHE senior management (paragraphs 2.41 to 2.43).

Opportunities to tackle governance and control weaknesses relating to land disposals were not fully exploited by NIHE and the Department

31. In a report to the Department and NIHE in February 2004, the Local Government Auditor⁷ highlighted a series of concerns with the Houses for Land schemes. Concerns included lack of documented procedures, no economic appraisals and lack of independent land valuations at contract award stage. Although economic appraisals and departmental

approvals for community and Housing Association transfers were part of NIHE's governance framework, the report's recommendations were not read across to other land disposals to private developers (paragraphs 3.1 to 3.3).

32. In 2007 the Department asked its Internal Audit unit to carry out a review of its monitoring arrangements for land disposals by NIHE. Internal Audit found that weaknesses in the Department's monitoring arrangements meant that they had insufficient information to effectively monitor NIHE's land disposal programme. Information that should have been supplied by NIHE to the Department⁸ was not sent and no follow up action had been taken by the Department (paragraphs 3.4 to 3.7).

33. In response to emerging land disposal issues and serious concerns over other aspects of NIHE's operations, for example response maintenance, the Department, in 2010, conducted a fundamental review of governance in NIHE. The review included an assessment of "the adequacy of controls over asset disposal and in particular, land and property". The review team reported in December 2010, making 75 recommendations, nine of which related to land and property matters (paragraphs 3.8 to 3.9).

⁷ NIHE's external audit arrangements are set out in Article 21 of the Housing (Northern Ireland) Order 1981. Up to, and including 2003-04, the Order recorded that NIHE would be audited by a local government auditor designated by the Department. From 2004-05 the Comptroller and Auditor General was given responsibility for the audit of NIHE as part of a re-organisation of Northern Ireland public sector audit responsibilities and the Housing (Northern Ireland) Order was amended.

⁸ Under the arrangements in place at that time NIHE should have supplied six monthly returns of its holding of undeveloped land to the Department. This was not done.

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There have been improvements in land and property management and governance arrangements in NIHE

34. NIHE has strengthened its controls over land and property transactions. As a result of revised policy, all disposals should now be supported by an economic appraisal. Independent valuations are obtained from Land and Property Services (LPS)⁹ prior to disposal, followed by a recommendation from LPS on acceptability in cases where the selling price is below this valuation. The approval papers presented to NIHE Committees and its Board are more detailed, allowing land disposal decisions to be based on meaningful information. NIHE introduced a new digital Land Terrier Management System in November 2011 which provides a digital record of all maps and deeds for all land acquired and disposed of by NIHE (paragraphs 4.1 to 4.11).
35. NIHE are currently relying on a range of manual and electronic systems and databases, which are not linked, to monitor land disposals. In our view, these systems do not produce management information that is as complete, timely and accurate as it could be (paragraph 4.12 to 4.14).
36. Departmental oversight and monitoring has increased in response to previous NIHE internal control failings and the Department told us that it continues to review its level of monitoring and oversight to ensure that its oversight arrangements are pitched at the

appropriate level (see **Appendix 1**).

The Department's Housing and Finance Divisions now receive regular reports from NIHE, detailing disposals of land and property from the Undeveloped Land Schedule (ULS). However, the current ULS may not accurately reflect the amount of land held by NIHE which may have development potential. NIHE are proposing to undertake a review of around 900 hectares of NIHE amenity land, to identify land with development potential for the Social Housing Development Programme (paragraphs 4.4, 4.17 to 4.19).

Recommendations

Recommendation 1

Maintaining a series of local databases is not only a duplication of effort but also has the potential to create differences between locally and centrally held records. In our view, this should be stopped and a central system used to record all land disposals.

Recommendation 2

The current NIHE land and property systems are not linked and we have concerns over whether NIHE can successfully obtain management information that is complete and accurate. We strongly recommend that NIHE consider developing a single end to end land sales system linking the Land Terrier Management System to other aspects of NIHE's land and property activities.

⁹ Land and Property Services (LPS) were known as the Valuation and Lands Agency, prior to 1 April 2007.

Recommendation 3

Given that the Undeveloped Land Schedule may not accurately reflect the amount of land with development potential that is held by NIHE and that NIHE's land and property management systems are not fully linked we recommend that the Department and NIHE's Board should consider requesting at least an annual schedule of all land disposals. This schedule could include for each disposal a brief description, LPS valuation and date of valuation, sale date, purchaser and proceeds received and ULS or non ULS classification.

Recommendation 4

NIHE's Asset Management Strategy (2009-2012) is now out of date and although the Action Plan included in this strategy was updated for 2013-15, we would recommend that NIHE update this key strategic document.

Part One:

Events in 2010 focused attention on governance in the Northern Ireland Housing Executive



©Hardcastle Street, Belfast (see Case Example 3)

Part One:

Events in 2010 focused attention on governance in the Northern Ireland Housing Executive

Introduction

1.1 The Northern Ireland Housing Executive (NIHE) is an executive non departmental public body of the Department for Social Development (the Department), originally established in 1971 with responsibility for social housing in Northern Ireland. It is the largest landlord in Northern Ireland and is responsible for the management and maintenance of around 87,200 homes.

1.2 The Department is responsible for the oversight, regulation and monitoring of NIHE activities, including the disposal of NIHE land. Responsibility for general policy, management and operation of NIHE is vested in a 10-person Board. The day to day operations and management of NIHE are delegated by the Board to the Chief Executive. Currently the organisational structure is based on the following Divisions, each headed by a Director: Landlord Services; Asset Management; Finance; Regional Services; Corporate Services, and Transformation. This structure was introduced in 2014, replacing the former arrangements based on Housing and Regeneration; Design and Property Services; Personnel and Management; Services; Corporate Services; and Finance.

1.3 When NIHE disposes of land which has been identified as surplus to its requirements, it is obliged by legislation¹⁰ to sell the land at the best consideration which can reasonably be obtained. If land is to be disposed of at less than best price, NIHE must obtain

prior consent from the Department. Under the provisions of the Housing (NI) Order 1981 NIHE may compulsorily acquire (vest) land for improvement, refurbishment or redevelopment.

1.4 NIHE owns significant land holdings across Northern Ireland which were inherited on formation in 1971 from predecessor housing authorities or subsequently acquired, for example, through urban renewal schemes.

Figure 3 shows that the value of land with development potential held by NIHE has declined from £409 million to £31 million since 2005-06. A proportion of this land is considered as undeveloped land and is either used to support the building of new social homes, retained for potential future use, or declared surplus to requirements.

Figure 3: The value and extent of lands with development potential held by NIHE between 2006-2014

Year Ending ¹¹	Value of land as at 31 March £m	Hectares of undeveloped land as at 31 March
2006	409	422
2007	636	390
2008	304	377
2009	144	364
2010	100	346
2011	67	303
2012	45	250
2013	33	237
2014	31	227

Source: NIHE

¹⁰ The Housing (NI) Order 1981 and the subsequent Housing Orders that amend this Order.

1.5 Since 2005 there have been 1,374 land disposals in total including 161 to registered housing associations for new build schemes (see **Figure 4**).

Figure 4: The number of land disposals made by NIHE 2006-2014

Year Ending ¹¹	Number of land disposals to Housing Associations	Proceeds £'000 ¹²	Number of other land disposals	Proceeds £'000	Total Disposals	Total Proceeds £'000
2006	15	4,881	181	3,638	196	8,519
2007	10	4,375	203	55,537	213	59,912
2008	22	18,950	199	17,420	221	36,370
2009	4	3,726	180	4,270	184	7,996
2010	16	5,777	153	3,094	169	8,871
2011	41	9,071	109	7,789	150	16,860
2012	24	3,540	49	1,309	73	4,849
2013	12	2,789	64	654	76	3,443
2014	17	1,641	75	689	92	2,330
Total	161	54,750	1,213	94,400	1,374	149,150

Source: NIHE

1.6 Throughout the period under scrutiny in this report (2004 -2010), responsibility for the management of land disposal fell within the remit of NIHE's Housing and Regeneration Division. The Division's Land and Property Department provided day to day administration of house sales, asset management, urban renewal/regeneration programmes and land disposals.

In 2010 concerns were raised about NIHE governance

1.7 In 2010, two cases involving land raised serious concerns about NIHE's corporate governance. These were:

- NIHE's involvement in a **planning application relating to land owned by a private developer** at Nelson Street, Belfast; and
- the sale of NIHE land at Hardcastle Street, Belfast.

11 NIHE told us the figures for 2004-05 are not available.

12 The NIHE does not actually receive proceeds for the transfer of land to housing associations. Instead, the relevant amount is accounted for in the calculation of Housing Association Grant.

Part One:

Events in 2010 focused attention on governance in the Northern Ireland Housing Executive

A site at Nelson Street in Belfast owned by a private developer

1.8 In January 2010, an internal complaint within NIHE brought alleged irregularities to the attention of the Deputy Chief Executive (Stewart Cuddy). These allegations concerned NIHE involvement in a planning application relating to land at Nelson Street, Belfast (see **Case Example 1**). Amongst the concerns highlighted were:

- a letter dated 4 January 2010, from an NIHE official to Department of the Environment (DoE) Planning Service which rescinded NIHE's request for social housing to be provided on the site, which was in an area of high need; and
- the attempted alteration of a response to an Assembly Question.

1.9 These actions were in direct contradiction to the stated positions of both NIHE and the Department, which were to ensure an element of social housing was to be built on the site (in September 2008, in response to a planning consultation, NIHE had objected to the site being developed for private use). The actions were, however, potentially to the commercial and financial benefit of a private sector developer. NIHE's initial investigation concluded there were serious grounds for concern and requested that the PSNI commence an investigation into the matter.

1.10 The PSNI submitted a file to the PPS on 6 July 2011 relating to suspected criminal conduct regarding NIHE's involvement in a planning application at Nelson Street, Belfast. The Public Prosecution Service concluded on the 10 July 2013, that "following very careful consideration of all the available evidence and circumstances surrounding the case, the test for prosecution was not met as insufficient evidence existed to provide a reasonable prospect of obtaining a conviction of any individual of any offence".

The sale of NIHE land at Hardcastle Street in Belfast

1.11 In September 2010, concerns with NIHE's management of a March 2005 land disposal at Hardcastle Street in Belfast, were highlighted in a report¹³ issued by the Northern Ireland Commissioner for Complaints (see **Case Example 3**).

1.12 The Commissioner found in favour of a complainant who had been denied the opportunity to bid for the land on the open market and recommended that he should receive a payment of £20,000 and a letter of apology from NIHE Chief Executive. The complainant did not accept this award and initiated legal action which resulted in an out of court settlement of £75,200 against NIHE.

¹³ Northern Ireland Housing Executive: Sale of Land (Case Number 200701162), Northern Ireland Commissioner for Complaints 2010-2011 Annual Report.

