

**APPEAL BY BEECHVIEW DEVELOPMENTS LIMITED
UNDER ARTICLE 162(2) OF THE WATER AND SEWERAGE SERVICES (NORTHERN IRELAND)
ORDER 2006**

FINAL DETERMINATION

17 June 2024

Contents

1.	SECTION ONE – INTRODUCTION	3
2.	SECTION TWO – THE PARTIES	6
3.	SECTION THREE – APPLICABLE LEGAL AND REGULATORY FRAMEWORK	7
4.	SECTION FOUR – FACTUAL BACKGROUND	16
5.	SECTION FIVE – VIEWS OF BD	25
6.	SECTION SIX – VIEWS OF NIW	42
7.	SECTION SEVEN – THE ISSUES TO BE DETERMINED	66
8.	SECTION EIGHT – FINAL DETERMINATION	68
	APPENDIX 1 – BUNDLE OF DOCUMENTS	79
	APPENDIX 2 – LEGAL OPINION	89

1. SECTION ONE – INTRODUCTION

- 1.1 On 16 June 2023, the Northern Ireland Authority for Utility Regulation (the **Authority** – and hereafter referred to as the **Utility Regulator**) received an application (the **Application: (B1)**) from Rafferty and Co Solicitors acting on behalf of Beechview Developments Limited (**BD**) requesting the Utility Regulator to determine an appeal (the **Appeal**) against Northern Ireland Water Limited (**NIW**): together the **Parties**.
- 1.2 The Appeal is brought under Article 162(2) of the Water and Sewerage Services (Northern Ireland) Order 2006 (the **Water Order: A1**) and relates to a refusal by NIW to enter into an agreement with BD under Article 161 of the Water Order.
- 1.3 Following an initial review of the Application, the Utility Regulator identified several items of correspondence that were referred to, but not provided, in the supporting documentation with the Application. That correspondence has now been provided. The Utility Regulator also sought further information and confirmation as to whether the sewers to which the Application relates were completed or still under construction. By email dated 22 December 2023 (**B68**), BD confirmed that the relevant sewers were still under construction.¹
- 1.4 The Application has been acknowledged and the Parties have been informed (by letter dated 03 January 2024 (**B70**)) that the Utility Regulator has jurisdiction to consider and determine the issues in dispute under Article 162 of the Water Order.
- 1.5 The Utility Regulator has appointed us, Kevin Shiels (Executive Director for Markets and Consumer Protection) and Sinead Dynan (Head of Domestic and Business Consumer Policy and Protection) jointly to determine the Appeal on its behalf (together the **Decision-Makers**).
- 1.6 The Utility Regulator is considering this appeal in accordance with its *Policy on the Resolution of Complaints, Disputes and Appeals and Guide for Applicants (August 2018)* (the **Dispute Policy: (A2)**).

¹ NIW makes several points in relation to that issue, as summarised in Section 6.

- 1.7 This document is our determination in respect of the Appeal.
- 1.8 In reaching this determination, we have reviewed and considered the following materials and documents –
- (a) A Statement of Case (the **Statement**) prepared for us by the case management team – the Statement sets out an overview of the background to the Appeal, the applicable statutory and regulatory framework, the views of the Parties in respect of the Appeal, and the issues to be determined.
 - (b) The documents set out in Appendix 1 to the Statement (and also copied to the Parties), which included all of the submissions of the Parties.
- 1.9 The Parties were also afforded the opportunity to comment on –
- (a) a draft of the Statement, and
 - (b) a provisional determination, dated 22 May 2024 (the **Provisional Determination**).
- 1.10 The comments received from the Parties were taken into account by the case management team in preparing the Statement (as also reflected within the relevant sections of this determination).
- 1.11 In arriving at our final determination, we have taken into account the submissions received from NIW on the Provisional Determination. BD did not provide any submissions on the Provisional Determination.
- 1.12 Our determination is structured as follows –
- (a) Parties to the Appeal (at Section 2).
 - (b) Legal and regulatory framework (at Section 3).
 - (c) Factual background to the Appeal (at Section 4).

- (d) Views of BD (at Section 5).
- (e) Views of NIW (at Section 6).
- (f) Issues to be determined (at Section 7).
- (g) Our determination in relation to those issues (at Section 8).

1.13 This determination references a number of documents (including correspondence provided by the Parties). An index to these documents is attached at Appendix 1 and any document which was not included in the Bundle provided to the Parties with the Statement is enclosed with this determination.

2. SECTION TWO – THE PARTIES

BD

2.1 BD is a company involved in property development.

2.2 BD's registered office is at –

46 Hill Street

Belfast BT1 2LB

2.3 BD is currently developing land at Doagh Road, Ballyclare, County Antrim.

NIW

2.4 NIW is the licensed sewerage undertaker for Northern Ireland. It is both a government owned company and a non-departmental public body.

2.5 It holds an instrument of appointment (more commonly referred to as a licence) – issued under Article 13 of the Water Order (**A1**) – authorising its activities in this regard (the **NIW Licence**). The NIW Licence includes various conditions with which it must comply.

3. **SECTION THREE – APPLICABLE LEGAL AND REGULATORY FRAMEWORK**

3.1 The legal and regulatory framework applicable in determining the Appeal is summarised below.

The Water Order (A1)

3.2 Article 159 of the Water Order provides –

(1) Subject to the following provisions of this Article and to Articles 160, 162 and 206(3), a sewerage undertaker may at any time declare that—

(a) any sewer which is situated within its area or which serves the whole or any part of that area; or

(b) any lateral drain which communicates or is to communicate with a public sewer which—

*(i) is so situated or serves the whole or any part of that area;
and*

(ii) is vested in that undertaker; or

(ba) any sustainable drainage system which is so situated or which serves the whole or any part of that area; or

(c) any waste water treatment works which are so situated or which serve the whole or any part of that area,

shall, as from such date as may be specified in the declaration, become vested in the undertaker.

(2) The owner, or any of the owners, of any sewer, lateral drain, sustainable drainage system or waste water treatment works with respect to which a sewerage undertaker might make a declaration under this Article may make an application to

that undertaker requesting it to make a declaration under this Article with respect to the sewer, lateral drain, system or works.

(3) A declaration or application under this Article may be made with respect to a part only of a sewer.

(4) A sewerage undertaker which proposes to make a declaration under this Article—

(a) shall give notice of its proposal to the owner or owners of the sewer, lateral drain, system or works in question; and

(b) shall take no further action in the matter until two months have elapsed without an appeal against the proposal being lodged under Article 162 or, as the case may be, until any appeal so lodged has been determined.

(5) A sewerage undertaker, in deciding whether a declaration should be made under this Article, shall have regard to all the circumstances of the case and, in particular, to the following considerations, that is to say—

(a) whether the sewer, system or works in question is or are adapted to, or required for, any general system of sewerage or sewage disposal which the undertaker has provided, or proposes to provide, for the whole or any part of its area;

(b) whether the sewer, lateral drain or system is constructed under a road or under land reserved by a planning scheme for a street;

(c) the number of buildings which the sewer, lateral drain or system]8 is intended to serve, and whether, regard being had to the proximity of other buildings or the prospect of future development, it is likely to be required to serve additional buildings;

(d) the method of construction and state of repair of the sewer, lateral drain, system or works; and

(e) in a case where an owner objects, whether the making of the proposed declaration would be seriously detrimental to him.

(6) Any person who immediately before the making of a declaration under this Article was entitled to use the sewer, lateral drain or system in question shall be entitled to use it, or any sewer, lateral drain or system substituted for it, to the same extent as if the declaration had not been made.

(7) No declaration may be made under this Article in respect of—

(a) any sewer or works the construction of which was completed before 1st October 1973;

(b) any lateral drain the construction of which was completed before the transfer date.

3.3 Article 161 of the Water Order provides (relevantly) –

(1) Subject to paragraph (7) and Article 206(3), a sewerage undertaker may agree with—

(a) any person constructing or proposing to construct—

(i) any sewer;

(ii) any drain which is intended to communicate with a public sewer vested in that undertaker;

(iia) any sustainable drainage system; or

(iii) any waste water treatment works; or

(b) any person at whose expense the undertaker is, by virtue of an agreement under Article 221, to carry out work in connection with the construction of such a drain or sewer,

that, if the sewer, drain, sustainable drainage system or waste water treatment works is or are constructed in accordance with the terms of the agreement, the undertaker will, upon completion of the work, at some specified date or on the happening of some future event, declare the sewer or such part of the drain as constitutes the lateral drain or the system or the works (as the case may be) to be vested in that undertaker.

(2) A person mentioned in sub-paragraph (a) or (b) of paragraph (1) may make an application to a sewerage undertaker requesting the undertaker to make an agreement under this Article.

(3) An application under paragraph (2) shall be accompanied and supplemented by all such information as the undertaker may reasonably require; but, subject to paragraph (4) and without prejudice to the effect (if any) of any other contravention of the requirements of this Article in relation to such an application, a failure to provide information in pursuance of the obligation to supplement such an application shall not invalidate the application.

(4) Where—

(a) a person who has made an application to a sewerage undertaker under paragraph (2) has failed to comply with his obligation under this Article to supplement that application with information required by the undertaker; and

(b) that requirement was made by the undertaker at such a time before the end of the period within which the undertaker is required, by virtue of Article 162, to respond to the application as gave that person a reasonable opportunity to provide the required information within that period,

the undertaker may delay its response to the application until a reasonable time after the required information is provided.

(5) Any agreement made under this Article by a sewerage undertaker shall be enforceable against the undertaker by the owner or occupier for the time being of any premises served by the sewer, lateral drain, system or works to which it relates.

