

## ABANDONING ROADS AND FOOTWAYS

### 1 INTRODUCTION

This briefing paper considers Roads Service Policy for abandoning roads and footways under The Roads (Northern Ireland) Order 1993. The paper looks at 'vesting', the process under which the Department of Regional Development can take charge of a piece of land for the purpose of creating a public right of way and the responsibilities it then adopts with regards to maintaining this right of way.

It will then go on to discuss the under what circumstances the Department will give its responsibility for the road and the policy regarding abandonment paying particular attention to situations where land will be abandoned in favour of Development and who owns the land which is being abandoned. Furthermore this paper will consider the Government policy on Disposal of Surplus Public Sector Property as it is relevant to this topic.

### 2 BACKGROUND

#### 2.1 The Roads Service

The Roads Service is an agency of the Department for Regional Development (The Department) and is the sole road authority in Northern Ireland, responsible for just over 25,000 kilometres of public roads together with about 9,000 kilometres of footways, 5,800 bridges, 261,000 street lights and 370 public car parks<sup>1</sup>.

The Department in fulfilling its functions under article 110 of The Roads (Northern Ireland) Order 1993 has the right to acquire, by agreement or otherwise any land which they deem necessary<sup>2</sup> to support the movement of traffic and that there is a compelling case that it will be in the public interest<sup>3</sup>. If the land is not acquired by agreement the department has the right to issue a vesting order<sup>4</sup>.

#### 2.2 Vesting

Vesting is where the Department will take ownership of the land and make it a public right of way. The public right of way, will then remain in place until such time that it is legally stopped. Similar legislation exists in England and Wales where under the Highways Act 1980 (263) "...every highway (either a public path or road) maintainable at the public expense together with materials and scrapings of it, vest in the highway authority".

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<sup>1</sup> Roads Service NI [\[online\]](#)

<sup>2</sup> The Roads (Northern Ireland) Order 1993 (Article 110)

<sup>3</sup> ODPM (2004) "*Compulsory Purchase and Cribchel Down Rules*". ODPM: London [\[online\]](#)

<sup>4</sup> The Roads (Northern Ireland) Order 1993 (Article 113)

In this case 'vests in' means the highway authority has complete ownership in fee simple (freehold) subject to the land remaining a public highway. The only way the land will ever cease to be a public highway is through making a Diversion Order (footpaths) or a Stopping – Up Order (roads).

### **3 ABANDONMENT AND STOPPING – UP OF ROADS**

In Northern Ireland, when an entity wishes to stop a public right of way over a piece of land, an application for an Abandonment or Stopping – Up order must be made to the Department. This entity can include the Roads Service, other public authorities or a member of the public. The Department can then issue an abandonment/stopping – up order under the Roads (Northern Ireland) Order 1993, which in effect relinquishes any responsibility for maintenance of the road and any public right of way over it is extinguished<sup>5</sup>.

As indicated therefore when discussing vesting, the department while for all purposes owning a road while it is in use is almost a type of custodian, maintaining the road so as to satisfy a public need, and when that need ceases to exist, they pass it back to the owner<sup>6</sup>. In the Republic of Ireland this is referred to as "taking in charge" of a road and this is undertaken by the relevant County Council. This means that the County Council formally decides to become responsible for the maintenance and upkeep of a road "to a minimum standard suitable for cars and traffic".<sup>7</sup>

Another instance in Northern Ireland where the Roads Service maintains a road is in the case of new developments. The Roads Service will become involved at the planning stage advising on the layout of the street, they will then monitor the progress of the construction and check that necessary standards are met. On satisfactory completion they will adopt the street under; The Private Streets (NI) Order 1980 as amended.<sup>8</sup>

#### 3.1 Abandonment in favour of development

In the cases where an abandonment order is required for a development, the developer must apply under Article 68 of The Roads (Northern Ireland) Order 1993 and this process can take up to 12 months to complete. The consultation process will be carried out by the roads service and must include consultation with statutory agencies and other interested parties these include: The PSNI, Fire Brigade, Local Council, Statutory undertakers, Crown Estate Commissioners and other land owners/frontagers. It is then up to the roads service to consider these responses when deciding whether the abandonment should be granted.