The NIHE Chairman commissioned an independent review to scrutinise the performance of the NIHE Chief Executive

- 1.13 An external review commissioned by the NIHE Chairman in December 2010 and completed in February 2011, focused on the role of the then NIHE Chief Executive (Paddy McIntyre) in light of governance failings that had emerged in NIHE, including the Nelson Street and Hardcastle Street cases and the investigation of Red Sky, a response maintenance contractor¹⁴.
- 1.14 In January 2011, shortly after his retirement, Paddy McIntyre met with the consultants who carried out the review. His response to the issues raised in the review was recorded in an appendix to their report. He told us that he was never informed about the issues raised in the report and the report was finalised without allowing him to challenge it. NIHE told us that the completed report was treated as a highly restricted and confidential document used to brief the then Chairman and presented orally to the Audit Committee. Mr McIntyre told us that the draft report was not circulated within Senior Management of the NIHE, which he would have welcomed as, in his view, its conclusions would have been different from those arrived at.

The Land Disposals Review Project was initiated by NIHE to scrutinise suspect land disposals

- 1.15 As a result of concerns arising from the Nelson and Hardcastle Street cases, NIHE launched the Land Disposals Review Project in January 2011. The first phase of the investigation was led by an NIHE Internal Auditor and reviewed a number of land disposals to determine whether they had been managed in line with agreed organisational policies and procedures and to highlight any cases of suspected fraud. The Phase 1 review team reported directly to the Acting Chief Executive¹⁵ (Stewart Cuddy).
- 1.16 The Phase 1 investigation team were presented with files on 12¹⁶ sites which had been sold off-market and had come to management's attention during the previous year. NIHE told us that the land involved in the 12 cases had been disposed of without the application of the relevant controls and where there was a risk that the best consideration had not been achieved. The 12 sites were chosen as off-market sales that shared characteristics with the Nelson Street case.
- 1.17 The Phase 1 team also examined NIHE's Undeveloped Land Schedule (ULS), which recorded surplus and sold sites back to 2004. NIHE told us that it used the ULS to select further sites for review as the Land Terrier was incomplete. We also note that the decision on whether to place land on the ULS would have been

14 Serious governance failures and controls weaknesses in the management of response maintenance contracts feature in the C&AG's report "NIHE Management of Response Maintenance Contracts" (4 September 2012) and the subsequent Public Accounts Committee report (13 March 2013).

15 The former Chief Executive (Paddy McIntyre) retired in December 2010.

16 Nelson Street was not included in the 12 cases passed to the investigation team. Nelson Street was subject to a separate investigation and was referred to PSNI in March 2010.

Part One:

Events in 2010 focused attention on governance in the Northern Ireland Housing Executive

taken by officials within the Housing and Regeneration Division. The investigation team acknowledged that disposals could be made from the Terrier without the sites showing on the ULS but, as the software needed to interrogate the Terrier was not yet available, cases of interest would have been difficult to identify. Given this approach, it is possible that other off-market land disposals existed but were not identified by NIHE.

- 1.18 NIHE told us that only land that has been identified by NIHE as developable is placed on the ULS. Other pieces of land can legitimately be disposed of without appearing on the ULS. In order to try to identify other cases of note that were not on the ULS, the Phase 1 team scrutinised Chief Executive Business Committee and NIHE Board papers over the relevant time period, to try to establish whether or not other land disposals were made that were conspicuous by their size or if they involved a large number of disposals to a single developer over a period of time. In order to ensure that this investigative work captured all disposals that were potentially concerning, the Department and NIHE are currently working with LPS to ensure that all land sales during the time period have been accurately recorded on the digitised Land Terrier.
- 1.19 The ULS detailed 71 land disposals between 2004 and 2010, valued at £84 million. A number of these were recorded as having been sold off-market. NIHE selected for investigation 11 of these disposals. This selection was made by an assessment that these cases presented the greater risk of fraud. This assessment was carried out by independent investigators and was agreed by the NIHE Chair and Deputy Chief Executive. In addition to the 12 disposals that were initially selected for investigation, these 11 further cases selected from the ULS brought the total identified for investigation to 23. The team considered whether these 23 disposals (representing £70 million in terms of value) had been managed in line with agreed organisational policies and procedures.
- 1.20 NIHE in collaboration with the PSNI presented a dossier of concerns to the Serious Fraud Office in London in June 2011. The dossier set out serious concerns of suspected criminality in aspects of NIHE business, particularly land disposals and response maintenance. In late June the Serious Fraud Office concluded that whilst it appeared that internal NIHE rules were not followed in the land disposals highlighted, there was little evidence presented to support claims of criminality, including that of fraud. As a result the Serious Fraud Office decided not to investigate the matters.
- 1.21 As a result of the findings of the Phase 1 review, a second phase of investigation was initiated by NIHE's Counter Fraud and Security Unit in September 2011. The Counter Fraud Unit focused on whether or not there was any evidence of suspected criminality in 11 (out of the 23) land disposal transactions. From October 2011 the Director of Finance

had overall responsibility for the Phase 2 investigation and reported directly to the Chief Executive, providing monthly updates to the NIHE Chairman and the Department's Permanent Secretary.

1.22 In addition to the NIHE's referral of the Nelson Street case, its Phase 2 team prepared evidential packs relating to four land disposals (Hardcastle Street, two land disposals at Glenalpin Street and Skegoneill Avenue) which were referred to the PSNI for further investigation. These referrals took place in 2011 and 2012. The case papers were prepared in accordance with the memorandum of understanding between the PSNI and the Northern Ireland Public Sector. The outcomes were:

- One of the two Glenalpin disposals referred to the PSNI was then referred by the PSNI to the PPS (see Case Example 2, Paragraph 7). The PPS directed no prosecution;
- The other Glenalpin disposal was not referred by the PSNI to the PPS. As Case Example 4, Para 6 details, the PSNI considered this case did not actually include a land sale and so could not present a complete case of fraud;
- The Hardcastle Street disposal was not taken forward. As Paragraph 2.16 shows, the PSNI considered that evidence provided to them about an "enabling policy" within the NIHE provided for "no likelihood

of proving fraud to the criminal standard"; and

- The Skegoneill Avenue disposal was not referred by the PSNI to the PPS. It should be noted that the NIHE referred this disposal to the PSNI for it to investigate fraud outside of the NIHE. The NIHE's investigation had concluded that "the reviewed material would not give rise for concern of offences of a criminal or fraudulent nature on the part of any NIHE employee".

1.23 Mr McCaughley (NIHE's Director of Housing and Regeneration until November 2011) told us that he was not given the opportunity to participate fully in the internal NIHE investigative processes and was not given the opportunity to comment on the allegations. NIHE told us that Mr McCaughley remained under criminal investigation for his role in the Nelson Street case during the lifespan of the Land Disposals review. Until the criminal investigation had ended either by conviction in court or by a decision not to prosecute then good practice did not permit NIHE to interview Mr McCaughley for any internal investigation. When the decision was made by the PPS in the summer of 2013, Mr McCaughley was no longer an employee of NIHE and therefore no disciplinary investigation was undertaken.

Part One:

Events in 2010 focused attention on governance in the Northern Ireland Housing Executive

1.24 The PSNI explained to us that the reason it was unable to take forward investigations based on NIHE referrals was due to failings in NIHE's management of land disposals including:

- the procedures used by NIHE were not sufficient;
- a lack of information was provided to the NIHE Board about land sales;
- not having two NIHE departments sign off on land disposals; and
- the practice of cellotaping signatures to disposal schedules approving land sales.

In the circumstances, the PSNI told us that there was no likelihood or prospect that it could prove fraud to a criminal standard.

Part Two:

There was a breakdown in the controls surrounding land dealings



©Nelson Street, Belfast (see Case Example 1)

Part Two:

There was a breakdown in the controls surrounding land dealings

Introduction

2.1 Consistent with the requirements of Managing Public Money Northern Ireland, NIHE had a system of controls in place to ensure that land was disposed of in the best interests of the organisation and for the best price. Our review of NIHE land sales revealed weaknesses across a number of disposals including:

- conflicts of interest which were not properly handled;
- land not being advertised on the open market;
- the use of an undocumented and unapproved policy known as 'enabling' to justify dealings with developers;
- a failure to obtain valuations for land being disposed of prior to sale or instances whereby outdated valuations were used;
- breaches of delegated approval limits for land disposals;
- a lack of business cases to justify disposal decisions;
- poor planning and contract management; and
- misleading or limited information being presented to the NIHE Board.

Conflicts of interest were not properly handled

2.2 Since January 2007, Mr Colm McCaughley had declared in NIHE's Register of Interests that a close family member was a Director of a property company, based in Dublin, which invested in Northern Ireland through Big Picture Developments Limited. In January 2010 he further declared that this close family member was now a Director of Big Picture Developments.

2.3 Despite this declaration:

- a. In 2007, Mr McCaughley was involved in an aborted disposal of NIHE land at Glenalpin Street, Belfast involving Big Picture Developments (see **Case Example 4**). Big Picture Developments told us that the aborted disposal involved unused NIHE land contiguous to that owned by them and that the decision to sell was not made by Mr McCaughley without endorsement from other NIHE departments and individuals within NIHE. They also added that the disposal was only aborted because they were unwilling to pay the sums being suggested by NIHE. In addition, Barry Gilligan, a Director of Big Picture Developments Limited, told us that no improper contacts were made by him with any NIHE official, including Colm McCaughley;

- b. In 2008 Mr McCaughley had direct correspondence with the close family member, in securing, at nil cost, the necessary wayleave and lease associated with a balcony in the Victoria Place apartment complex at Glenalpin Street in Belfast. This apartment complex was built by Ravella Properties Limited (see **Case Example 2**). The close family member was assisting Ravella Properties Limited, a company of which Barry Gilligan was also a director; and
- c. in 2009, Mr McCaughley became involved in NIHE's objection to Big Picture Developments planning application in respect of a site at Nelson Street in Belfast (see **Case Example 1**).

2.4 In our view, these conflicts were so fundamental that Mr McCaughley should not have been involved in any land transactions with these companies. Mr McCaughley told us that, in his view, this report does not present potential conflicts of interest within common sense and appropriate boundaries.

2.5 We expect all public sector organisations to have robust procedures in place to deal with conflicts of interest. NIHE had procedures but they were able to be circumvented by a senior member of staff without challenge.