(6) Without limiting the terms which may be included in an agreement under this Article—

(a) such terms may include terms as to the provision of such security as the undertaker may reasonably require for the discharge of any obligations imposed on the other party to the agreement;

(b) such terms relating to a drain may include in particular—

(i) identification of that part of the drain which constitutes the lateral drain for the purposes of the agreement and, in particular, the point or points of connection between that part and the remainder of the drain;

(ii) a requirement for the installation of an inspection chamber, at the expense of the person with whom the sewerage undertaker is to make the agreement, at a place specified in the agreement;

(iii) provision, if the inspection chamber is constructed in accordance with the terms of the agreement, for the undertaker to declare that the inspection chamber be vested in the undertaker at the same time as the lateral drain; and

(iv) provision for the lateral drain, once vested in the undertaker, to communicate with a public sewer at the place or places specified in the agreement; and

(c) an agreement relating to a sewer or drain may include terms requiring the other party to construct one or more sustainable drainage systems

designed to receive surface water from any premises served by that sewer or drain.

(6A) In paragraph (6)(c) “the other party” means the person with whom the sewerage undertaker is to make the agreement.

...

3.4 Article 2(2) of the Water Order provides the following definitions –

“drain” means (subject to paragraph (3)) a drain used for the drainage of one building or of any buildings or yards appurtenant to buildings within the same curtilage;

...

“lateral drain” means—

(a) so much of that part of a drain which runs from the curtilage of a building (or buildings or yards within the same curtilage) to the sewer with which the drain communicates or is to communicate as is located or is to be located in, under or over a road; or

(b) (if different and the context so requires) the part of a drain identified in a declaration of vesting made under Article 159 or in an agreement made under Article 161;

...

“public sewer” means (subject to Article 163(2)) a sewer for the time being vested in a sewerage undertaker in its capacity as such, whether vested in that undertaker by virtue of a scheme under Article 270 or Schedule 1 or under Article 241 or otherwise, and “private sewer” shall be construed accordingly;

...

“sewer” includes (without prejudice to paragraph (3)) all sewers and drains (not being drains within the meaning given by this paragraph) which are used for the drainage of buildings and yards appurtenant to buildings;

...

“waste water treatment works” means any works, apparatus or plant used for the disposal of sewage;

3.5 Article 2(3) of the Water Order provides –

(3) In this Order—

(a) references to a pipe, including references to a main, a drain or a sewer, shall include references to a tunnel or conduit which serves or is to serve as the pipe in question and to any accessories for the pipe; and

(b) references to any waste water treatment works shall include references to the machinery and equipment of those works and any necessary pumping stations and outfall pipes;

and, accordingly, references to the laying of a pipe shall include references to the construction of such a tunnel or conduit, to the construction or installation of any such accessories and to the making of a connection between one pipe and another.

3.6 Article 162 of the Water Order provides (relevantly) –

...

(2) A person who has entered into or wants to enter into an agreement under Article 161 may appeal to the Authority about any matter concerning the agreement (including whether it is concluded, its terms and its operation).

...

(4) *On the hearing of an appeal under this Article, the Authority may—*

...

(b) in the case of an appeal under paragraph (2)—

(i) uphold the refusal of the undertaker to grant the application or to modify the terms offered; or

(ii) on behalf of the undertaker, refuse the application or enter into any agreement into which the undertaker might have entered on the application;

...

(6) Where the Authority makes an agreement under paragraph (4)(b) on behalf of a sewerage undertaker, it may do so on such terms as it considers reasonable or, as the case may be, on the terms offered by the undertaker subject to such modifications as the Authority considers appropriate for ensuring that the terms of the agreement are reasonable.

(7) The Authority, in deciding on an appeal under this Article whether any declaration or agreement should be made, shall have regard to all the circumstances of the case and, in particular, to the considerations specified in Article 159(5); and for the purposes of this paragraph, in its application in relation to an appeal under paragraph (2), sub-paragraphs (a) to (e) of Article 159(5) shall have effect with the necessary modifications.

Practice and procedure

- 3.7 The practice and procedure being followed by the Utility Regulator for the purposes of the determination of the Dispute is that set out in the Dispute Policy **(A2)** – supplemented as required in order to ensure good governance and best practice.
- 3.8 For completeness, the Decision-Makers should note that, in determining appeals under Article 162(2), the general duties of the Utility Regulator under Article 6 of the Water Order do not apply (see Article 6(1) and (8) of the Water Order).

4. SECTION FOUR – FACTUAL BACKGROUND

- 4.1 The following summary of the factual background is derived mainly from the relevant section of the Statement and we note that it is not in contention between the Parties. We take the following summary to be accurate and adopt it for the purposes of this determination.
- 4.2 In October 2021, Nuport Homes Ltd (**Nuport**) acquired from Ballyclare Developments Limited (**Ballyclare**) a site for 62 residential units at Doagh Road, Ballyclare. The development is known as 'Rectory Park' and is being developed by BD on Nuport's behalf. The BD development forms part of a larger tranche of land with planning approval for 1200 residential units. It is intended that the developments will run along a new spine road — a new bypass for Ballyclare – and that the developments will adjoin the spine road.²
- 4.3 The Decision-Makers are directed to the Ordinance Survey map of the overall site provided at p. 3 of the bundle of documents accompanying NIW's response to the Application (the **NIW Bundle (B4)**). BD's development is adjacent to that of Ballyclare, coloured red on the map. Ballyclare's development is covered by an existing Article 161 agreement (NWA-0414) and it is proposed that the sewers in BD's development drain into those of Ballyclare.
- 4.4 Ballyclare has also submitted an application for an Article 161 agreement in relation to a development upstream of the area coloured red on the map, which has yet to be determined by NIW.³
- 4.5 Downstream of Ballyclare's development lie three developments belonging to Ramore Investments Limited (**Ramore**). These are being developed by Lotus Homes (UK) Ltd (**Lotus**) which, together with Ramore, is a subsidiary of Lotus Homes Holdings Limited Group.⁴ Working downstream, the first is coloured green on the map and subject to Article 161

² The Application (**B1**), p. 1, the Response (**B84**), P. 8.

³ NIW's response to the draft Statement of Case (the **NIW SOC Response: (B135)**), p. 14.

⁴ The Response (**B84**), p. 14.

agreement NWA-0420. The second is coloured blue and subject to Article 161 agreement NWA-0382 and the third is coloured orange and subject to Article 161 agreement NWA-0413.

- 4.6 The final stage before the site meets the Templepatrick Road is coloured pink on the map. It is owned by Six Mile Water Developments Limited (**Six Mile Water**) and is subject to a requisition agreement with NIW (NWA-0296).
- 4.7 Nuport has employed BD to construct the residential dwellings on its development and to obtain all statutory approvals including the Road Bond and Article 161 in respect of sewage works.⁵
- 4.8 BD in turn retained Sheehy Consulting Ltd (**Sheehy**) as its consultant for water and sewage works on the development.⁶
- 4.9 On 6 November 2018, Ballyclare lodged a reserved matters planning application for the development with the Department for Infrastructure (the **Dfi**). The planning application sought permission for a major urban extension to include a residential neighbourhood, the southern section of Ballyclare Relief Road, a local centre, a riverside park and other open spaces, children's play areas and associated works at lands extending from north of Doagh Road to the Templepatrick Road, Ballyclare, immediately west of the cemetery, Huntingdale and Dennisons Industrial Estate.⁷
- 4.10 On 22 May 2019, the Dfi granted reserved matters planning approval for the proposal. The planning approval was subject to 22 conditions with no conditions pertaining to NIW or to sewerage requirements. NIW was consulted as part of the reserved matters application and provided a response on 19 December 2018. No site-specific conditions were requested by NIW in this response⁸ although it was based on the proposal that sewerage would be treated

⁵ The Application (**B1**), p. 1.

⁶ The Application (**B1**), p. 2.

⁷ The Application (**B1**), p. 2.

⁸ The Application (**B1**), p. 2.

at Templepatrick Waste Water Treatment Works as no other treatment works was proposed in the application for planning permission.⁹

- 4.11 During the negotiations between Ballyclare and BD for the sale of the lands, RPS, the technical consultants for the vendors of the development provided a summary of NIW's position on 27 July 2021. The summary document stated that RPS had been working *"in collaboration with NI Water closely on the works along the link roads and have agreements in principle for the process and designs"*.¹⁰
- 4.12 On 25 May 2022, NIW entered into Article 161 agreement NWA-0414 with Ballyclare in respect of the area shaded red in the plan encompassing the lands adjacent to and West of the subject site. This authorised sewer is the proposed connection point for BD's site.¹¹
- 4.13 On the same date NIW also entered into an Article 161 agreement NWA-0413 with Lotus and Ramore in respect of the area shaded orange.¹²
- 4.14 Agreement NWA-0382 was concluded on 24 November 2021 in respect of the area shaded blue.¹³
- 4.15 By email dated 30 May 2022, Sheehy lodged on behalf of BD an application for an Article 161 agreement in respect of BD's development. The application was acknowledged and validated by NIW by email dated 30 May 2022.¹⁴
- 4.16 By email dated 31 May 2022, BD confirmed that it had paid the fee for the application.
- 4.17 The design for the development proposed that sewerage from it would discharge into Ballyclare's sewers in the area shaded red in the plan¹⁵ and then flow through the green, blue and orange areas owned by Ramore, and the area in pink owned by Six Mile Water, before

⁹ The Response (**B84**), p. 8.

¹⁰ The Application (**B1**), p. 2.