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<sup>5</sup> Roads Service (2008) "Abandonment/Stopping-Up Orders". Roads Service Policy and Procedure Guide: RSPPG\_S019. DRD: Belfast

<sup>6</sup> There are exceptions with regards to offering land back to the previous owner see: DFP (2005) "Disposal of Surplus Public Sector Property in Northern Ireland". DFP: Belfast [\[online\]](#)

<sup>7</sup> O'Sullivan, D. (2008) "Rights of Way". Wolfe and Co. Solicitors: Dublin [online] available from: [http://www.wolfe.ie/news\\_pdf/Rights%20of%20Way.pdf](http://www.wolfe.ie/news_pdf/Rights%20of%20Way.pdf)

<sup>8</sup> The Private Streets (Construction) Regulations (NI) 1994 as amended The Planning Order 1991

### Example Case

*The Ardnavalley Park, Comber (Abandonment) Order (Northern Ireland) 2009*<sup>9</sup>

Ardnavalley Park is a housing development in Comber, Newtownards, County Down. The development was constructed around 1973/74 and there single road serving the development was adopted by the Department into the public road network, i.e. the Department became responsible for the maintenance of the road. However, the Department did not acquire ownership of the land on which the road was constructed. If a road is a public road, i.e. maintainable by the Department, as in the case of Ardnavalley Park, Comber, then the public have a right to pass and repass along the road. The effect of an abandonment order is that the road ceases to be maintainable by the Department and that the public right of way over it is extinguished.

Once the road is abandoned the person who owns the land on which the road is constructed may do with it what they like. In the case of Ardnavalley Park, the land on which the road is constructed is owned by a developer. There was no publicly owned land involved. In this case therefore the abandonment order is the department abandoning responsibility to maintain the road as stated in the legislation

### 3.2 Other instances for Abandonment

The Department can take the decision to abandon a road under Article 68(1) in cases where it is no longer deemed useful for example if a road ceases to be used following the construction of a new road. Additionally rather than seeking the abandonment for a development, per se, a frontager may apply for a road or footpath to be abandoned so they can extend their garden. In these cases the same process has to be followed as in the case of abandonment for development.

When a frontager makes an application for an abandonment order it will often be the case that the frontager does in fact own the land. In terms of the legislation where this is concerned "there is a rebuttable presumption that the owner of the property fronting the public road will own the land (bed and soil) of that part of the road, up to the middle line of the road"<sup>10</sup>. This is referred to as Prima Facie evidence where this person, because their property faces onto the land has established a presumption of fact and it is up to any other claimant therefore to prove otherwise (burden of proof). The evidence to support or refute this will generally be in the property owners' title<sup>11</sup>.

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<sup>9</sup> The abandonment order complete with map outlining area to be abandoned can be accessed by clicking [here](#)

<sup>10</sup> Roads Service (2008) "Abandonment/Stopping-Up Orders". Roads Service Policy and Procedure Guide: RSPPG\_S019. DRD: Belfast (Page 3, para 1.3.2)

<sup>11</sup> Ibid. (Page 3, Para 1.3.2.1)

### Example Case

*The Larchwood Avenue, Banbridge (Abandonment) Order  
(Northern Ireland) 2009*

In this case a couple (Mr. and Mrs. James O'Neill) had permission to construct a dwelling which required the abandonment of an area of road. The area of road formed a hammerhead and while the couple did not own the land themselves it was discovered that it was owned by a local building contractor.

Going back to the consultation process as discussed in this paper, the owners were approached and they then agreed to sell the land to the couple so that they could go ahead with their development.

## 4 PUBLICLY OWNED LAND

As in the (above) case, where land forming part of a public road was owned by another party, land which is publicly owned and forms a part of a public road which is subsequently abandoned can also be sold. Assuming the land is surplus to the Department's requirements, the Department will dispose of the land in accordance with the guidelines 'Disposal of Surplus Public Sector Property in Northern Ireland'<sup>12</sup> issued by the Central Advisory Unit of the Valuation and Lands Agency. In accordance with the guidelines, the disposal price would be agreed by the District Valuer.

### 4.1 Sale Price

Generally the legislation under which surplus public sector property is disposed of is Section 5 of the Stormont Regulation and Government Property Act (NI) 1933. This states that:

“a sale, exchange, lease or surrender of land under this section shall be at the best price or for the best rent or otherwise on the best terms which, in the opinion of the Ministry of Finance, can reasonably be obtained”.