Part Two:

There was a breakdown in the controls surrounding land dealings

Case Example 1: A privately owned site at Nelson Street, Belfast

Background

1. From September 2004 privately owned land at Nelson Street, Belfast (0.8 acres) had two conflicting zonings both as a development opportunity site and for social housing. In January 2006, the Department for Social Development approved a plan, submitted by a Housing Association (in partnership with local community groups), to develop 66 social housing units on the site. At this time, the Housing Association was at an advanced stage in negotiations to purchase the site from the owners for £2.9 million. We note that at that time around 1,500 families on the social housing waiting list in North Belfast were classified as being in housing stress.
2. In June 2006, a property developer, Barry Gilligan (Director of Big Picture Developments Limited), was asked by the community groups to provide advice on the social housing development. In July 2006 the site was sold to Big Picture Developments Limited for £3.5 million. Mr Gilligan told us that the purchase of this site by Big Picture Developments was wholly unrelated to the limited assistance provided to a community group.
3. In March 2008, Big Picture Developments submitted a planning application for a mixed use development on the Nelson Street site including office and commercial space and 238 apartments that would be sold on the open market. The application made no provision for social housing. In September 2008, NIHE responded to a DOE Planning Service consultation, objecting to the proposed private use as part of the site was zoned for social housing.
4. On 12 February 2009, Colm McCaughley, NIHE's Director of Housing and Regeneration Division, emailed NIHE's Belfast Area office raising the issue of NIHE's objection in September 2008 and making a number of arguments as to why NIHE's objection to private housing was unreasonable. The Belfast Area office responded, on 20 February 2009, defending the NIHE objection. Colm McCaughley replied to the Belfast Area office, again questioning the NIHE position.
5. Colm McCaughley had a clear conflict of interest in the Nelson Street case. Since 2007, he had declared in NIHE's Register of Interests that a close family member was a director of a property company, based in Dublin, which invested in Northern Ireland through Big Picture Developments. By January 2010 he further declared that this close family member was a Director of Big Picture Developments Limited. It appears Colm McCaughley was aware of the conflict, as reflected in comments in emails to other NIHE staff, "I had best stand aside from the review" and "I am struggling to stay away from this". Colm McCaughley told us that he was fully aware that his advice to NIHE staff could be seen as a potential conflict of interest but he had limited options. In our view this was not a potential conflict but a real one and we have seen no evidence that he sought advice to clarify his position.

Case Example 1: A privately owned site at Nelson Street, Belfast

6. In April 2009, a Housing and Regeneration Division official wrote to NIHE legal department asking them to consider “the reasonableness of our decision to sustain our objection to the proposals”. In our view, the letter sets out the issues from the developer’s perspective. The legal department indicated that the issue was a matter for DoE Planning Service.
7. Big Picture Developments submitted a revised planning application in September 2009, with the proposal for 238 private apartments unchanged. In response to a request for comment from the media, the NIHE Information Department confirmed that the Housing Executive’s objection to the planning application still stood.
8. Colm McCaughley emailed a NIHE official in the Housing and Regeneration Division (of which he was Director) on 4 December 2009 explaining that due to changes in European Union procurement rules, the private developer would not be in a position to comply with the zoning of the Nelson Street site for social housing. Colm McCaughley told us that his advice was not site specific. On 4 January 2010 this official wrote to DoE Planning Service indicating that although there was a need for social housing in the area, the developer would not be in a position to provide such housing due to changes in European Union procurement rules and that NIHE was therefore withdrawing its request for social housing within the scheme. A subsequent internal NIHE review concluded that the letter was “premature, was inaccurate and may, as NIHE Corporate Procurement Unit has indicated, have helped ‘the developer but (did) not assist the Social Housing Development Programme’”. NIHE told us that responsibility for issuing letters to Planning Service, withdrawing NIHE interest in sites zoned for social housing, was the responsibility of Corporate Services Division, headed by the Deputy Chief Executive (Stewart Cuddy), and not the Housing and Regeneration Division.

Alteration of responses to written Northern Ireland Assembly Questions

9. On 13 January 2010, the Department forwarded three Assembly Questions to NIHE’s Information Department. The questions were:
 - to ask the Minister for Social Development if the Department had been involved in proposals to rezone the Nelson Street site from social to private housing;
 - to ask the Minister for Social Development to outline any contact her Department has had with developers or agencies/representatives of developers in relation to the Nelson Street site in North Belfast; and
 - to ask the Minister for Social Development if she can confirm that her intention for the Nelson Street site in North Belfast is to develop social housing for people on the North Belfast housing list.

Part Two:

There was a breakdown in the controls surrounding land dealings

Case Example 1: A privately owned site at Nelson Street, Belfast

10. A three paragraph draft response was prepared by an NIHE official following consultation with other relevant NIHE staff/Directors and copied to Colm McCaughley and the Deputy Chief Executive (Stewart Cuddy) as joint lead Directors. After the three paragraph response was approved by the Deputy Chief Executive (Stewart Cuddy), an additional paragraph was added by an Assistant Director who reported to Colm McCaughley. NIAO have seen no evidence to suggest that Mr McCaughley saw this additional paragraph. Mr McCaughley told us that while he was aware of the initial draft response to the Assembly Question, which was prepared by another division and sent to him, he had no knowledge of the amended response and it was not approved by him.
11. This additional paragraph, withdrawing NIHE's request for social housing on the site, was an almost direct replication of the Housing and Regeneration Division's letter of 4 January to DoE Planning Service and contradicted responses included in the preceding three paragraphs of the draft response. NIHE told us that, whilst the response did not reflect its stated policy, it was factually correct at the time of its submission, given the letter to Planning Service on 4 January 2010.
12. The additional paragraph was not referred back to the Deputy Chief Executive (Stewart Cuddy) but rather was passed to the NIHE Chief Executive (Paddy McIntyre) who, on the 18 January, approved all four paragraphs and forwarded them to the Department. Paddy McIntyre told us that he had no knowledge that the response to the Assembly Question had not been cleared in the normal way with the relevant officers. A Departmental official realised that the additional paragraph contradicted the previous three paragraphs of the draft response and that the Department would not have approved any attempt to "withdraw a request for an element of social housing within the scheme" at Nelson Street. The Department's official removed the additional paragraph. The Social Development Minister responded formally to the Assembly Question's in line with the response approved by the NIHE Deputy Chief Executive (Stewart Cuddy).
13. We also note that the response to the second Assembly Question was inaccurate. The response stated that "the Housing Executive is not aware of its staff meeting with developers or agencies/representatives of developers specifically in relation to the Nelson Street site". However, during our examination of papers related to the Nelson Street site we noted a meeting on 27 January 2007 between the NIHE Assistant Director (see paragraph 10), an NIHE Area Planning Officer, Barry Gilligan and other Big Picture Developments associates. The issue under discussion was the development of the Nelson Street site.
14. NIHE Internal Audit had also noted this meeting and in their March 2010 report they concluded that, "information surrounding a meeting between NIHE officers and the Developer has been omitted from the Assembly Question response. Details of this meeting and its impact on NIHE's relationship with the Developer need to be explored, together with an examination of the rationale for the omission of relevant details".

Case Example 1: A privately owned site at Nelson Street, Belfast

15. An independent disciplinary investigation was carried out in July 2011 with terms of reference that included a review of all documentation held in relation to the handling of the Nelson Street site and meetings with appropriate officers of the NIHE to clarify the issues arising. NIHE told us that the disciplinary team were not asked to consider the inaccuracy of the response to the second Assembly Question, regarding the meeting with Barry Gilligan. The disciplinary investigation focused primarily on the planning issue in the third question. Given that the NIHE Assistant Director and the Area Planning Officer had been involved in drafting responses to the Assembly Questions, we are surprised that the January 2007 meeting was disregarded from the investigation.

Investigations and Reviews

16. In late January 2010, the Deputy Chief Executive (Stewart Cuddy) was made aware of the existence and contents of the Housing and Regeneration Division's letter of 4 January (see paragraph 8). The Deputy Chief Executive immediately wrote to DoE Planning Service rescinding this letter and stating that "the Housing Executive continues to seek and support the development of social housing at the Nelson Street site in line with the zoning for social housing detailed within the Belfast Metropolitan Area Plan 2015". Three NIHE Directors (Deputy Chief Executive, Director of Finance and Director of Design and Property Services) met with the Chief Executive (Paddy McIntyre) on 2 February 2010 and expressed their concern at the letter of 4 January and NIHE's response to the related Assembly Questions. It was agreed that the Head of Internal Audit would conduct an enquiry.
17. The Head of Internal Audit reported on 15 February 2010, recommending that the enquiry be upgraded to an investigation. By 1 March 2010 the internal investigation team recommended that the current internal investigation should be halted and the matter formally referred to the PSNI for their consideration of a criminal investigation.
18. Colm McCaughley was suspended on 30 September 2010 having been on sick leave since 23 March 2010. The NIHE Chairman, following advice from Senior Queens Counsel, wrote to the PSNI Chief Constable outlining his serious concerns with the "actions and behaviour of certain senior NIHE staff" and their connection with Big Picture Developments Limited. The PSNI conducted a criminal investigation and a file was submitted to the PPS in July 2011 for its consideration.
19. In July 2010, NIHE engaged consultants to assess whether the NIHE Code of Conduct for Housing Executive officers, and other NIHE policies in relation to conflicts of interest, had been complied with in relation to the Nelson Street situation. The report concluded that there was evidence that Colm McCaughley had breached the NIHE Code of Conduct as regards conflicts of interest, and recommended that NIHE should consider disciplinary action against specific NIHE officers involved in the Nelson Street case.

Part Two:

There was a breakdown in the controls surrounding land dealings

Case Example 1: A privately owned site at Nelson Street, Belfast

20. NIHE engaged a consultant in July 2011 to undertake an independent disciplinary investigation. The investigation focused on two NIHE officials (an Assistant Director and the official who wrote to Planning Service in January 2010 – see paragraphs 8 and 10). Colm McCaughley was excluded from the investigation as he was suspended pending a decision from the PPS on a criminal prosecution. In August 2011 the disciplinary investigation concluded that neither officer had infringed any requirements of their Contract of Employment or NIHE's Code of Conduct and recommended that no further disciplinary action should be pursued. Colm McCaughley retired in November 2011.
21. In May 2013 the Planning Appeals Commission upheld an appeal, granting outline planning permission, subject to conditions, for 217 apartments on the Nelson Street site. The planning application was made by a private developer, the Nelson Street Partnership (a joint venture involving Barry Gilligan). The Planning Appeals Commission's reasoning and conclusions on the zoning issue are set out in Appendix 2. Colm McCaughley told us that in his view events have proven him correct in every aspect of his advice to NIHE staff. Nevertheless, we consider that he failed to deal appropriately with the conflict of interest issue which arose.
22. On the 10 July 2013 the PPS concluded that, following careful consideration of all the evidence and circumstances surrounding the Nelson Street case, that the test for prosecution was not met as insufficient evidence existed to provide a reasonable prospect of obtaining a conviction of any individual of any offence.