¹¹ The Application (**B1**), p. 6, the Response (**B84**), p. 9

¹² The Response (**B84**), p. 9, NIW Bundle (**B85**), p. 3

¹³ NIW SOC Response (**B135**), p. 15.

¹⁴ The Application (**B1**), p. 2, the Response (**B84**), p. 8.

¹⁵ The NIW Bundle (**B85**), p. 3

entering NIW's network. It was assumed that all of these private sewers would be vested by NIW at some future date.¹⁶

- 4.18 Initial feedback on the design was provided by NIW on 24 August 2022. This included the following¹⁷ –

"Please note a section of the receiving infrastructure has not yet been authorised by NIW. The Agreement was previously emailed but not returned. We have requested this Agreement to be returned asap. This Development can only be approved once all receiving infrastructure has been subsequently authorised by NIW. In the interim we will continue with this assessment on the assumption that outstanding Agreements will be authorised in due course. The Developer has confirmed this will be dealt with shortly."

- 4.19 By email dated 14 November 2022 (**B6**), NIW issued a blank Article 161 agreement (NWA-0436, the **BD Agreement**¹⁸) to BD for signing and bonding. That email stated¹⁹ –

"Third party land signatures will be required on Page 3 for the receiving foul infrastructure including the Pumping Station. We refer to downstream Agreements in the name of Ballyclare Developments Limited & Lotus Homes (UK) Ltd.

This Agreement can only be countersigned by NIW following authorisation of the downstream Phase NWA-0420 (Phase 3).

Final Adoption of this Development Drainage can only be considered following full and final Adoption of the receiving infrastructure. We refer to sewers approved under NWA-0414, NWA-0420, NWA-0382 & NWA-0413."

¹⁶ The Response (**B84**), p. 9.

¹⁷ The Application (**B1**), p. 3.

¹⁸ The BD Agreement (**B27**).

¹⁹ The Application (**B1**), p. 4.

4.20 The email also requested maps to be attached to the BD Agreement and further stated²⁰ –

"Please note the following with respect to this Approval.

- *Third party signatures will be required on Page 3 for the receiving foul infrastructure including the Pumping Station. We refer to downstream Agreements in the name of Ballyclare Developments Limited & Lotus Homes (UK) Ltd.*
- *This Agreement can only be countersigned by NIW following authorization of the downstream Phase NWA-0420 (Phase 3).*
- *Final adoption of this Development Drainage can only be considered following full and final Adoption of the receiving infrastructure. We refer to sewers approved under NWA- 0414, NWA-0420, NWA-0382 & NWA-0413."*

4.21 BD signed, bonded and returned the BD Agreement to NIW on 10 January 2023 along with a cheque for a £6,487.00 for the inspection fees.²¹

4.22 BD has had in place a £104,700.00 bond with HCC International since 2 December 2022.²²

4.23 Sheehy emailed NIW's Developer Services on 20 January 2023 querying if the BD Agreement had been countersigned by NIW and, if so, requesting a copy of the signed agreement.²³

4.24 NIW responded by email on 20 January 2023 stating²⁴ –

"The issue here is that this phase will be connecting in to phases owned by other developers which aren't yet adopted, and as such we need them to provide the developer for this phase with written authorisation to discharge through what will be

²⁰ The Application (B1), p. 5.

²¹ The Application (B1), p. 3.

²² The Application (B1), p. 3.

²³ The Application (B1), p. 4.

²⁴ The Application (B1), p. 4.

private sewers until such times as they are adopted. Normally this isn't an issue as all phases in a development are normally under the same developer, but in this case, there are multiple phases owned by different developers.

...

I'm going to get the agreement returned today and have an email from [REDACTED] to respond to as well (haven't had a chance to look at it yet) and will be advising him directly. Unfortunately, this wasn't something I was aware of when the agreement was handed to me."

- 4.25 Further to the issuing of the BD Agreement on 14 November 2022, Sheehy had various informal conversations with NIW. During those conversations it was confirmed that NIW had issued four other Article 161 agreements to developers for bonding with the reference numbers listed in the email of 14 November 2022.
- 4.26 Of these four agreements, at the point of the Application, three had been bonded and subsequently countersigned by NIW, as referred to above, and the last (reference NWA-0420) remained outstanding.²⁵
- 4.27 By email dated 20 January 2023, NIW advised BD that there had been no change in its approach, and that it would refrain from providing the signed BD Agreement until it had obtained legal advice.²⁶
- 4.28 By the point of the Application, further correspondence between the Parties had not resolved the matter.²⁷

²⁵ The Application (B1), p. 5.

²⁶ The Application (B1), p. 8.

²⁷ The Application (B1), p. 8.

4.29 By email dated 29 January 2024, NIW advised the Utility Regulator that it had received a fully executed Article 161 agreement in respect of NWA-0420. However, in its email it states that the following issues remained before the BD Agreement could be concluded²⁸ -

- (a) *"The Applicant to adduce evidence that they have the legal right to discharge sewage from their site into all private sewers downstream of the site. In accordance with the standard form Article 161 Agreement, an Applicant must have these legal rights and easements in place before entering into the Article 161 Agreement (see clause 3.3 of the Article 161 Agreement).*
- (b) *The Applicant to adduce evidence that they have the legal right to commission the sewers (i.e. connect properties and commence discharge into the sewer) prior to adoption as is required by clause s8.2 of the Article 161 Agreement.*
- (c) *In the event of a default by the Applicant NIW must be able to exercise the legal rights set out at 1 and 2."*

4.30 On 6 February 2024, NIW issued a revised version of the BD Agreement to BD (the **Revised Agreement (B119)**). The Revised Agreement contained a series of amendments (shown in red below) reflecting NIW's requirement for consents to be provided from owners of downstream sewers as well as owners of sewers on land immediately adjacent to the site owned by BD –

*"3 "The Adjoining Owner(s)" defined as the sole beneficiary or joint freehold owner of the land located adjacent to **or downstream of the Site containing the development and [specifically where the connecting pipe will be laid] [and/or] on which there are intervening private sewers which link the Works to the public sewerage system which are required to receive discharge from the Works prior to Vesting.** (Needed if the Works are being constructed within the Site but outside the Green Land)" [p. 2]*

²⁸ Email from NIW to Utility Regulator (**B91**).

"SIGNED for and on behalf of The Adjoining Owner

I hereby give consent to Beechview Developments Ltd (developer) entering my land to lay m of sewer and/or consent to Beechview Developments Ltd (developer) and the Undertaker to have free and uninterrupted passage and running of services including sewerage and water through the pipes which now are or at any time hereafter be in under or passing through the land.

(along the route shown marked brown on the attached deed map/ land folio map to serve the aforementioned development." [p. 3]

[In the definitions section]

"Adjoining Land" Land located adjacent to or downstream of the Site on which the connecting pipe will be laid and/or on which there are intervening private sewers which link the Works to the public sewerage system which are required to receive discharge from the Works prior to Vesting

"Adjoining / Third Party Land Owner" Owner of the Land where it is proposed to lay drainage, to be offered for adoption, that is not in the ownership of the Developer, or the owner of the land downstream of the Site containing the development on which there are intervening private sewers which link the Works to the public sewerage system which are required to receive discharge from the Works prior to Vesting" [p. 8]

"3.2 If any of the Works are to be constructed within the site but outside the Green Land then the Adjoining Owner(s) shall join into this Agreement solely for the purposes of acknowledging and consenting to the arrangements herein expressed between the Developer and the Underwriter and to permit discharges into any pipes on Adjoining Land. For the avoidance of doubt the Adjoining Owner(s) shall have no liability under the provisions of this Agreement in relation to the construction and future maintenance or repair of the Works". [p. 12]

- 4.31 On 15 February 2024, the Utility Regulator asked the Parties a series of questions to clarify their positions.²⁹ This included asking BD whether, in light of NIW's confirmation that the lack of a fully executed agreement NWA-0420 was no longer a reason for not entering into the BD Agreement, BD wished to narrow the issues in its appeal.
- 4.32 The letter from the Utility Regulator stated that where BD did not wish to narrow the issues, the Decision-Makers may themselves decline to make a determination on the NWA-0420 issue as it is no longer a reason for NIW's refusal to enter into the BD Agreement.
- 4.33 Responses were received from the Parties on 26 February 2024. In its response, BD declined the invitation to narrow the issues in its appeal.

²⁹ Letter from the Utility Regulator to the Parties (**B111**).

5. SECTION FIVE – VIEWS OF BD

5.1 BD's views are set out in –

- (a) the Application **(B1)**,
- (b) its reply, dated 9 February 2024 (the **Reply to the Response: (B101)**) to NIW's submissions in respect of the Application, dated 17 January 2024 (the **Response: (B84)**),
- (c) its response dated 26 February 2024 (the **BD Clarifications: (B116)**) to the further questions asked by the Utility Regulator on 15 February 2024, and
- (d) its response to the draft Statement of Case (the **BD SOC Response: (B134)**).

5.2 BD did not provide any submissions on the Provisional Determination.

5.3 We have read the above documents in full and have had full regard to all of these submissions. In doing so, we have borne in mind that our role is to determine the issues set out in Section Seven of this document.

5.4 The summary below is derived mainly from the relevant section of the Statement. We adopt it as accurate for the purposes of this determination.

The current position with BD's development

5.5 BD states that its development is one part of a larger residential development scheme of over 1200 houses on the new Jubilee Road link road in Ballyclare County Antrim. This is a major strategic development for Ballyclare and the East Antrim area with consequent potential for economic development and benefits to the region.³⁰

³⁰ The Reply to the Response, Conclusion for the Applicant **(B103)**, p. 1.