Disposal of assets is considered in Government Accounting Northern Ireland 2004 (GANI), which states that; “A department or NDPB should take appropriate professional advice to ensure that the consideration obtained for the property is “the best that can reasonably be obtained”.<sup>13</sup>

That is to say any property sold should be sold at current market value. Market Value is defined by the Royal Institute of Chartered Surveyors (RICS) 'Red book' as:

<sup>12</sup> DFP (2005) “Disposal of Surplus Public Sector Property in Northern Ireland”. DFP: Belfast [\[online\]](#)

<sup>13</sup> This information has been taken from directly from the above document (see footnote 12) page 18 paragraph 19.1

“The estimated amount for which a property should exchange on the date of valuation, between a willing buyer and a willing seller in a arm’s-length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion”.<sup>14</sup>

#### 4.2 Sites with development potential

The guide to the disposal of public property states that disposing bodies which in this case would be The Department, must seek professional guidance particularly from the local DOE Planning Service on whether there is likely to be potential for development, the nature of such development and/or whether there are particularly sensitive planning issues. This information will be important to the district valuer in formulating the correct market value and in doing so protecting the interests of the public.

#### 4.3 Clawback

In circumstances where there may be a potential for land being sold are, becoming more valuable due to unforeseen development potential or if there are issues surrounding planning which may take time and subsequently delay the sale, a public body may decide to sell the land with these uncertainties in place even though when resolved they could drastically change the value of the land.

“Where this is the case the public body should carefully consider, in the interests of the taxpayer, whether they should seek to secure from the purchaser, by suitable wording of the disposal terms, part of an increase in value which is realised subsequent to the original disposal”.<sup>15</sup>

This measure is also particularly useful in light of dropping property values experienced recently due largely to the “credit crunch”. This has seen an increase in the use of methods such as clawback and overage<sup>16</sup> which allow public and private sector bodies to ensure that developers cannot take advantage of the opportunity to ‘bank land’ on the cheap for future development.<sup>17</sup>

The guide to disposing of surplus public sector property in Northern Ireland suggests a number of methods which can be used depending on the particular circumstances of the case. These methods may include<sup>18</sup>:

1. **Selling land subject to a restriction on use** – the normal scenario here is that a developer would want to change the use so as to maximise the development potential of the land. In order to change the use he would have to buy out the restrictive covenant and the disposing body would therefore share in the full development value of the land.
2. **Selling land subject to a restriction on access** (sometimes referred to as “ransom strips”) similar to method 1 (above) but the restriction is physical rather than legal in nature. The disposing body would in this case sell its land but

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<sup>14</sup> DFP (2006) Paragraph 19.4

<sup>15</sup> DFP (2006) Paragraph 21.1

<sup>16</sup> Clawback and Overage are terms used interchangeably with Clawback most commonly used by local and central government. See: Jessel, C. (2000) “Overage – Approaches and Pitfalls”. Briefings in Real Estate Finance. VOL. 1(1) pp. 28 –36

<sup>17</sup> Rees, C. (2009) “Overage Payments Make Ground as Market Stalls”. Planning. Oct 2, 2009. , Iss. 1838; pg. 9

<sup>18</sup> Taken from DFP (2006) Paragraph 22.1

retain a narrow strip, usually along the road frontage. Again the developer would have to buy out this remaining interest in order to achieve his aims<sup>19</sup>.

3. **Selling an option to purchase** - there may be circumstances where it is in the disposing body's interest to retain legal ownership of the surplus land but to sell an option to purchase to a developer. This might be the chosen method where the land being disposed of has complex planning issues attached to it and where the property market is buoyant. The eventual full disposal would be triggered by some future event, for example the obtaining of planning permission, resulting in payment of the market value for the permitted use (less the amount already paid for the option) assessed at the relevant time.
4. **Disposal via a developer's brief and /or a building agreement** – this is a method used in urban situations where the public sector is keen to influence the type of development which takes place on the surplus land. This should be a relatively rare occurrence and would be influenced by the strategic importance of the site in question. Typically a developer will make a down payment for the land of a relatively small percentage of its open market value. The balance will then be paid in stages as the development proceeds.

While clawback provisions can potentially be beneficial to the public purse there are also situations where they may be costly in terms of both time and money. Situations which can arise include high legal fees due to disputes which are common in cases where purchasers feel aggrieved that they have to pay out a large percentage of what they perceive as their money having spent a long time pursuing for example planning permission. This emphasises the point that seeking good advice is important to ensure that the end will justify the means in the interest of the public.

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<sup>19</sup> For valuation of ransom strips The case of Stokes v Cambridge City Council in 1950 is often used. In this case the Court considered the amount of money the ransom owner should fairly receive for the purposes of compensation for compulsory purchase of his property. The Court settled on the ransom owner receiving 33.33% of the overall development value of the combined development site. However, in the open market this could range between 10% and 50% based on negotiations.