Source: NIAO based on NIHE documents

Case Example 2: Victoria Place apartments, Glenalpin Street, Belfast

The NIHE Director of Housing and Regeneration Division had a conflict of interest and the transaction completed before a valuation was obtained

1. Ravella Properties Limited developed a block of apartments, known as Victoria Place on land at Glenalpin Street, Belfast. Each apartment had a small balcony. An individual who had entered into a contract to purchase an apartment questioned the legality of the balcony forming part of the apartment and its overhang into Glenalpin Street at a time when the property market had entered severe decline. It was found that the balconies in the apartment block required “wayleave”¹⁷ permission from the owner of the land over which the balconies extended. This land was owned by NIHE.
2. NIHE investigators uncovered email evidence indicating that Colm McCaughley in his capacity as NIHE Director of Housing and Regeneration, had assisted a close family member, who acted for Ravella Properties Ltd (see paragraph 2.3), in obtaining the required permissions from NIHE for the wayleave. With Ravella now having dealt with the wayleave issue the individual buying the apartment now requested a lease on the pavement bed-rock of the apartment. Colm McCaughley also assisted Ravella Properties Limited in this transaction.
3. Ravella Properties Limited obtained the wayleave and the lease for the balconies in July and November 2008 at no cost. It is concerning that NIHE did not appoint a solicitor to act on their behalf for either transaction. An independent valuation at nil value, relating to the wayleave, was only received from DFP’s Land and Property Services in December 2008, some five months after the disposal.
4. The granting of the wayleave and the lease helped Ravella Properties Limited complete contracted sales of private apartments at a time when the property market had gone into severe decline and some buyers were attempting to back out of agreements to buy apartments. The benefit which NIHE derived from the sale is not apparent.
5. Ravella Properties Limited told us that this was a normal and commonplace transaction whereby NIHE was willing to dispose of valueless land contiguous to a development in the interests of that development. There was nothing sinister or unlawful in the contact, by a close family member, with Colm McCaughley, to assist in cutting through the bureaucracy more quickly. No promise or reward was made for his assistance.
6. Colm McCaughley told us:
 - that attempts by third parties (see paragraphs 1 and 2) to adopt spurious contract tactics were totally irrelevant and that there was no reason to refuse a legitimate request to establish good title. This was a standard, no cost, business practice designed to assist development – it was not a legal contest;

¹⁷ A right of way (but not an interest in land) granted by a landowner, generally in exchange for payment and typically for purposes such as the erection of telegraph wires or laying of pipes.

Part Two:

There was a breakdown in the controls surrounding land dealings

Case Example 2: Victoria Place apartments, Glenalpin Street, Belfast

- that there were thousands of similar transactions; and
- that since the transaction had already been agreed in principle, his involvement was peripheral and arose because of undue delay.

NIHE told us that there is only one instance of this (granting of a wayleave and lease) occurring – in this case study.

7. NIHE investigators referred this disposal to the PSNI for further investigation. The PSNI referred the disposal to the PPS. The PPS directed no prosecution.

Source: NIHE Land Disposals Investigations Team

Sites were not advertised on the open market

2.6 A key principle of public sector guidance, when disposing of a public sector asset, is that organisations achieve the best consideration that can be reasonably obtained. This is further recognised in the Housing (Northern Ireland) Order 1981 which states that the NIHE must achieve “best consideration” for any land disposed of. In circumstances where this is likely not to be achieved, the prior consent of the Department must be sought.

2.7 An important control to ensure that the best price is achieved is to ensure land is sold on the open market. NIHE’s own land and property manual states that obtaining the best price available for land “means selling it on the open market”. LPS currently recommends that “departure from open marketing should only be considered” for small, inconsequential and unmarketable sites “and on professional advice”.¹⁸

2.8 In our view, disposing of an asset outside of the open market carries with it significant risks. An open market competitive bidding process provides strong evidence that a disposal has proceeded in a transparent and fair manner and that the best market price has been achieved. Disposal of land “off-market” inevitably leads to a lack of transparency, particularly if the process is not fully documented. This in turn can lead to suspicions that particular developers are being favoured in the disposal process. It also leaves the motives of public sector officials involved in such disposals open to question.

2.9 Despite this the NIHE investigation teams found instances in which NIHE had disposed of land without open market competition. At Hardcastle Street (see **Case Example 3**) land was sold to one preferred developer without open market competition, despite the stated interest of another private developer. Other examples of off-market disposals include sales of land at Ligoniel Bridge and Skegoneill Avenue. NIHE investigators

concluded that giving preferential treatment to individual developers at the expense of other potential purchasers

is likely to lead to a situation where NIHE cannot demonstrate that the best outcome for NIHE was achieved.

Case Example 3: Hardcastle Street, Belfast

Background

1. In March 1999, NIHE acquired land ("the site") at Hardcastle Street, Belfast under a Vesting Order. In May 1999, the NIHE Chief Executive's Business Committee approved a Land and Property Department Report that stated the site would be transferred to the "adjacent landowner (the Developer) to provide secure car-parking for private apartments (Somerset Studios)." Prior to the sale of the site being completed, in early 2000 the Developer obtained planning permission to build four apartments on the site (in addition to Somerset Studios which occupied adjacent land). In March 2000, a second developer expressed an interest in purchasing the site from NIHE.

The land was not advertised on the open market

2. The Chief Executive's Business Committee twice gave approval for the site to be offered for sale on the open market - in July 2000 and again in April 2004. Despite these approvals, however, the site remained in NIHE ownership until March 2005 when it was sold "off-market" to the Developer for £98,000. We note that the site had been valued in March 2004 at £98,000, by Land and Property Services for inclusion in NIHE's Annual Accounts. NIHE agreed also to pay the Developer's planning costs (for the four apartments) amounting to £16,500. Net of this, therefore, the proceeds from the sale were £81,500. The Developer immediately sold the site to another company.
3. The second developer, who had expressed an interest in buying the site in 2000, submitted a complaint to the Northern Ireland Commissioner for Complaints¹⁹. In September 2010, the Northern Ireland Commissioner for Complaints issued a report on NIHE's handling of the sale of the site. The Northern Ireland Commissioner for Complaints found maladministration and concluded that the complainant had been denied the opportunity to bid for the site on the open market. The Commissioner recommended that the complainant should receive a payment of £20,000 and a letter of apology from the NIHE Chief Executive. The complainant did not accept this award and initiated legal action against NIHE. The resulting out of court settlement cost NIHE £75,200.
4. Four private townhouses were eventually constructed on the site.

¹⁹ The Northern Ireland Commissioner for Complaints considers complaints from people who claim to have suffered injustice because of maladministration by government or public bodies in Northern Ireland. Where he finds maladministration he seeks to provide a remedy for any injustice caused to the citizen.

Part Two:

There was a breakdown in the controls surrounding land dealings

Case Example 3: Hardcastle Street, Belfast

5. NIHE Counter Fraud investigators concluded that:
 - there were no documentary records supporting the rationale behind NIHE's decision to use compulsory acquisition powers for the site and no documentary evidence of the Developer approaching NIHE requesting vesting;
 - some senior NIHE officials were aware of the June 1999 planning application, by the Developer, for four apartments but did not intervene despite the planning application being contrary to NIHE's reason for vesting the site in the first place i.e. to provide car parking for the existing private apartments on adjacent land;
 - the site was sold to the Developer at a value provided by LPS for accounting purposes despite (at the time of the sale) having planning permission for four apartments. As the site had full planning permission for four apartments, it is likely that the market value of the land was considerably more than it was sold for;
 - there is no evidence of consultation with private residents at Somerset Studios prior to vesting;
 - the NIHE Chief Executive's Business Committee's approval to a sale on the open market was disregarded and the site was sold off-market to a preferred developer;
 - there was a lack of competition for the sale, minimising cost to purchase for the developer; and
 - NIHE paid the developers planning fees which reduced the developers' costs and the amount received by the public sector.
6. NIHE investigators concluded that the sale of the site based on a LPS valuation for accounting purposes, combined with NIHE's payment of the developer's planning fees, meant that best consideration was not obtained on this disposal. As a result, the disposal is likely to have been inconsistent with NIHE's statutory requirement to obtain best value.
7. NIHE investigators referred this disposal to the PSNI for further investigation.

Source: NIHE Land Disposals Investigations Team and the Northern Ireland Commissioner for Complaints

An undocumented policy was used to justify the Hardcastle Street disposal

the Hardcastle Street disposal. The investigators found no policy papers and no statutory definition for the concept.

2.10 NIHE's Counter Fraud and Security Unit investigation of suspect land transactions noted that the concept of "enabling" was used to justify the manner of

2.11 In November 2006, after a critical current affairs programme, Colm McCaughley presented a paper to the NIHE Board explaining the rationale

- behind the Hardcastle Street disposal. He explained that the decision to sell the Hardcastle Street site off-market to the Developer (despite the NIHE Chief Executive's Business Committee previously recommending an open market sale) was because the "planning consent (held by [the Developer]) was due to expire and there was sufficient risk to the consent not being renewed to warrant direct sale". The Board noted this preliminary report and requested a further review of the disposal process.
- 2.12 At the February 2007 NIHE Board meeting Colm McCaughley presented a paper²⁰, prepared by a LPS official, explaining that the disposal was "based upon sound commercial reasoning to achieve the best return". Colm McCaughley argued that NIHE should adopt and implement a policy of enabling which the LPS paper had quoted as "assisting the private sector with land assembly where access or title problems are preventing or constraining development"²¹. The Board agreed that a formal written enabling policy should be put in place, along with an operational manual.
- 2.13 A further paper entitled "Enabling role: Use of Land and Acquisition Powers" was tabled at the April 2007 Board meeting, explaining that NIHE through its enabling role supported the development of social and private housing.
- 2.14 A formal written policy supported by procedures was never produced. The NIHE investigation team noted that,
- 2.15 The NIHE Counter Fraud and Security Unit, in the course of its investigations, had serious concerns about the application of the term enabling in order to justify the Hardcastle Street disposal outside of the established policy and procedures. In March 2012 the NIHE Counter Fraud Unit forwarded an evidential pack to the PSNI for further investigation.
- 2.16 In the course of their inquiry into enabling, the PSNI requested further clarification from the recently retired NIHE Chief Executive (John McPeake). In a written statement John McPeake explained that there was never a clear policy statement or guidance on what constituted the Housing Executive's enabling role. He also explained that enabling in the Housing Executive was a generic term that seemed to have gradually evolved over many years, was endorsed at NIHE Board and Chair level, and used within various NIHE Divisions to describe a wide range of activities. The PSNI told us that due to the information provided by John McPeake in his statement it could not take forward a criminal investigation of enabling as there was no likelihood of proving fraud to the criminal standard.

20 The terms of reference were for LPS to carry out "...an analysis of the disposal procedures adopted in the sale of lands at Hardcastle Street and which utilized the principles of "Enabling."

21 The Board paper stated that the concept originated in a 1990s Department of the Environment working group which had considered ways of promoting private sector housing development within Belfast. However, all files relating to this working group had been destroyed under NIHE's document retention policy.