- 5.6 BD's development, to be covered by the BD Agreement, is for 49 units. Drainage has been constructed for 15 of these.³¹ Some of these units are occupied and discharge to the strategic infrastructure in the spine road.³² BD confirms that the sewers for its development remain under construction.³³
- 5.7 In response to NIW's statement that the Utility Regulator needs to satisfy itself that BD's development is still in the course of construction or proposed to be constructed and hence capable of being covered by an Article 161 agreement, BD states that NIW frequently enters into such agreements where it is fully aware that infrastructure has already been constructed or is in the course of construction. It provides an example of an Article 161 agreement in respect of sewers which it states NIW was aware had been constructed for some time.³⁴
- 5.8 In the BD SOC Response, BD states that it is surprised that the Utility Regulator considers the issue of whether or not its sewers have or have not been constructed remains to be determined. It refers back to the evidence previously submitted on this point. It states that the failings of NIW that it has described in the Application merit consideration by the Utility Regulator and that the issue of whether or not the sewers have been constructed should not be a barrier to doing so.³⁵

The sequencing of Article 161 agreements in the relevant multi-developer site

- 5.9 BD states that legislation in Northern Ireland requires all sewers to be offered to NIW for adoption under Article 161 of the Water Order in order to connect a sewer to a public sewer.³⁶
- 5.10 In response to the Utility Regulator's query as to whether it wished to narrow the grounds of its appeal, BD stated that, although the absence of agreement NWA-0420 had now been removed as a reason for NIW not to enter into an Article 161 agreement with BD, this was

³¹ The Reply to the Response (**B101**), p. 2.

³² The BD Clarifications (**B117**), p. 2.

³³ Email from BD to the Utility Regulator, 22 December 2023 (**B67**).

³⁴ The Reply to the Response (**B101**), pp. 42 and 46 and Appendix F (**B106**).

³⁵ The BD SOC Response (**B134**).

³⁶ The Application (**B1**), p. 3.

only confirmed on 29 January 2024, long after the appeal had been lodged. At that late stage, BD stated that it had already spent considerable time and effort preparing a response to NIW's original submission to the Utility Regulator.³⁷

- 5.11 NIW countersigned Article 161 agreement NWA-0414 on 22 May 2022 in respect of the lands adjacent to, and west of, the BD's site. This sewer is the proposed connection point for BD's site. It conveys sewage in a southerly direction and discharges to the pumping station. The downstream sewage infrastructure and pumping station are in place.³⁸
- 5.12 Downstream of BD's site, a separate residential development is connecting to the foul network which flows to the pumping station. NIW's position is that, although a separate development can utilise this network, BD cannot because a section of it is not covered by an Article 161 agreement. However, this situation has arisen due to NIW's actions.³⁹
- 5.13 BD also contends that there would never have been a "*missing link*" in the chain of Article 161 agreements at the site had NIW managed the process properly.⁴⁰
- 5.14 BD submits that the Article 161 agreements for the site should have been entered into by NIW consecutively to ensure connectivity to the public sewer via authorised drainage networks was maintained at all times. Unfortunately, NIW did not do this and, as a result of this failure, the sale of houses on BD's development has been substantially frustrated.⁴¹
- 5.15 BD has acted in good faith and in reliance on the original Article 161 Agreement that was issued to it. The fact that a portion of the downstream sewer network remains unauthorised is a situation not of BD's making or within its control.⁴²

³⁷ The BD Clarifications (**B117**), p. 1.

³⁸ The Application (**B1**), p. 7. NIW states that the pumping station, although at an advanced stage, is not yet at an adoptable standard (NIW SOC Response (**B135**), p. 25).

³⁹ The Application (**B1**), p. 7.

⁴⁰ The BD Clarifications (**B117**), p. 1.

⁴¹ The Application (**B1**), p. 6.

⁴² The Application (**B1**), p. 9.

5.16 BD submits that NIW will permit, and has in the past permitted, an Article 161 agreement to be entered into in respect of a site where that site is connecting into a sewer which is itself subject to an Article 161 agreement.⁴³

5.17 BD states that this is confirmed by ██████████ of NIW in an email dated 20 January 2023 in which he stated⁴⁴ –

"This site is further complicated by the fact that there aren't Article 161 agreements in place for all of the downstream sewerage and we can't sign off an agreement for an section of sewer which is upstream of a section which is not adopted or covered by an Article 161 agreement... "

5.18 BD provides examples of Article 161 agreements which it states NIW has entered into where the receiving sewer is either adopted or covered by an Article 161 agreement⁴⁵ –

(a) NWC-0358: Atlantic Court, Coleraine

(b) SEB-4219 & SEB-4297: Blackrock, Mallusk

5.19 BD contends that NIW should have entered into the BD Agreement as the proposed point of connection was to a sewer that is itself covered by an Article 161 agreement.⁴⁶

5.20 BD states that it had a reasonable and legitimate expectation that, as in the past, NIW would enter into an Article 161 agreement in respect of its development since it connects to bonded infrastructure and BD is not proposing to construct any sewers in third party lands.

5.21 BD submits that the legislation does not state that the developer is expected to check downstream to ensure all infrastructure is subject to an Article 161 agreement. In the future a developer could face uncertainty as to how far downstream should be checked before any

⁴³ The Application (**B1**), p. 7.

⁴⁴ The Application (**B1**), p. 7.

⁴⁵ The Application (**B1**), p. 7.

⁴⁶ The Application (**B1**), p. 8.

development could proceed. It is the responsibility of NIW to manage a multi-phased and multi-developer sites so that "*missing links*" in the infrastructure do not occur.⁴⁷

5.22 BD states that, through Sheehy, it attempted to engage with NIW to find an appropriate temporary solution which would allow NIW to enter into an agreement and thus enable the sale of the houses on BD's development. The temporary solution would have involved BD constructing a temporary holding tank for sewage which was emptied on a regular basis at BD's expense until such times as the downstream network became subject to an Article 161 agreement. That temporary solution would not involve the consent of any third parties.⁴⁸

5.23 BD states that NIW had engaged extensively in relation to BD's development by –

- (a) validating BD's Article 161 application,
- (b) assessing that application,
- (c) issuing BD Agreement,
- (d) accepting the signed and bonded BD Agreement from BD for counter signing,
- (e) accepting the payment for the inspection fees,
- (f) accepting the Watermains Installation Request Form,
- (g) laying watermain into the site (BD states that in the past NIW has refused to issue watermain approvals until an Article 161 agreement is in place⁴⁹),
- (h) accepting the application for 15 small diameter water connections,
- (i) accepting payment for eight small diameter water connections, and

⁴⁷ The Reply to the Response, Conclusion for the Applicant (**B103**), p. 1.

⁴⁸ The Application (**B1**), p. 8.

⁴⁹ The Reply to the Response (**B101**), p. 32.

(j) installing eight small diameter water connections.

5.24 BD states that all of the above implied that whatever issues NIW had with the development were expected to be sorted out imminently to allow the BD Agreement to be counter-signed.⁵⁰

5.25 NIW's email of 24 August 2022 stated⁵¹ –

"Please note a section of the receiving infrastructure has not yet been authorised by NIW. The Agreement was previously emailed but not returned. We have requested this Agreement to be returned asap. This Development can only be approved once all receiving infrastructure has been subsequently authorised by NIW. In the interim we will continue with this assessment on the assumption that outstanding Agreements will be authorised in due course. The Developer has confirmed this will be dealt with shortly."

5.26 BD states that the email acknowledges the following points⁵² –

(a) NIW was in negotiation with the other developer(s) and was proactively engaging with them to get the outstanding Article 161 agreement returned. This suggests that it knew that if the Article 161 agreement remained outstanding it would cause a problem.

(b) NIW would have been happy to enter into an Article 161 agreement with BD had all the receiving infrastructure been covered by Article 161 agreements. This confirms that NIW own actions led to the impasse.

5.27 NIW's email of 14 November 2022, (by which it issued the BD Agreement to BD for signing and bonding) stated⁵³ –

⁵⁰ The Application **(B1)**, p. 8.

⁵¹ The Application **(B1)**, p. 3.

⁵² The Application **(B1)**, p. 4.

⁵³ The Application **(B1)**, p. 4.

- *"Third party land signatures will be required on Page 3 for the receiving foul infrastructure including the Pumping Station. We refer to downstream Agreements in the name of Ballyclare Developments Limited & Lotus Homes (UK) Ltd.*
- *This Agreement can only be countersigned by NIW following authorisation of the downstream Phase NWA-0420 (Phase 3).*
- *Final Adoption of this Development Drainage can only be considered following full and final Adoption of the receiving infrastructure. We refer to sewers approved under NWA-0414, NWA-0420, NWA-0382 & NWA-0413."*

5.28 In relation to that email BD addresses each point in turn as follows⁵⁴ –

- (a) Third party signatures are not required under the terms of the BD Agreement. NIW's definition of Adjoining / Third Party Land Owner is included on page 7 of the BD Agreement which states –

"Owner of the land where it is proposed to lay drainage, to be offered for adoption, that is not in the ownership of the Developer."

In this instance, BD is not proposing to lay any drainage in or through lands that are not in its ownership, therefore signatures not required on page 3 of the BD Agreement.

- (b) The reason that agreement NWA-0420 had not been entered into at that point was the fault of NIW.

⁵⁴ The Application (B1), p. 4.