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- 2.17 Colm McCaughley told us, “the conclusions that the enabling policy was unapproved, retrospectively contrived, outside normal policy and detrimental to NIHE interests were fundamentally incorrect and show a total lack of understanding of the roles undertaken by NIHE and the ways in which they were and continue to be operated”. He also explained that, “similar transactions to those highlighted in this report were common place and policy driven and in no case is there any evidence of the enabling policy being detrimental to the interests of NIHE”.
- 2.18 Mr McCaughley told us that there were monthly schedules of enabling/facilitating schemes discussed at Area Managers meetings. NIHE told us that the meetings to which he refers were in fact meetings between Housing Associations and NIHE design group staff to enable delivery of the social housing new build programme and that there was no possible link between this and the term “enabling” as used in the Hardcastle Street case study. The acquisition of land formed no part of these enabling meetings.
- 2.19 Mr McCaughley also told us management information (incorporating the operation of enabling policy) was regularly produced and advised to the Board. NIHE told us that the Board never substantially engaged with enabling as a policy until 27 February 2007 – and this was in relation to Hardcastle Street. This was the first occasion enabling policy was discussed by the Board.
- 2.20 It is clear that NIHE never had a formally adopted policy of enabling. However, it does appear that a concept of enabling did exist: for example, two disposal-related Board papers prior to 2006 (and prior to Hardcastle Street) make broad but passing references to NIHE’s enabling role. We are surprised that a concept which had the capacity to permit NIHE staff to act in a manner that would appear to be contrary to NIHE interests could exist without being formally documented or approved by its Board. There is also no evidence that the application of enabling was ever challenged or scrutinised internally by Finance, Corporate Services or Internal Audit. In addition, there is no evidence that the Department was aware of, or had approved, anything approaching a policy. In our opinion relying on something less than a documented policy, which could facilitate land sales that could be detrimental to the interests of NIHE gives rise to major concerns around the governance, leadership and ethical standards that were prevailing in parts of NIHE at that time.
- 2.21 The lack of documentary evidence makes it difficult for those staff working in this area to protect themselves from accusations of misconduct. Enabling, as it was apparently outlined, also appears to be in direct contravention of the requirement for NIHE to obtain “best consideration” in all its land disposals (see paragraph 2.6).
- 2.22 NIHE told us that since the initiation of the NIHE review into land disposals in

2011, there has been no further internal discussion around this policy nor has it been developed further. In addition, NIHE told us that whilst a function of NIHE is to enable the development of land for housing, “enabling” as a defined policy never existed and its use to justify the off-market sale of Hardcastle Street was clearly of such concern to the investigation team they felt it merited referral to the PSNI.

- 2.23 Through the Department, NIHE told us that the policy of enabling did not exist in the terms presented by Colm McCaughley at the February and April 2007 NIHE Board meetings.

Valuations were not always obtained prior to approval to sell

- 2.24 A basic control designed to ensure that the interests of a landowner are being protected during a sales process is to obtain a valuation from experts. Throughout this period, NIHE’s guidance stated that independent valuations should be obtained from LPS for any property which was being disposed of. Despite this, on occasions, such as the proposed sales of land at Glenalpin Street (see **Case Example 4**), Florence Place and Shore Road, valuations were obtained but only after approval to sell was granted. Mr McCaughley told us that approvals did not routinely take place without independent valuations.

- 2.25 We accept that valuations will often provide a starting point for negotiations

and are not a fixed price that must be achieved. However, we have concerns about the negotiations which occurred during a disposal of land at Skegoneill Avenue in October 2007. The purchaser was able to negotiate the price down with LPS from its initial valuation in September 2007 of £750,000 to an agreed sale price of £600,000 in October 2007. No documentation was retained on the NIHE file to justify this significant reduction of 20 per cent. The Board approved the sale in October 2007 but was unaware of the negotiated reduction in value. A subsequent valuation commissioned by the Phase 1 Review team in June 2012 indicated that the estimated value of the site at that time was around £365,000.

- 2.26 In our view, it is difficult to see how well informed decisions could have been taken on NIHE’s strategic use of land if they were not supported by an independent valuation prior to approval being sought to dispose of land. In April 2008, NIHE strengthened their internal controls to require a valuation to be obtained before Board approval was sought.

Breaches of delegated approval limits for land disposals

- 2.27 NIHE had a range of delegated limits in place allowing either the Director or the Chief Executive’s Business Committee to approve disposals of land that had lower valuations and therefore were less likely to be of strategic importance

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to NIHE. Similar policies exist in all large scale public sector bodies and help ensure that the Board's and Chief Executive's attention are directed towards the most strategic matters. The delegated limits laid down in the NIHE Land and Property Manual (2005) were as follows:

- disposal of land up to a value of £50,000 could be approved by a Director;
- disposal of land up to a value of £100,000 could be approved by the Chief Executive's Business Committee; and
- disposal of land valued at more than £100,000 had to be approved by the NIHE Board.

2.28 Whilst this system of delegation was in place the NIHE investigation team noted that the limits were disregarded in a number of cases. As valuations were not obtained until after approval had been granted to dispose of the land, it was often unclear at what level approval was required. The sale of land at Glenalpin Street was approved by the Director of Housing and Regeneration prior to the LPS valuation of £8 million²². Despite this valuation vastly exceeding the Director's approval limit, NIHE Board approval for the sale of the land was never sought. The proposed sale, however, never completed (see **Case Example 4**).

2.29 Although Colm McCaughley told us that there were other supplementary checks in the disposal approval system and that in his view there was a comprehensive and effective decision-making system for undeveloped land holdings, we do not believe that NIHE controls were operating effectively. The PSNI told us that the reason it could not progress investigations into disposals was due to control failings related to NIHE's management of land disposals (see paragraph 1.24). We have highlighted concerns over the completeness of the Undeveloped Land Schedule and note that the decision to place land on the schedule would have been taken by officials within the Housing and Regeneration Division.

22 LPS told us that the £8 million valuation was based on the assumption that the existing adopted roadbed could be abandoned.

Case Example 4: Land at Glenalpin Street, Belfast

The Director of Housing and Regeneration Division exceeded his delegated limits when approving this disposal and the approval was given prior to obtaining an LPS valuation

1. In February 2007, solicitors acting on behalf of Barry Gilligan approached NIHE, seeking to purchase land owned by NIHE at Glenalpin Street, comprising the roadway and footpath adjacent to the Victoria Place apartments (see **Case Example 2**) which would be used to provide additional car parking and garden decking. The off-market sale to Mr Gilligan was approved by Colm McCaughley in October 2007, prior to seeking an independent valuation from LPS, as it was deemed by NIHE staff to be nil cost.
2. LPS replied to the request for valuation in December 2007 explaining that the land at Glenalpin Street was an adopted road and as a consequence would have no development value. However, if NIHE was able to have this road abandoned, making it suitable for development, then a site of this size could achieve a price in excess of £8 million. The site would have a “marriage value” with the adjoining car park site which was not owned by NIHE. LPS had contact with Barry Gilligan who indicated interest in acquiring the car park (subject to NIHE altering the restrictions of the leases which restricted use to car parking) next to Victoria Place. LPS explained that “without knowing what Mr Gilligan’s plans are for the proposed extension to Victoria Place it is not possible to assess a premium that would reflect the value of your Glenalpin Street land”. LPS concluded that Barry Gilligan should, “put in an offer for consideration and also include as much information as possible on his proposals for the extended Victoria Place”.
3. If the preliminary site valuation of £8 million was accurate then Colm McCaughley exceeded his delegated approval authority of £50,000 by a huge margin; the disposal would have required NIHE Board approval.
4. However, Colm McCaughley told us that the original transaction was deemed by NIHE staff to be nil cost and on that basis was forwarded through the system for approval. In his opinion this transaction was nothing other than a normal case involving an adopted road. He explained that the subsequent LPS valuation set out a totally different disposal strategy designed to add £8 million of value which additionally required NIHE to take abandonment action in respect of the public road. If that approach were to be adopted, any approval he had given through the Director/Committee system became irrelevant, and NIHE Board approval would have been required.
5. In our view, approving land disposals prior to obtaining independent valuations increases the risk of bypassing internal controls. We note that in April 2008, in response to an Internal Audit recommendation, NIHE required valuations to be obtained prior to seeking approval for disposal.
6. The disposal did not take place and the Glenalpin Street land is still in the ownership of NIHE. NIHE investigators referred this disposal to the PSNI for further investigation. The PSNI told us that there was no sale of this land therefore it “believed that the offence of fraud was not complete”.

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A lack of business cases to justify disposal decisions

2.30 Business cases are a fundamental control that should be used to justify expenditure or the disposal of an asset. The preparation of a proportionate business case demonstrates that adequate consideration has been given to alternative uses for land before disposing of it. These include:

- making the land available for the construction of social housing;
- inviting expressions of interest from other government departments;
- open space or amenity use;
- development in accordance with a redevelopment scheme; or
- private sector use (including private sector housing).

2.31 In his response to an Internal Audit Report (2007), the Director of Housing and Regeneration Division, Colm McCaughley, expressed the view that the DFP requirement²³ to prepare a business case to support land disposal decisions did not apply to NIHE. This view was not challenged by other senior NIHE officials or the NIHE Board. As a result, in land deals at Glenalpin Street, Florence Place and Shore Road, there is no evidence that any options other than off-market disposal to a private developer were considered.

Mr McCaughley told us that, in his view, procedures in place amounted to a business case in all but name, namely:

- a “need test” to establish whether land was surplus to requirements such that it should be sold;
- consideration of whether there was the possibility of an acceptable sale to a contiguous developer; and
- if there was not, then the land was placed for sale on the open market.

NIHE told us they have not found evidence of this in the case files investigated as part of the Land Disposals Review project. NIHE also told us that business cases are now subject to new systems and processes of control and governance, and are now subject to continuous improvement and much better oversight is now exercised by the NIHE Board.

Poor planning and contract management

2.32 A range of other weaknesses were evident in the disposals we examined. These had the cumulative effect of weakening the position of NIHE and ensuring that in several instances, the balance of risk and reward appeared to lie with private developers. Examples of these weaknesses include:

Contractual delays and extended payment periods

2.33 During a sale of land at Annadale (see **Case Example 5**), the contract was extended on three occasions by NIHE to facilitate the developer obtaining planning permission, with the balance of the payment only being received some four years after signing the contract. NIHE told us the delay in planning was as a result of a long process involving public hearings and objections from the community over the perceived lack of social housing. In another case, the sale of Granton Heights, final payment was only received seven years after the NIHE Board had first approved the sale.

enhancing pre-existing planning permission. We also note that the guidance included a scenario of property being later resold for a higher price *“can usually be avoided by good advice and, possibly, use of one of the clawback schemes.”*

2.36 In the Public Accounts Committee’s report on the Transfer of Surplus Land in the PFI Education Pathfinder Projects²⁵, a key recommendation was that overage (clawback) provisions should address the public sector’s long term interests. The Committee emphasised the importance of preserving public sector rights to share in future development gains or profits arising following the sale or transfer of assets to connected parties.

Overage (clawback)

2.34 Overage (clawback) clauses in a land disposal contract provide for additional sums to be paid to the seller, over and above the original purchase price, if and when certain trigger events occur, for example obtaining planning consent.

2.35 Guidance²⁴ available to public sector bodies at the time of these land disposals dealt with the disposal of sites with development potential and the inclusion of clawback. The guidance stated that public bodies should carefully consider a number of options in order to seek to secure part of any future increase in value, either as a result of receiving planning permission or as a result of

2.37 Land at Annadale in Belfast was sold by NIHE for £3.4 million. The land had been valued in 2002 by LPS, based on the land being developed for 60 terraced houses. By 2008 the developer had received planning consent for 216 apartments and the land had significantly increased in value. NIHE failed to consider including an overage (clawback) clause in the contract which could have allowed the public sector to share in the significant development gains made by the developer (see **Case Example 5**).

2.38 LPS has recently updated its guidance²⁶ relating to overage and clawback. Public bodies and their professional advisors are now required,

24 Disposal of Surplus Land and Buildings by Public Sector Bodies, September 2001, LPS. This guidance was updated in July 2005.

25 Public Accounts Committee: Report on the Transfer of Surplus Land in the PFI Education Pathfinder Projects (Report: 11/07/08R) 22 November 2007.

26 Land and Property Services, Central Advisory Unit, Disposal of Surplus Public Sector Property in Northern Ireland, March 2013.

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for audit purposes, to fully document the considerations made, advices taken and decisions reached on overage (clawback) clauses.

Poor Planning

- 2.39 NIHE decided to sell Millmount House in advance of the open market sale of the extensive development lands surrounding the House. This decision led to the new owners of the House effectively holding a ransom strip which resulted in NIHE accepting their offer of £36.1 million for the surrounding lands. The situation severely weakened NIHE's negotiating position, effectively restricting the market to one bidder (the Developer) (see **Case Example 6**). The lands that were sold by NIHE for £36.1 million were resold 15 months later for £93 million.

A lack of legal representation

- 2.40 Two land transactions at Glenalpin and Ligoniel were carried out without legal representation. In our view, we can see no justification for dispensing with legal advice when dealing with complex transactions involving thousands of pounds of public money.
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Case Example 5: Land at Annadale, Belfast

NIHE's contract management arrangements were poor

1. Land owned by NIHE at Annadale in Belfast was sold on the open market to a property developer in February 2003, for £3.4 million. The site had been valued by LPS in April 2002 based on the development of 60 terraced social houses. The conditional contract of sale allowed for an initial payment of £50,000 by the developer, with NIHE agreeing that:
 - a second payment of 50 per cent would be paid when the developer received planning permission or 15 months after the contract date; and
 - the balance would be paid 12 months after the second stage payment.
2. The contract was extended on three occasions by NIHE, with the full balance of £3.35 million finally being received in August 2007, some four years after contract signature.

NIHE failed to consider including an overage (clawback) clause in the contract

3. In February 2008 the developer received planning permission for 216 apartments on condition that 50 units would be allocated for social housing. In 2010, a housing association purchased 50 apartments at a total cost of £9.2 million (representing £184,000 per unit). The remaining 166 apartments were sold as private housing. In our opinion, NIHE appears to have taken on most of the risk in this contractual arrangement, with the developer making significant development gains from enhanced planning consent and the increase in land values prevalent in Belfast between 2003 and 2007. NIHE did not consider the possibility of including overage (clawback) clauses in the contract to reflect possible enhancements to the planning permission and to share in any increase in the value of the site. NIHE also extended the contract on several occasions at a time when the property market was extremely buoyant. In our view, the absence of an overage clause, combined with contract extensions, resulted in the public sector losing out on significant additional revenue.

The NIHE Board made decisions based on limited information

4. NIHE investigators recorded concerns about the poor quality of the information provided to NIHE's Board to allow it to make the decision to approve the sale. We share these concerns. The paper provided to the Board did not explain the conditions of the contract of sale i.e. that the valuation was based on the provision of 60 terraced houses, and did not outline how it might be possible for NIHE to protect its interest through an overage clause. Furthermore, the NIHE Board was not kept informed of the subsequent time extensions to the contract.
5. NIHE investigators found no evidence of criminal conduct in the Annadale land disposal.

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Case Example 6: Millmount House and Lands

NIHE's decision to sell Millmount House in advance of the surrounding lands resulted in a significant loss of revenue to the public purse

1. In 1961 the NI Housing Trust (now NIHE) purchased a listed farmhouse known as Millmount House and the surrounding 156 acres of agricultural land. NIHE sold the house and around two acres of land in 1996 to a private purchaser but in August 2000 repurchased the house under the Special Purchase of Evacuated Dwellings scheme²⁷. NIHE was granted Outline Planning Permission for 510 homes on the surrounding lands in 2002.
2. In May 2003, NIHE sold Millmount House on the open market for £500,000 to "the Developer". In February 2004 the NIHE Board approved the sale of the surrounding lands on the open market and by December 2004 the Board had approved a sale to the highest of the seven bidders, for £35.2 million.
3. During the sale process, however, it became apparent that the existence of a Right of Way to Millmount House would prevent the highest bidder from obtaining the funding necessary to complete the purchase. We note that NIHE had been aware of the existence of this Right of Way prior to the sale of Millmount House in 2003 but we have found no documentary evidence which indicates that NIHE recognised the significance of this issue. The Developer retained control over a key access point to Millmount lands which would enable the Developer to prevent development on the surrounding lands and this was in effect a ransom strip. In May 2005 the Developer offered to buy the surrounding lands for £36.1 million. We note that advice received from Senior Counsel to the NIHE Board in August 2005 on the sale of the surrounding land concluded that "this is not an open or even market. [The Developer] has an advantage, and other interested parties are at a considerable – indeed, insurmountable – disadvantage".
4. The NIHE Board in December 2005 agreed to proceed to sell the surrounding lands to the Developer, based on staged payments and the Developer's proposal to apply for full planning approval for at least 510 houses. A contract signed by the Developer and another company, together with a £1 million deposit, was forwarded to NIHE in March 2006. In August 2006 the contract was closed through a novation agreement²⁸ whereby an off-shore Isle of Man consortium effectively replaced the Developer as the purchaser under the contract. At this point a stage payment of £26 million was received by NIHE.
5. The final stage payment of £9.1 million was not paid to NIHE until 18 June 2007. This was three days after the off-shore consortium had sold both Millmount House and the surrounding lands for £96 million.

27 The SPED scheme makes provision for NIHE to acquire by agreement houses owned by persons who, in consequence of acts of violence, threats to commit such acts or other intimidation, are unable or unwilling to occupy those houses.

28 Novation Agreements are used to transfer the rights and obligations of one party under a contract to another party, whilst the other contracting party remains the same. All three parties - the transferor, the transferee, and the counterparty (i.e. the other contracting party) - need to sign the novation agreement.

Case Example 6: Millmount House and Lands

6. NIHE's failure to recognise the significance of the Right of Way, combined with its decision to sell Millmount House as a separate transaction in advance of the surrounding land disposal, in our opinion was a significant error of judgement which distorted the market and resulted in NIHE not securing the best possible deal from a full open market competition. Our opinion is supported by the advice that NIHE received from LPS in July 2007. LPS stated that the Developer's increased bid of £36.1 million in May 2005, when compared to the £35.2 million the open market sale had generated in December 2004, represented "market value at that date...on the basis that the limited increase in value was accounted for by the increased bid, coupled with the depreciation in the value of the site caused by the right of way".

No consideration was given to including an overage clause

7. NIHE did not consider including an overage clause in this contract (see paragraphs 2.34 to 2.38). Given the scale of the lands, the buoyancy of the property market at that time and the possibility that developers could seek to enhance planning consents, an overage clause may have been a means of offsetting the risk to value for money from the sale to the Developer. The contract did, however, include a clause proposed by the Developer which stated that if planning permission was granted below a stated density, the sale price would be reduced by £55,000 per dwelling.
8. NIHE told us that whilst overage was not considered, as required by LPS guidance at the time (see paragraph 2.35), an alternative approach was adopted to protect its interests. The land was marketed according to the value of its full development potential of between 800 and 1200 units, as assessed by independent planning consultants. As a result, NIHE told us that, in their opinion, the open market bidders would have been aware of the potential for increased density of housing and would have bid accordingly. NIHE believe that due to this approach, overage was not necessary.
9. NIHE investigators found no evidence of criminal conduct in the Millmount land disposal.

Source: NIHE Land Disposals Investigations Team

Information provided to the NIHE Board was inadequate

- 2.41 The failure to adhere to the existing control framework in land transaction processes should have been identified

by the NIHE Board and improvements sought. In our view, part of the reason for this failure was deficiencies in the information that the Board received from NIHE senior management. For example, the NIHE Board in 2007

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was made aware of the issues in the Hardcastle Street disposal however the Director of Housing and Regeneration provided information that erroneously led the Board to believe that the disposal had achieved the best consideration reasonably obtained in the circumstances (see paragraph 2.11). This was not the case. In addition, NIHE did not inform its Board that the Commissioner for Complaints was investigating the sale of NIHE land at Hardcastle Street until after the Commissioner's draft report had been received. During the approval process for the Annadale land disposal, the Board was not made aware of the conditions attached to the sale.

- 2.42 The Public Accounts Committee, in its consideration of NIHE's management of response maintenance contracts, has already concluded that during this period, "information provided by senior management within the NIHE to the Board on important issues was sometimes inadequate" and that "in some instances key information that should have gone to the Board was deliberately held back by senior management or presented in a superficial way."²⁹
- 2.43 NIAO's 2012 report "NIHE Management of Response Maintenance Contracts" noted that an NIHE Internal Audit report on Land Disposals had never been finalised.³⁰

29 Report on the Northern Ireland Housing Executive: Management of Response Maintenance Contracts, 20 February 2013, Public Accounts Committee, NIA 99/11-15.

30 NIHE Management of Response Maintenance Contracts, Report by the Comptroller and Auditor General, 4 September 2012, p. 52.

Part Three:

Opportunities to tackle governance and control weaknesses relating to land disposals were not fully exploited by NIHE and the Department



©Glenalpin Street, Belfast (see Case Examples 2 and 4)

Part Three:

Opportunities to tackle governance and control weaknesses relating to land disposals were not fully exploited by NIHE and the Department

The Department had concerns in 2001 and asked the Local Government Auditor to examine the Houses for Land schemes

3.1 In 2001, the Department asked the Local Government Auditor³¹ to examine NIHE's Houses for Land schemes. These schemes were intended to attract private sector finance into NIHE's social housing programme by providing land to developers in exchange for the construction of social housing on part of the site. The Department at that time stated "we know very little about the details and procedures adopted by NIHE and are concerned about value for money and probity in these schemes to safeguard public funds". The main issues raised by the Department included the completion of economic appraisals, the form of tendering, the currency of valuations, whether written procedures were available and whether clawback should have been provided for in the arrangements.

3.2 The Local Government Auditor reported to the Department and NIHE in February 2004, highlighting a series of concerns including:

- poor project management arrangements including a lack of documented procedures, processes and progress reporting;
- no economic appraisals for individual schemes;

- no independent land valuations at award of contract and reliance upon outdated valuations;
- the need to develop a proactive approach to handling delays; and
- the need for closer liaison between the Housing and Regeneration Division and other divisions within NIHE.

In presenting his report to the Department the Local Government Auditor confirmed that NIHE recognised weaknesses in their processes and formally adopted revised evaluation arrangements.

3.3 Following the Local Government Auditor's report, no further Houses for Land schemes were pursued by NIHE beyond the four which were subject to the Auditor's review. The Houses for Land matters referred to the Department were followed up to the satisfaction of the Local Government Auditor and he formally closed his review. The Department's acceptance of the report's findings and recommendations provided an opportunity to tackle some of the control weaknesses relating to NIHE land disposals. However, although economic appraisals and departmental approvals for community and Housing Association transfers were part of NIHE's governance framework, the report's recommendations were not read across to other land disposals to private developers.