- (c) The requirement for final adoption of sewers in BD's development to follow adoption of receiving infrastructure did not prevent NI Water from countersigning the BD Agreement.
- 5.29 BD states that the email from NIW on 20 January 2023 makes reference to downstream sewers not being yet "*adopted*" which is contrary to its email dated 14 November 2022 which says that the BD Agreement can only be entered into once downstream sewers are "*authorised*" (i.e. covered by an Article 161 agreement).⁵⁵
- 5.30 BD submits that NIW should have issued and entered into the Article 161 agreements for the site consecutively to ensure connectivity to the public sewer via authorised drainage networks was maintained at all times. Unfortunately, NIW did not do so and, as a result of this failure, the sale of houses on BD's development has been substantially frustrated.⁵⁶
- 5.31 By contrast, Lotus (which owns the development to which Article 161 agreement NWA-0420 relates) has been able to progress with its development and build, sell and occupy houses in the knowledge that developers upstream cannot do so because of its refusal to enter into the agreement.⁵⁷
- 5.32 BD states that the sewers for the Lotus development are not "*under construction*" as the section of sewers is located under a section of the relief road which has been completed and is operational.⁵⁸
- 5.33 The sewers owned by Ballyclare on the land lands adjacent to and west of BD's development (covered by the Article 161 agreement NWA-0414) convey sewage in a southerly direction and discharge to the pumping station. BD states that this means that downstream of BD's development a separate residential development is connecting to the network which flows to the pumping station. NIW's position was that, although Ballyclare's development can utilise

⁵⁵ The Application (**B1**), p. 5.

⁵⁶ The Application (**B1**), p. 6.

⁵⁷ The Reply to the Response (**B101**), p. 24.

⁵⁸ The Reply to the Response (**B101**), p. 2.

this network, BD's cannot because a section of it was not covered by an Article 161 agreement. However, this situation arose due to NIW's actions.⁵⁹

- 5.34 BD also refers to email correspondence between ██████████ of NIW and ██████████ of the Dfl.⁶⁰
- 5.35 BD states that, in that email, NIW confirmed that the drainage being installed in the relief road was "strategic" drainage and that NIW had made a commitment to adopt this drainage in advance of any connections from new dwellings. BD question why this had not happened.⁶¹
- 5.36 Following NIW's email, ██████████ issued an internal email on 6 January 2021 to ██████████ ██████████ advising her that it was OK to progress with issuing road bonds as NIW had confirmed that the Article 161 agreements would all be entered into before any housing was complete (i.e. connected to the network).⁶²
- 5.37 BD states that NIW is quite clearly unable to deliver on this commitment, as evidenced by the fact that agreement NWA-0420 had not been entered into at the point of the Reply to the Response.⁶³
- 5.38 BD states that NIW has powers to vest private sewers not subject to an Article 161 agreement and had not used that power to rectify the position in relation to the commitment it had made to the Dfl.⁶⁴
- 5.39 NIW was aware that this "missing link" had existed since at least 30 May 2022 when BD made the application for an Article 161 agreement. From at least that date NIW would have been aware that this missing link would ultimately result in a "ransom scenario". The responsibility

⁵⁹ The Application (B1), p. 7; See also Reply to the Response (B101), pp. 3, 9 – 10.

⁶⁰ The BD Clarifications (B117), p. 1. The email can be found at Appendix A to the Reply to the Response (B104), p. 2.

⁶¹ The Reply to the Response (B101), p. 2.

⁶² The Reply to the Response (B101), p. 2.

⁶³ The Reply to the Response (B101), p. 2.

⁶⁴ The Reply to the Response (B101), p. 3.

was on NIW to commence the vesting process as quickly as possible knowing the length of time it took to complete.⁶⁵

NIW's interpretation of the BD Agreement

- 5.40 BD does not agree that the third-party signatures requested by NIW are required since BD is connecting to a sewer which is itself subject to an Article 161 agreement. It points out that, had NIW bonded the downstream network all at once, there would not be a need for any third-party signatures as an Article 161 agreement confers rights to connect.⁶⁶
- 5.41 In response to NIW's reference to clause 3.3 of the BD Agreement, BD states that this clause relates to rights to enter lands outside of the "Green Land" as shown in drawings C-01E Drainage Layout and L-03A Green Land Map included in Appendix D to the Application⁶⁷ (i.e. land not owned by BD) for construction of sewers. However, BD is not intending to carry out work on land belonging to any other developer.⁶⁸
- 5.42 Likewise, NIW refers to clause 3.3, when read alongside clauses S8 and S12.4, as entitling NIW to request evidence of rights to discharge into downstream private sewers. BD states that those clauses relate to construction and subsequent adoption or vesting of sewers and are therefore not relevant. BD repeats that had the downstream sewers been covered by Article 161 agreements then permission to connect would be available without the need for third-party agreements.⁶⁹
- 5.43 BD states that NIW's reference to clause S8.2 of the BD Agreement requiring evidence that it has the legal right to commission the sewers (i.e. connect properties and commence discharge into the sewer) prior to adoption is irrelevant to the appeal since it deals specifically with Preliminary Adoption and not the issuing of a bonded Article 161 agreement.⁷⁰

⁶⁵ The Reply to the Response (**B101**), pp. 4 and 26.

⁶⁶ The Reply to the Response (**B101**), p. 5.

⁶⁷ The Reply to the Response, Appendix D (**B104**), pp. 41 – 42.

⁶⁸ The Reply to the Response (**B101**), pp. 5, 18 and 30.

⁶⁹ The Reply to the Response (**B101**), pp. 19, 30 and 32.

⁷⁰ The Reply to the Response (**B101**), pp. 7 and 30.

5.44 BD states that nowhere in the BD Agreement does it reference a signature being required for “consent”. The "Adjoining Owner" section of the BD Agreement is for granting permission to enter lands not owned by the developer to construct sewers as shown in the excerpt below⁷¹

SIGNED for and on behalf of. ² The Adjoining Owner

I hereby give consent to _____ (developer)
entering my land to lay _____ m of sewer
(along the route shown marked brown on the attached deed map/ land folio map *(delete as appropriate)*
to serve the aforementioned development.

In the event that I dispose of this land at any time in the future I will notify the relevant parties of the existence of this pipe. I shall also pass a copy of the authorised Article 161 Agreement to my Solicitor.

I confirm I am an adjoining sole/joint land owner (with _____) *(delete where not applicable)*

I attach a deed map/ land folio map *(delete as appropriate)* for the area in question.

Upon Final adoption of the said sewer I hereby consent to NI Water as the relevant Undertaker entering my land for repair and maintenance purposes of the sewer serving this development.

Signature (land owner 1) _____

Print Name _____

Phone number/s mobile _____

 land line _____

Position in company (where applicable) _____

Date _____

5.45 BD states that it is NIW's responsibility to manage how multi-phased and multi-developer sites are dealt with and in previous instances it did not require adjacent landowners to sign Article 161 agreements.⁷²

⁷¹ The Reply to the Response (B101), pp. 5 – 6.

⁷² The Reply to the Response (B101), p. 29, and Appendix E (B105).

- 5.46 It gives the example of Article 161 agreement NWC-0370 and notes that this agreement has been signed by an adjoining owner as it was necessary to enter its land to construct sewers to serve the development.⁷³
- 5.47 BD also notes that agreement NWC-0370 has not been signed by the owner of the downstream private bonded sewers. It states that this demonstrates NIW's policy in relation to downstream sewers and confirms that the issue with the BD Agreement is not the sewers flowing through private lands, but that those sewers are not subject to an Article 161 agreement.⁷⁴
- 5.48 BD asks why Article 161 agreement NWA-0414 with Ballyclare was entered into at a point when agreement NWA-0420 had not been concluded and Ballyclare's sewer was therefore discharging into a private sewer not covered by an Article 161 agreement.⁷⁵
- 5.49 NIW states that agreement NWA-0414 was signed by Ramore as owner of the adjacent and downstream lands providing consent to Ballyclare connecting to and discharging into Ramore's privately held sewerage infrastructure. In response, BD states that it does not accept that such a signature was needed as Ballyclare was not proposing to lay sewers in any land outside its ownership. It also states that when Ballyclare sold the Rectory Park site to BD the rights that Ballyclare had transferred to BD by default. The Deed of Transfer dated 8 October 2021 from Ballyclare to Nuport specifically provides for the full and free right to the passage and running of services through the conducting media which specifically includes sewers, drains and conduits.⁷⁶

⁷³ The Reply to the Response **(B101)**, p. 6 and Appendix B **(B104)**.

⁷⁴ The Reply to the Response **(B101)**, p. 6 and Appendix B **(B104)**.

⁷⁵ The Reply to the Response **(B101)**, p. 35.

⁷⁶ The Reply to the Response **(B101)**, pp. 22 – 23, 32, 37 and 39, and Appendix G **(B107)**.

The rights required by NIW

- 5.50 BD states that there is no reference in Article 161(6) of the Water Order to adjoining landowners being made party to an Article 161 agreement.⁷⁷
- 5.51 BD agrees that Article 161(3) of the Water Order expressly permits NIW to request such information as it reasonably requires as part of an application for an agreement. However, it states that it is unreasonable to put the responsibility for obtaining third-party permissions or signatures on BD in this case as had NIW followed its own procedures the need for third party signatures would not be required.⁷⁸
- 5.52 In response to NIW's statement that it had made clear throughout the application process that it would not enter into the BD Agreement until BD adduced evidence that it had the right to discharge into all receiving sewers prior to adoption, BD states that no such evidence was ever requested.⁷⁹
- 5.53 BD submits that NIW's requirement that all downstream receiving landowners should be party to the BD Agreement is not required as BD has the benefit of reserved rights in the Deed of Transfer from Ballyclare to Nuport (on whose behalf BD acts), dated 8 October 2021.⁸⁰
- 5.54 That transfer provides the following in paragraph 4 of Schedule One which relates to rights granted⁸¹ –

"The full and free right (in common with all other persons having like rights) to the passage and running of the Services through the Conducting Media."