31 NIHE's external audit arrangements are set out in Article 21 of the Housing (Northern Ireland) Order 1981. Up to, and including 2003-04, the Order recorded that NIHE would be audited by a local government auditor designated by the Department. From 2004-05 the Comptroller and Auditor General was given responsibility for the audit of NIHE as part of a re-organisation of Northern Ireland public sector audit responsibilities and the Housing (Northern Ireland) Order was amended.

A DSD Internal Audit report in 2007-08 was critical of the Department's oversight arrangements for NIHE land disposals

- 3.4 In 2007, the Department asked its Internal Audit unit to carry out a review of its monitoring arrangements for land disposals by NIHE. No overall audit opinion was given, as the work was undertaken by Internal Audit in its consultancy service role. Internal Audit concluded that:
- the Department's monitoring arrangements were not fit for purpose;
 - there were no information systems in place to facilitate the monitoring arrangements; and
 - controls had been weakened in direct contravention of the applicable legislation.
- 3.5 Internal Audit stated that weaknesses in the Department's monitoring arrangements meant that they had insufficient information to effectively monitor NIHE's land disposal programme. Information that should have been supplied by NIHE to the Department³² was not sent and no follow up action had been taken by the Department. Internal Audit concluded that the Department could have no assurance that public owned assets were being fully utilised or their maximum capital value was being obtained through disposal.

3.6 Internal Audit's examination found that the statutory requirement for NIHE to seek approval from the Department when disposing of land at less than best consideration (see paragraph 2.6) had been removed from written guidance³³. They concluded that "no audit trail existed to show who had made this decision". This deletion of a key oversight control took place in October 2005, just eight months after the Local Government Auditor had recommended in his Houses for Land report that controls should be strengthened.

3.7 NIHE told us that whilst their guidance had been amended the statutory requirement had not changed and they continued to seek the Department's approval in relevant cases. NIHE's guidance was amended in May 2008 to include the previously omitted requirement.

In response to serious concerns over aspects of NIHE's operations the Department initiated a review of governance in NIHE

3.8 In response to emerging land disposal issues and serious concerns over other aspects of NIHE's operations, for example response maintenance, the Department in 2010 engaged a team with skills in governance, internal audit, investigation, procurement and human resources to carry out a fundamental review of governance in NIHE. The review included an assessment of "the adequacy of controls over asset disposal

32 Under the arrangements in place at that time NIHE should have supplied six monthly returns of its holding of undeveloped land to the Department. This was not done.

33 The Management Statement: Financial Memorandum and Dossier of Controls sets out the control to be exercised over NIHE activities and represents a formal statement of the standards the Department requires the NIHE to achieve.

Part Three:

Opportunities to tackle governance and control weaknesses relating to land disposals were not fully exploited by NIHE and the Department

and in particular, land and property". The team reported in December 2010, making 75 recommendations, nine of which related to land and property matters. The review's findings relating to land and property included:

- not all land sales were being presented for appropriate Board or Chief Executive's Business Committee approval. Six out of the ten sales examined by the review team had not been approved;
- insufficient information relating to land disposals, including independent valuations, was provided to the Board and Chief Executive's Business Committee to allow them to make informed decisions based on the facts;
- there was no evidence of any post-completion monitoring of land disposals which could have provided management with assurance that disposals had been completed in line with guidance; and
- NIHE Internal Audit had carried out reviews leading to limited and unacceptable audit opinions³⁴. A recurring weakness was the lack of a full Economic Appraisal supporting the decision to dispose of land (see paragraph 2.30 to 2.31).

3.9 The Governance Review concluded that NIHE had developed comprehensive procedures and guidelines for staff when managing the disposal of surplus assets within the organisation. The Review

Team noted there had previously been issues with seeking Board approval for individual land disposals due to an assumption that the Board's approval of the annual Undeveloped Land Schedule provided sufficient approval to proceed. The Review Team did however recognise this policy had now changed. The Review Team also noted that there was currently a lack of monitoring or inspection of completed sales of land and houses to provide management with the necessary level of assurance that these procedures were being adhered to. A number of key recommendations were also made in relation to the level of information provided to both the Board and Chief Executive's Business Committee when being asked to approve a sale so that a fully informed decision could be made.

The Department's oversight was not sufficient to prevent the land and property issues highlighted in this report

3.10 In 2013, the Public Accounts Committee³⁵ concluded that "there were clear failings in the Department's oversight of the Housing Executive" and that they were "not alert to problems in the Housing Executive, which were evident over many years". In particular the Committee concluded that for many years before 2010, the Department did not do enough to adequately test the assurances it received from NIHE. The land disposal issues highlighted in this report provide further evidence

34 NIHE Internal Audit Land Disposal reports from 2007 and 2009.

35 Report on the Northern Ireland Housing Executive: Management of Response Maintenance Contracts, Public Accounts Committee, 20 February 2013, NIA 99/11-15.

of this. The Department told us that the weaknesses identified in this report occurred despite the Department having in place NIHE governance arrangements acknowledged as good practice, and the Department taking action to address weaknesses in land disposals which it identified.

- 3.11 The Department told us that it identified concerns and took action by commissioning the Local Government Auditor review in 2001 and also commissioning its own Internal Audit review of its monitoring arrangements in 2007. Despite this and NIHE's own Internal Audit report into land disposal matters in 2007, governance weaknesses continued to occur in NIHE. In our opinion these various reports represented opportunities to tackle governance and control weaknesses relating to land disposals which were not fully exploited by the NIHE and the Department at the time. A full scale investigation into governance weaknesses was commissioned by the Department in 2010.
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Part Four:

There have been improvements in land and property management and governance arrangements in NIHE



©Annadale, Belfast (see Case Example 5)

Part Four:

There have been improvements in land and property management and governance arrangements in NIHE

NIHE have improved many of their systems and processes surrounding land and property disposals

4.1 NIHE have strengthened the controls surrounding land and property disposals to address many of the issues raised in our review of historic cases. NIHE detected and investigated issues in land disposals and instigated significant internal change, beginning in 2010. One key addition is the presentation of all proposed surplus land disposals to an NIHE Regional Services Clearing House Committee. This committee comprising representatives from Regional Services, Landlord Services and Finance, considers papers prior to submission for approval to either the Chief Executive's Business Committee or the Board, in accordance with Standing Orders.

Information sent to the NIHE Board on land disposals has been improved

4.2 Following approval by the Central Clearing House Committee, papers are sent to either the NIHE Board or the Chief Executive's Business Committee, depending on the disposal value. The approval papers presented to committees now contain detailed information including site valuations, the outcome of internal NIHE consultations, option appraisal results, offer history and any other relevant issues. These enhanced measures ensure that the Board and NIHE committees take informed land sales decisions based on meaningful evidence.

4.3 To review NIHE land which has development potential, the NIHE Board also considers and annually approves the Undeveloped Land Schedule (ULS). Recorded against each site listed on the ULS is:

- a location description;
- a classification, such as surplus, retain for future use, for transfer to housing association;
- a valuation and the date of valuation;
- an annual update on housing need, if relevant, from NIHE Corporate Planning Services; and
- any other relevant information.

4.4 The ULS, taken in conjunction with amenity lands and lands designated as existing open spaces, forms the entire holding of NIHE undeveloped lands. NIHE told us that the ULS was originally created around a decade ago, using local office knowledge. Whilst some additional undeveloped lands have been identified each year and added to the ULS, in our opinion, there is a risk that the current ULS does not accurately reflect the total amount of land with development potential held by NIHE. We therefore welcome NIHE's proposal to undertake a major review of around 900 hectares of NIHE land to identify development potential which could support the Social Housing Development Programme. This exercise aims to ensure

the accuracy and completeness of the land database and could potentially significantly increase the value of lands recorded on the ULS.

Valuations are now obtained for property prior to disposal

- 4.5 Independent valuations are now obtained from LPS prior to disposal, followed by a recommendation from it on acceptability in cases where the selling price is below this valuation. The value and the date of valuation are part of the information presented to the Board for approval to sell a site. NIHE's Internal Audit examined all sites disposed of from the ULS during 2012-13 and found that valuations had been obtained for all sites and all were approved by the correct committee in line with NIHE's delegated authorities.
- 4.6 To strengthen the controls around valuation, NIHE put in place a Service Level Agreement with LPS in 2012. The Department, in its 2012 review of governance, concluded that this Service Level Agreement has established clearly defined roles and responsibilities for each body in the disposal and valuation process.

Business cases are now produced to justify decisions

- 4.7 As a result of revised policy, all disposals should now be supported by an economic appraisal. Sites recorded on the ULS are classified as surplus or as sites to be retained for future use. The completion of an appraisal ensures that the classification process is robust and justifies any decision taken to either dispose of or retain a site. Appraisals include explanations from NIHE Area Planners for lands which are designated as surplus but are situated in areas of high housing need.
- 4.8 There are currently 207 sites on the ULS. The process of producing and approving economic appraisals for these sites is now underway. To date, NIHE has classified 26 sites as surplus for disposal by way of economic appraisal.

NIHE's policy governing off-market sales has been revised

- 4.9 NIHE has revised its policy concerning off-market sales. The policy now states that land can only be sold to adjoining owners and only in circumstances where the land has no marketing potential. Where more than one party owns bordering lands, the land will be split between the interested parties. All sales are now subject to approved economic appraisals.

Part Four:

There have been improvements in land and property management and governance arrangements in NIHE

Management information has been improved but further work is required

4.10 The Management Statement and Financial Memorandum³⁶ requires NIHE to have and maintain a Land Terrier database of land in its ownership consisting of a series of maps cross-referenced to records of acquisitions and disposals. NIHE introduced a new digital Land Terrier Management System in November 2011 which provides a digital record of all maps and deeds for all land acquired and disposed of by NIHE. The digital system aims to:

- enhance the security of land and property records;
- introduce standard processes for the management of NIHE land and property records;
- introduce a more efficient system for the recording and updating of land and property records;
- improve management information; and
- ensure effective processes are in place to maintain the accuracy of land and property information.

4.11 NIHE currently maintains a Land Sales System which is used to register any application received for a land disposal. The Land Sales System is not currently linked to the Land Terrier Management system and is a database to record and

give a unique reference number to any application to purchase NIHE land. We note that in addition to the Land Sales System the three regional land and property units each maintain a manual database and the NIHE Land and Property Central unit maintains an economic appraisal monitor. These various systems are not electronically linked.

Recommendation 1

Maintaining a series of local databases is not only a duplication of effort but also has the potential to create differences between locally and centrally held records. In our view, this should be stopped and a central system be used to record all land disposals.

4.12 NIHE told us that since the fieldwork for this report commenced a centralised land sales system was developed and rolled out across NIHE.

4.13 To monitor details of land disposals and for accounting purposes NIHE at present places reliance on a Finance Division report which records capital receipts received for land disposals, which is not connected to the Land Sales System. In our view, NIHE are currently relying on a range of systems that are not linked to monitor land disposals (Finance records of receipts for land sales, the Land Sales System and local databases). None of these systems currently produce management information that, in our view, is as timely, accurate and complete as it could be.

³⁶ The Management Statement: Financial Memorandum and Dossier of Controls sets out the control to be exercised over NIHE activities and represents a formal statement of the standards the Department requires the NIHE to achieve.

Recommendation 2

The current land and property systems are not linked and we have concerns over whether NIHE can successfully obtain management information that is complete and accurate. We strongly recommend that NIHE consider developing a single end to end land sales system linking the Land Terrier Management System to other aspects of NIHE's land and property activities.

- 4.14 NIHE told us that a project manager has been appointed to oversee a review into the possibility of linking of the Land Terrier Management system and the Land Sales data.

Recommendation 3

Given that the Undeveloped Land Schedule (ULS) may not accurately reflect the amount of land with development potential that is held by NIHE and that NIHE's land and property management systems are not fully linked we recommend that the Department and NIHE's Board should consider requesting at least an annual schedule of all land disposals. This schedule could include for each disposal a brief description, LPS valuation, date of valuation, sale date, purchaser, proceeds received and ULS or non ULS classification.

- 4.15 NIHE told us they now intend to provide the NIHE Board with a quarterly update of all land disposals.

- 4.16 NIHE has recently reviewed its Land Disposal Policy to take into account revised guidance from LPS³⁷ and the revised internal policy on the need for economic appraisals. We note however, that NIHE's overarching Asset Management Strategy is out of date. NIHE informed us that once the information from the latest stock condition survey has been processed, the responsibility for asset management in the organisation will be split between the Landlord and Regional Services functions. It is anticipated that this will take place in 2015-16 at which point the asset management strategy for each function will be updated and implemented.

Recommendation 4

NIHE's Asset Management Strategy (2009-12) is now out of date and although the Action Plan included in this strategy was updated for 2013-15, we would recommend that NIHE update this key strategic document.

The Department has enhanced its arrangements for oversight of NIHE

- 4.17 The Department told us that since it commissioned the governance review in 2010 it has continually reviewed and enhanced its oversight arrangements in response to previous NIHE internal control failings. **Appendix 1** provides further detail of the governance and oversight improvements that have been implemented.

37 Disposal of Surplus Public Sector Property in Northern Ireland, Central Advisory Unit, Land and Property Services, DFP, March 2013.

Part Four:

There have been improvements in land and property management and governance arrangements in NIHE

- 4.18 The Department's Housing and Finance Divisions now receive regular reports from NIHE, detailing disposals of land and property. These include:
- a monthly return which is provided to Finance Division, highlighting land recorded on the ULS which is currently for sale or recently sold;
 - a quarterly return provided to Housing Division, highlighting land recorded on the ULS that has recently been sold or transferred to Housing Associations; and
 - a copy of NIHE's ULS, which is forwarded annually to Housing Division.
- 4.19 The Department told us that it continues to review its level of monitoring and oversight of NIHE to ensure best practice and in order to ensure departmental oversight arrangements are pitched at the appropriate level.
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Appendix 1: Governance and oversight improvements implemented by the Department and NIHE

The Department told us that the normal cycle of the accountability and sponsorship arrangements now include:

- bi-annual performance review meetings between the Minister and Chairman of the NIHE Board to examine performance against its business plan, budgets and targets;
- Quarterly Assurance and Risk Meetings between NIHE Chair and DSD Deputy Secretary to discuss any issues relating to assurances and risks to the NIHE Board and DSD;
- quarterly accountability meetings to discuss strategic performance, current and future financial position and governance issues, including land disposals;
- monthly performance meetings; and
- monthly Finance meetings.

The Department also explained that in addition it:

- strengthened the NIHE Board through the appointment of new a Chairman, Vice Chairman and other Board members;
- initiated the 2010 DSD Governance review and a follow-up review in 2013 to ensure that appropriate action had been taken on recommendations from the 2010 review;
- is now provided with draft Internal Audit and Corporate Assurance Unit reports;
- worked with NIHE to restructure the NIHE Senior Management Team;
- worked with NIHE to introduce a NIHE transformation programme; and
- continually reviews NIHE's Management Statement Financial Memorandum and Dossier of Controls.

The Department also commented that further actions taken in relation to oversight include:

- representation at NIHE quarterly Audit Committee and review of minutes and escalation to a departmental issues log where appropriate;
 - review of NIHE monthly Board minutes to identify issues for follow up and escalation through the issues log process;
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- detailed review of NIHE Internal Audit and Corporate Assurance Unit reports;
 - review of NIAO reports including formal monitoring of PAC recommendations; and
 - review of NIHE's annual Governance Statement.
-

Appendix 2:

Extract from the Planning Appeals Commission's decision on the zoning issue at Nelson Street, 22 May 2013 (Appeal Reference: 2012/A0079)

Procurement Rules

54. EU Directive 2004/18 on the co-ordination of procedures for the award of public contracts imposes various procedural requirements whenever a contracting authority, either by itself or through a third party, seeks offers in relation to a proposed public works contract, the value of which exceeds €6,242,000. A key purpose of the Directive is to guarantee the opening up of public procurement to competition across the EU. It requires contracts to be tendered for and awarded to persons offering the lowest price or the most economically advantageous terms.

55. The Public Contracts Regulations 2006 transpose the Directive into UK law. Regulation 3 and Schedule 1 identify DOE as a contracting authority. However, in *Helmut Müller GmbH v Bundesanstalt für Immobilienaufgaben* (C-451/08), the European Court of Justice held that the mere fact that a public authority, in the exercise of its urban planning powers, examines building plans presented to it or takes a decision applying its powers in that sphere, does not amount to the award of a public works contract within the meaning of the Directive.

56. NIHE argued that the procurement rules do not prevent DOE from entering into an Article 40 planning agreement with a private developer to secure social housing. In *R (Midlands Co-operative Society) v Birmingham City Council* [2012] EWHC 620, it was held in order for there to be a public works contract a required element is a commitment by the contractor, legally enforceable by the contracting authority, to perform relevant works. It is insufficient if, legally, the contractor has a choice and is entitled not to perform the works. The annex to Policy Procurement Note 12/10, issued by the Office of Government Commerce, makes the point that a planning obligation is normally conditional upon some voluntary act connected with the implementation of a planning permission.

57. I accept that a planning agreement could in theory be tied to a grant of planning permission for the proposed apartment development in such a way that if the appellants did not implement the permission they would be under no obligation to carry out any works specified in it. Such an agreement would not, of itself, amount to the award of a public works contract within the meaning of the Directive.

58. While the case law establishes that a planning condition or a carefully drafted planning agreement would not, of itself, engage the Directive, that is not the end of the procurement question. In this instance, the effect of such a condition or agreement would be to oblige the appellants, if they wished to implement their planning permission, to agree terms for the transfer of housing units to a registered social landlord. The appellants' bargaining position would be very weak. NIHE has a pivotal co-ordinating role in the provision of social housing. NIHE would be able to dictate the design of the development and the financial terms upon which transfer of the relevant units would take place. In the absence of an agreement with NIHE, the appellants would be unable to develop the site.

59. NIHE is not listed as a contracting authority in the 2006 Regulations but it falls within the definition of a contracting authority in Article 1(6) of the Directive. Any legal agreement between the appellants and NIHE would have as its object the execution of building works to NIHE's requirements. No one sought

to argue that the value of the works would be below the specified threshold. For these reasons, any such legal agreement would be caught by the Directive.

60. In its supplementary evidence, NIHE referred to the ruling of the European Court of Justice in *Jean Auroux v Commune de Roanne* (C-220/05), which says that development agreements or negotiated design-and-build contracts obliging a contractor to carry out works specified by the contracting authority and in which the authority has a pecuniary interest are not compliant with the Directive. NIHE accepted that a legal agreement between the appellants and either itself or a registered social landlord would not comply with the EU procurement regime.

61. NIHE put forward three options by which social housing could be delivered without breaching the Directive. Option 1 was for the developer to sell the land in question to NIHE or a housing association. Option 2 was for a housing association or NIHE to tender for land and/or social housing dwellings within a defined area. Option 3, described as "Off the Shelf", was for the developer to take a decision to build social housing on his land to the required specifications in the expectation that when completed a housing association would buy the dwellings. NIHE stated that these options were compliant with public procurement rules, as the purchase of land and existing buildings is exempt under the Regulations.

62. Option 1 and Option 2, in so far as it relates to vacant land, envisage the appellants voluntarily selling up and abandoning their current development proposals for apartments on the appeal site. The appellants showed no interest in these options. The theoretical availability of these options does not assist in the determination of the present appeal.

63. Option 3 and Option 2, in so far as it relates to completed dwellings designed to be social housing units, would be extremely risky for any developer. These options seem wholly unrealistic, unless it is anticipated that prior to construction the appellants would come to an informal understanding with NIHE and/or a housing association for the transfer of the dwellings. Such an understanding could be viewed as highly irregular, as it would enable the parties concerned to circumvent the requirements of the Directive and the Regulations. It would be wrong to decide this appeal on the assumption that the appellants would build social housing units without a legally binding agreement with NIHE or a housing association.

64. In practice, a condition or planning agreement directed at securing an element of social housing as part of an approved apartment development at the appeal site would require the appellants to enter into a contract with a social housing provider, but such a contract would not be compliant with current procurement rules. The appellants would be required to do something which they would not be able to do. Any such condition or planning agreement would be manifestly unreasonable and take away the benefit of the permission in its entirety.

Conclusions on Tenure

65. My findings on the tenure issue can be summarised as follows. The imposition of a social housing requirement on the appeal development would not be consistent with previous Departmental practice

Appendix 2:

Extract from the Planning Appeals Commission's decision on the zoning issue at Nelson Street, 22 May 2013 (Appeal Reference: 2012/A0079)

in regard to the appeal site itself and other sites proposed for social housing in Draft BMAP. It is highly unlikely that NIHE would enter into or sanction any arrangement involving the transfer of housing units to a registered social landlord within a mixed-tenure apartment development at the site. And in any case, having regard to current procurement rules, the imposition of a social housing requirement would be manifestly unreasonable. In these circumstances, it must be concluded that there is no effective mechanism to secure social housing at the site through the planning control process.

66. DOE's position shifted several times in the course of the appeal process but its final view was that the application should be refused on a "precautionary" basis. However, refusal of planning permission for private housing development on the site would fly in the face of the statutory BUAP and the DOS zoning likely to be included in BMAP, when adopted. The foregoing analysis leads inexorably to the conclusion that housing development unrestricted as to tenure is acceptable in principle on the appeal site in the prevailing legal and planning policy context.

67. I appreciate that my analysis could have implications for other sites zoned or proposed to be zoned for social housing. However, it does not represent a setting aside by the Planning Appeals Commission of the State's international obligations relating to social or low-cost housing. Planning policy for social housing in PPS 12 needs to be reviewed to take account of the Public Contracts Directive. But the planning system is not the only means by which social housing can be provided.

68. As its witness confirmed, NIHE has vesting powers and the necessary money and could arrange for the appeal site to be brought into public ownership. That was what was envisaged when NIHE prepared its HNA in 2004. While NIHE prefers to assemble land by agreement, it could if necessary deploy its more recent data on housing need in any vesting inquiry. Regardless of the outcome of this appeal, there is a reasonable prospect of social housing being built on the Nelson Street site if NIHE buys the land.

Source: Planning Appeals Commission

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