⁷⁷ The Reply to the Response (B101), p. 11.

⁷⁸ The Reply to the Response (B101), p. 13.

⁷⁹ The Reply to the Response (B101), p. 7.

⁸⁰ The Reply to the Response, Introduction (B100), p. 1 and Appendix G (B107).

⁸¹ The Reply to the Response (B101), p. 23, Introduction (B100), p. 1, and Appendix G (B107), p. 6.

5.55 In addition, the Deed of Transfer dated 14 October 2019 from Ballyclare to Ramore provides as follows in the reservations at paragraph 1 of Schedule Two⁸² –

“The free and uninterrupted passage and running of Services from and to the Retained Lands or any part thereof through the Pipes which now are or may at any time hereafter during the Perpetuity Period be in under or passing through the Land subject to the Pipes to which the connection is to be made having sufficient capacity to serve the development on the Transferee’s land.”

5.56 BD states that the proposal by NIW that all downstream receiving landowners be party to the BD Agreement is superfluous and not required as the reserved rights described above grant BD the right to discharge through the infrastructure running along the Jubilee Road downstream of its development.⁸³

5.57 BD states that NIW can exercise these rights itself as the rights attach to the lands and not the purchaser.⁸⁴

The Revised Agreement

5.58 As the legal agreements that are in place would allow NIW to exercise the same rights, BD does not agree that signatures from third-parties are required to give NIW such rights. The wording of the BD Agreement does not require any third-party signatures to grant rights. BD states that NIW obviously agrees as it issued the Revised Agreement specifically requiring signatures from third parties where a developer is connecting to existing sewers.⁸⁵

5.59 BD states that it is imperative that the Utility Regulator considers the BD Agreement in its determination of the Appeal. It submits that the Revised Agreement cannot be considered as a remedy to the impasse. It is unprecedented in the long experience of the BD that conditions

⁸² The Reply to the Response (B101), Introduction (B100), p. 1 and Appendix G (B107), p. 17.

⁸³ The Reply to the Response, Introduction (B100), p. 1, and the BD Clarifications (B117), p. 2.

⁸⁴ The BD Clarifications (B117), p. 2.

⁸⁵ The BD Clarifications (B117), p. 2.

be “*retro-fitted*” thereby imposing a set of new obligations not within the control of an applicant for an Article 161 agreement.⁸⁶

- 5.60 BD states that the Revised Agreement seeks to redefine what an “Adjoining Landowner” is and what they are consenting to in signing an Article 161 agreement. Whilst BD accepts that it is within NIW’s gift to do this, it states that NIW cannot try to apply such changes whilst the BD Agreement is subject to an appeal to the Utility Regulator.⁸⁷
- 5.61 BD also states that the fact that NIW has sought external, independent legal advice and concluded that the definition of an “Adjoining Landowner” required amendment, only reinforces BD’s argument that third-party signatures were not required in the BD Agreement.⁸⁸
- 5.62 BD argues that the Revised Agreement puts the onus on BD to acquire signatures from “Adjoining / Third Party Land Owners” for permission to utilise their sewers. This definition is not contained in the BD Agreement.⁸⁹
- 5.63 NIW contends that signatures from “Adjoining / Third Party Land Owners” were required on the BD Agreement. However, BD asks why, if that was the case, NIW considered it necessary to make the amendments in the Revised Agreement.⁹⁰
- 5.64 BD suggests that it is obvious that NIW considers that the text of the BD Agreement does not require signatures from “Adjoining / Third Party Land Owners” to give permission to utilise their sewers. It states that this further reinforces the key point of the Appeal – that NIW acted unfairly in refusing to enter into the BD Agreement and did not act in accordance with the terms of that agreement itself.⁹¹

⁸⁶ The BD Clarifications (**B117**), p. 2.

⁸⁷ The Reply to the Response, Addendum (**B102**), p. 1.

⁸⁸ The Reply to the Response, Addendum (**B102**), p. 1.

⁸⁹ The Reply to the Response, Addendum (**B102**), p. 3.

⁹⁰ The Reply to the Response, Addendum (**B102**), p. 3.

⁹¹ The Reply to the Response, Addendum (**B102**), p. 3.

5.65 BD argues that the Revised Agreement is prejudicial to BD and unfair as it adduces additional conditions not previously envisaged and materially changes BD's obligations.⁹²

Other points made in the Reply to the Response

5.66 BD states that NIW's reference to clause S4 of the BD Agreement (provision of notice to NIW prior to commencement of works and provision of plans to ensure NIW has a change to agree final plans or specifications and schedule inspections during construction) is not relevant to the appeal. Notwithstanding this, BD makes the following points⁹³ –

- (a) There are no "*final plans or specifications*" to be agreed after the Article 161 agreement has been authorised. A set of stamped approved drawings are issued with the authorised agreement which are legally the final drawings. If a developer wishes to make any changes to proposals after the Agreement is authorised, these must be approved via an Article 161 Re-Submission application.
- (b) In BD's experience and that of its agents, NIW has never made contact on any scheme to schedule inspections during the construction phase.⁹⁴
- (c) BD refers to the "Application Approval and Adoption of Sewers and Facilities in New Housing Developments" flowchart in an appendix to the BD Agreement.⁹⁵ The flowchart is dated April 2017 and BD states that it was produced and released by NIW at that time to assist developers in understanding the various steps in the Article 161 process from application to final adoption. It is a true representation of what actually happens. BD notes that no mention is made of notifying NIW prior to commencement or of scheduling inspections during the construction phase.
- (d) BD states that this flowchart has been updated since the NIW Portal went live. It notes that the updated flowchart confirms in the first box that as soon as the

⁹² The Reply to the Response, Introduction (**B100**), p. 2.

⁹³ The Reply to the Response (**B101**), pp. 14 – 15.

⁹⁴ See also the Reply to the Response (**B101**), p. 42.

⁹⁵ The Reply to the Response, Appendix C (**B104**), p. 38.

applicant is in receipt of the authorised Article 161 agreement it can commence construction of the sewers. No reference is made to giving NIW notification of commencement or scheduling of inspections.⁹⁶

⁹⁶ The Reply to the Response, Appendix C (**B104**), p. 39.

6. **SECTION SIX – VIEWS OF NIW**

6.1 The views of NIW are set out in –

- (a) the Response **(B84)**,
- (b) its response dated 26 February 2024 (the **NIW Clarifications: (B121)**) to the further questions asked by the Utility Regulator on 15 February 2024, and
- (c) the NIW SOC Response **(B135)**, and
- (d) its response to the Provisional Determination (the **NIW PD Response: (B145)**).

6.2 We have read the above documents in full and have had full regard to all of these submissions. In doing so, we have borne in mind that our role is to determine the issues set out in Section Seven of this document.

6.3 The summary below is derived mainly from the relevant section of the Statement. We adopt it as accurate for the purposes of this determination.

The current position with BD's development

6.4 NIW notes that Article 159(2) of the Water Order permits the owner or any of the owners of any sewer, lateral drain, sustainable drainage system or waste water treatment works with respect to which NIW may make a vesting declaration under Article 159(1) to request that NIW vest that infrastructure in accordance with Article 159.⁹⁷

6.5 NIW notes that an application form under Article 159 was issued to BD's agent on 12 December 2023 but that NIW has not received a completed application from BD for adoption under Article 159.⁹⁸

⁹⁷ The Response **(B84)**, p. 15.

⁹⁸ The Response **(B84)**, p. 16.

- 6.6 In order to pursue the Appeal, NIW states that BD must satisfy the Utility Regulator that the infrastructure in question is eligible to be subject to an Article 161 agreement. Where the infrastructure has been built and is serving properties, this indicates that the infrastructure is not in the “*course of construction*” or “*proposed to be constructed*” and therefore falls outside Article 161 of the Water Order.⁹⁹
- 6.7 NIW states that the standard form Article 161 agreement assumes that the infrastructure to be adopted is under construction and that NIW will be afforded the opportunity to inspect the works and agree the final detailed design. This is reflected in NIW’s “Sewers for Adoption” document, which applicants are required to sign alongside the Article 161 agreement, paragraph 1.4 of which states¹⁰⁰ –
- “This Agreement should be entered into prior to the commencement of work on-site unless interim arrangements are agreed with Northern Ireland Water in writing.”*
- 6.8 NIW states that a visual inspection of the Rectory Park site was carried out by NIW on 10 January 2024. That inspection found that sewers appear to be complete or at least at a very advanced stage with manhole covers provided. However, it noted that the roads through which they are laid are not completed. There are 15 houses completed, eight of which are currently occupied.¹⁰¹
- 6.9 NIW notes from the correspondence between BD and the Utility Regulator that there appears to be some conflicting information in respect of the state of construction of the sewers on the Rectory Road site.¹⁰²
- 6.10 NIW invites the Utility Regulator to determine whether the appeal should be refused on the basis that the infrastructure is already at an advanced stage and is already serving residential units and as such, cannot be capable of being subject to an Article 161 agreement. NIW acknowledges that the Utility Regulator does not currently have sufficient information before

⁹⁹ The Response (B84), p. 16.

¹⁰⁰ The Response (B84), p. 16, and the NIW Bundle (B85), p. 115.

¹⁰¹ The Response (B84), p. 16.

¹⁰² The Response (B84), p. 17.

it to make this determination and may require further detailed survey information from BD, in which case it states that NIW must be afforded the opportunity to review and comment on that information.¹⁰³

Article 161 agreement NWA-0420

- 6.11 NIW states that one of the initial reasons for refusing to enter into the BD Agreement was that the design assumes that all of the private sewers downstream of BD's development will be vested by NIW at a future date. However, one section of the sewer was not then subject to an Article 161 agreement. NIW had indicated to BD that it will not exercise any vesting powers in respect of any portions of the sewer which remained in private ownership and were not currently subject to an Article 161 agreement. As such, there was no certainty that the design of sewers proposed in the application for the BD Agreement could be delivered.¹⁰⁴
- 6.12 NIW states that it can only adopt a sewer where there are no intervening private sewers between the sewer to be adopted and the NIW network.¹⁰⁵
- 6.13 It states that an Article 161 agreement does not empower NIW to vest lands or easements outside of the lands subject to the Article 161 agreement. Whilst NIW does have separate powers to vest lands in certain circumstances, the exercise of these powers can be subject to legal challenge and will result in NIW incurring significant cost and risk. It states that in the absence of an Article 161 agreement, there is no guarantee that NIW will be able or willing to vest an intervening private sewer.¹⁰⁶
- 6.14 NIW states that a further practical issue arises in that where sewage passes through a private sewer NIW has no control over the volume, flow rate and composition of that sewage. NIW requires all of the necessary legal rights to ensure that¹⁰⁷ –

¹⁰³ The Response (B84), pp. 17 – 18.

¹⁰⁴ The Response (B84), p. 2.

¹⁰⁵ The Response (B84), p. 10.

¹⁰⁶ The Response (B84), p. 10.

¹⁰⁷ The Response (B84), p. 10.

- (a) it has control over the composition, treatment and content of the sewage entering the receiving NIW network,
- (b) the sewage reaches its treatment facilities, and
- (c) the sewage is treated in accordance with all applicable environmental standards.

6.15 NIW states that the standard form Article 161 agreement sets out the stages prior to vesting of the sewers. In accordance with clause S8.2, the sewers must be “live” and discharging before a preliminary certificate of completion can be issued. The sewers will then enter a “maintenance period”. Only after the expiry of the maintenance period (and, if necessary, upon completion of remediation works) are the sewers vested by NIW.¹⁰⁸

6.16 NIW notes that BD has invited the Utility Regulator to “*enter into any agreement into which the undertaker might have entered on the application*” (emphasis added). However, NIW states that the technical solution proposed in BD's May 2022 application cannot be delivered as it relies upon passing through an intervening private sewer before it reaches the NIW network. BD did not set out any proposals for how this can be resolved and how the conditions for adoption can be met. In addition, the sewers as proposed in the application could not meet the requirements of the “Sewers for Adoption” document.¹⁰⁹

6.17 It is NIW's position that the Utility Regulator cannot lawfully require NIW to enter into the BD Agreement, as it does not include clearly designed proposals which establish how and where the sewage from the Rectory Park Site will be treated. Furthermore, it states that the Utility Regulator does not currently have enough information to modify the BD Agreement to produce proposals that meet the requirements for “Sewers for Adoption”.¹¹⁰

6.18 NIW states that what was proposed (before Article 161 agreement NWA-0420 was executed) would not connect to NIW's general system of sewerage or sewage disposal. It does not meet

¹⁰⁸ The Response (B84), p. 10.

¹⁰⁹ The Response (B84), p. 3.

¹¹⁰ The Response (B84), p. 17.

the requirements of “Sewers for Adoption”. In order to operate, it would have required the erection of a Waste Water Treatment Works or some other system of treatment of wastewater. No planning permission has been obtained for a such a facility and no proposals for such a facility have been put forward by BD.¹¹¹

- 6.19 NIW states that throughout the application process it made it clear that it would not enter into the BD Agreement until all intervening private sewers were subject to an Article 161 agreement or adopted and BD adduced evidence that they had the right to discharge into all receiving sewers prior to adoption. BD accepted this position throughout, acknowledging this when it requested that NIW issue the BD Agreement to allow it to obtain a bond. It is not a legitimate complaint to make of NIW that it has failed to remedy private sector failings which necessarily would involve the expenditure of public monies.¹¹²
- 6.20 NIW states that the bond or surety it holds under an Article 161 agreement can only be used to carry out the works specified in the BD Agreement. It cannot be utilised for works outside the site boundary specified in the BD Agreement, used to vest third-party lands or to fund a temporary solution such as the tankering of waste for offsite treatment.¹¹³
- 6.21 NIW states that in circumstances where NIW cannot use the bond to rectify one of the likely barriers to vesting (i.e. the intervening private sewer), it would be inappropriate for NIW to issue an Article 161 agreement which will be relied upon by residential occupiers and lenders.¹¹⁴
- 6.22 Turning specifically to the arguments made in the Application, NIW states the height of BD’s case is that NIW executed an Article 161 agreement NWA-0414 relating to the area adjacent to BD’s development and as BD’s sewers are to communicate with these sewers, NIW must

¹¹¹ The Response (B84), p. 19.

¹¹² The Response (B84), p. 4.

¹¹³ The Response (B84), p. 3.

¹¹⁴ The Response (B84), p. 3.

enter into the BD Agreement. On BD's case any issues in respect of intervening private sewers downstream are a matter for NIW to resolve.¹¹⁵

- 6.23 NIW states that BD further seeks to rely upon water main supply connections to support its position. However, the water supply obligations imposed on NIW by statute are entirely different and separate to its obligations as a sewerage undertaker and in particular, its statutory obligations under Article 161 of the 2006 Order.¹¹⁶
- 6.24 Article 161 agreement NWA-0414 was concluded on 25 May 2022 with Ballyclare in respect of phase 1. NIW states that, importantly, that agreement was also executed by Ramore as the adjoining landowner. That agreement contains clauses 3.3 and 12.4 and has a period of construction of eight months which expired on 25 January 2023.¹¹⁷
- 6.25 At the date of completion of agreement NWA-0414, NIW states that it had agreed the technical specifications for the infrastructure and had issued agreement NWA-0420 for execution. Furthermore, Ramore as the owner of the land to which agreement NWA-0420 relates, had also executed agreement reference NWA-0414 confirming its consent to permit the discharge of sewage into their infrastructure prior to adoption.¹¹⁸
- 6.26 However, in the intervening period between the execution of agreement NWA-0414 and receipt of the application from BD, it became clear that Ramore was unwilling or unable to enter into agreement NWA-0420. By the time BD had returned the BD Agreement, there was approximately two weeks left of the period of construction specified in NWA-0414 and it was clear that no progress had been made in meeting the requirements for adoption under that agreement.¹¹⁹

¹¹⁵ The Response (B84), p. 11.

¹¹⁶ The Response (B84), p. 12.

¹¹⁷ The Response (B84), p. 12.

¹¹⁸ The Response (B84), p. 12.

¹¹⁹ The Response (B84), p. 12, and NIW Bundle (B85), p. 35.

6.27 NIW states that in an email dated 22 August 2022 from NIW to BD's agent it is clearly stated that¹²⁰ –

“Receiving Infrastructure: Please note a section of the receiving infrastructure has not yet been authorised by NIW. The Agreement was previously emailed but not returned. We have requested this Agreement to be returned asap. This Development can only be approved once all receiving infrastructure has been subsequently authorised by NIW. In the interim we will continue with this assessment on the assumption that outstanding Agreements will be authorised in due course. The Developer has confirmed this will be dealt with shortly.” (Emphasis added by NIW)

6.28 NIW states that what was proposed in BD's application assumed that all downstream receiving infrastructure would be authorised and adopted by NIW. It was also very clear that NIW agreed to assess the proposals set out in the application on that basis.¹²¹

6.29 NIW states that it was clear from correspondence between the Parties that BD accepted NIW's clearly stated position that it could not approve the Beechview scheme until all downstream infrastructure was adopted or subject to an Article 161 agreement. BD understood that it had a role in securing this as the email from its agent referred to “*chasing this up*”.¹²²

6.30 NIW refers to a further email from BD's agent on 20 October 2022 which stated¹²³ –

“Also, █████ asking if the blank Art. 161 can be released to allow him to proceed with getting it bonded on the agreement that it won't be counter-signed by NIW until the outstanding Art. 161 downstream is sorted first.” (Emphasis added by NIW)

¹²⁰ The Response (B84), pp. 12 – 13, and NIW Bundle (B85), p. 39.

¹²¹ The Response (B84), p. 13.

¹²² The Response (B84), p. 13, and NIW Bundle (B85), p. 39.

¹²³ The Response (B84), p. 13, and NIW Bundle (B85), p. 37.

6.31 NIW states that this email underscores that BD clearly understood that NIW would not execute the agreement until the Article 161 agreement for the downstream private sewer had been returned.¹²⁴

6.32 On 21 October 2022 NIW responded¹²⁵ –

“We should be able to release the Blank Agreement but will only authorise once the downstream section has been Signed off.” [sic] (Emphasis added by NIW)

6.33 On 14 November 2022 a copy of the BD Agreement was released with a covering email which stated¹²⁶ –

“Please note the following with respect to this Approval.

- *Third party land signatures will be required on Page 3 for the receiving foul infrastructure including the Pumping Station. We refer to downstream Agreements in the name of Ballyclare Developments Limited & Lotus Homes (UK) Ltd.*
- *This Agreement can only be countersigned by NIW following authorisation of the downstream Phase NWA-0420 (Phase 3).*
- *final Adoption of this Development Drainage can only be considered following full and final Adoption of the receiving infrastructure. We refer to sewers approved under NWA-0414, NWA-0420, NWA-0382 & NWA-0413.”*

6.34 NIW states that this chain of correspondence shows that BD was made aware from the outset of its application that the BD Agreement could not be executed by NIW until the issue of the downstream receiving infrastructure was resolved.¹²⁷

¹²⁴ The Response (B84), p. 13.

¹²⁵ The Response (B84), p. 13, and NIW Bundle (B85), p. 36.

¹²⁶ The Response (B84), pp. 13 – 14, and NIW Bundle (B85), p. 31.

¹²⁷ The Response (B84), p. 14.

- 6.35 It states that it is also clear from the timeline of events that at the date that NIW received the BD Agreement from BD, there was little prospect of Ballyclare meeting the requirements for adoption within the period of construction specified in agreement NWA-0414.¹²⁸
- 6.36 For these reasons, NIW states that BD cannot rely on the execution of agreement NWA-0414 as creating a legitimate expectation that any future upstream agreements would be executed by NIW.¹²⁹
- 6.37 NIW states that the issue in relation to the non-execution of agreement NWA-0420, which BD states is the fault of NIW is, in reality, a problem created by Lotus, Ramore or Ballyclare when the relevant land was sold, or a failure on BD's part to secure the necessary rights when acquiring the land for its development. NIW states that BD may have a contractual remedy against Ballyclare, which may in turn have a remedy against Lotus or Ramore that, if successful, could have allowed NIW to enter into the BD Agreement.¹³⁰

The BD Agreement

- 6.38 NIW states that when a person wishes to construct a drain or sewer with the intention that it will ultimately link into the public sewer system, that person normally approaches NIW and agrees design and construction specifications. Thereafter that person, usually a developer, applies to NIW for an Article 161 agreement. NIW then issues an Article 161 agreement setting out the terms under which NIW will, upon completion of the work, at some specified date or on the happening of some future event, declare that the sewerage infrastructure is vested.¹³¹
- 6.39 NIW states that an application for an Article 161 agreement can only be accepted where the proposed development has a valid full planning permission. That planning permission will usually, through the application process, have specified the mode of foul disposal. Certain modes of foul disposal will require specific planning permission, such as where the disposal

¹²⁸ The Response (B84), p. 14.

¹²⁹ The Response (B84), p. 14.

¹³⁰ The Response (B84), p. 15.

¹³¹ The Response (B84), p. 4.

requires the erection of a waste water treatment works or pumping station to serve the development.¹³²

- 6.40 NIW note that under Article 161(6) it has a wide discretion in respect of the terms it may impose in an Article 161 agreement and, in particular, may require adjoining landowners to be made parties to the agreement.¹³³
- 6.41 It points out that Article 161(3) of the Order expressly permits NIW to request that an application for an Article 161 agreement be accompanied by such information as it shall reasonably require.¹³⁴
- 6.42 NIW explains that, upon payment, an application will be assigned to a Technical Advisor, who will liaise with the applicant via NIW's online portal until the drainage design meets the current specification, on clarification of all queries and receipt of all necessary documentation Technical Advisor checks all submitted information.¹³⁵
- 6.43 NIW states that it uses a standard form Article 161 agreement and that the BD Agreement is in that standard form.¹³⁶
- 6.44 Once an Article 161 agreement is completed NIW states that it will have certainty that the works specified will be completed to an adoptable standard within a specified time period and that, in the event of any default, NIW can step in and remedy any deficiency in the works, drawing upon the bond or surety if required.¹³⁷
- 6.45 It further states that purchasers of residential properties and their lenders rely on the existence of an Article 161 agreement as evidence that¹³⁸ –

¹³² The Response (**B84**), p. 4.

¹³³ The Response (**B84**), p. 4.

¹³⁴ The Response (**B84**), p. 5.

¹³⁵ The Response (**B84**), p. 5.

¹³⁶ The Response (**B84**), p. 5.

¹³⁷ The Response (**B84**), p. 5.

¹³⁸ The Response (**B84**), p. 5.

- (a) sewers will be constructed to an appropriate standard,
- (b) NIW will adopt those sewers within a reasonable period and therefore the residential occupier will not be liable for the repair and maintenance of those sewers, and
- (c) in the event of a default by the developer, NIW has sufficient funds to complete the works required to adopt the sewers.

6.46 NIW states that it is therefore vital that it only enters into Article 161 agreements for works that NIW knows will be capable of construction and adoption within the terms of the Article 161 agreement.¹³⁹

6.47 The standard form agreement specifies a “period of construction” during which all works specified must be completed. In the case of the BD Agreement, the period of construction was identified as 24 months. The agreement also provides a bond or surety to secure the works.¹⁴⁰

6.48 NIW states that clause S4 of its standard form agreement requires that the developer provide notice to NIW prior to commencement of the works and must provide copies of all relevant plans and drawings. This is to ensure that NIW has the opportunity to inspect and agree any final plans or specifications, and to schedule inspections of the works during construction as required.¹⁴¹

6.49 Clause S5 requires the developer to complete the works within the period of construction, although at NIW's discretion further corrective works can be carried out outside this period. If the works are not completed within the period of construction, NIW has the right in accordance with clause S11 to enter the lands subject to the agreement (but not lands outside the agreement where that landowner was not a party to the agreement) to complete the works and recover the costs of doing so from the bond or surety or from the developer.¹⁴²

¹³⁹ The Response (**B84**), p. 5.

¹⁴⁰ The Response (**B84**), p. 5.

¹⁴¹ The Response (**B84**), p. 6.

¹⁴² The Response (**B84**), p. 6.

6.50 Clause S7 places restrictions on the backfilling of the works, to provide NIW with the opportunity to inspect the works.¹⁴³

6.51 NIW states that the standard Article 161 agreement is drafted on the basis that the sewers and drains in question are yet to be constructed and that NIW is given ample opportunity to inspect and survey the works during construction and if necessary to direct any repairs or remedial action. This is reflected in the “Sewers for Adoption” document which states at paragraph 1.6¹⁴⁴ –

“During construction of the Works, Northern Ireland Water may carry out inspections to check compliance with the Agreement. If improper work, materials or variations are found, Northern Ireland Water will notify the Developer without delay (to be confirmed in writing) and defects should be remedied or substituted with the minimum of delay.”

6.52 NIW states that clause S8 of the agreement sets out the process for obtaining a Preliminary Certificate of Completion. Once obtained, the bond or surety is reduced and the works enter a “maintenance period” following which the works will be vested by NIW. Clause S8.2.2 stipulates that a Preliminary Certificate of Completion can only be obtained if 51% of the residential units to be served by the section of the sewer to be adopted are occupied and are discharging into the sewer. NIW states that it is important to note that the Article 161 agreement allows for a phased vesting so that parts of the works specified in an agreement can be vested whilst other elements are under construction.¹⁴⁵

6.53 Prior to vesting under clause S12, sewers subject to an Article 161 agreement are private sewers constructed and maintained at the expense of the landowner(s) on whose land they are constructed. Where those sewers discharge into other private sewers in separate ownership, NIW states that the landowner must secure the appropriate easements and rights

¹⁴³ The Response (B84), p. 6.

¹⁴⁴ The Response (B84), p. 6 and NIW Bundle (B85), p. 122.

¹⁴⁵ The Response (B84), p. 6.

to communicate and discharge into those private sewers prior to the preliminary certificate of completion and during the maintenance period.¹⁴⁶

6.54 NIW submits that clause 3.3 of the standard agreement reflects this position¹⁴⁷ –

“The Developer has sufficient rights in that part of the Site that is outside the Green Land to enable the Works to be carried out therein and to permit the use repair and maintenance thereof and discharge therefrom to any Watercourse prior to the date of the final Certificate of Adoption (Vesting Declaration) and to enable a valid and effectual declaration to be made in respect of the Works.” (Emphasis added by NIW)

6.55 NIW states that clauses 3.3, S8 and S12, make clear that it is a requirement that the developer must have all necessary easements and rights to discharge into any receiving private infrastructure prior to entering into the Article 161 Agreement.¹⁴⁸

6.56 Clause S12.4 makes it clear that NIW will not vest the sewer until all intervening private sewers are themselves adopted¹⁴⁹ –

“Notwithstanding the provisions of this paragraph 12 the Undertaker shall not be obliged to vest sewers in itself until all intervening private sewers which link the Works to the receiving public sewerage system are themselves public sewers.” (Emphasis added by NIW)

6.57 NIW states that the standard agreement also requires that adjoining landowners be party to the agreement where the Article 161 works require to connect to or flow through another sewer which is not currently vested by NIW and is not in the ownership of the developer.¹⁵⁰

6.58 NIW argues that prior to entering into an Article 161 agreement a developer must be able to demonstrate that it has the right to connect to any sewer on adjoining land and that it has

¹⁴⁶ The Response (B84), pp. 6 – 7.

¹⁴⁷ The Response (B84), p. 7.

¹⁴⁸ The Response (B84), p. 7.

¹⁴⁹ The Response (B84), p. 7.

¹⁵⁰ The Response (B84), p. 7.

sufficient rights to enable NIW to vest the Works. Clause 3.3, when read alongside clauses S8 and S12.4, entitles NIW in accordance with Article 161(3) to request evidence that the developer has sufficient rights to discharge effluent into downstream, private sewers and that those sewers will be brought forward for adoption within a reasonable time frame.¹⁵¹

- 6.59 Developers are also required to design sewers in accordance with the “Sewers for Adoption” document, which states in respect of third-party lands¹⁵² –

“The Agreement requires on-site and off-site landowners to join in, to ensure that any off-site sewers are laid with the consent and knowledge of all parties. The ownership of land and access/easement rights to pumping stations, sewers and other Works (including rights to discharge to balancing areas) should be transferred, confirmed or exercised on or before adoption.”

- 6.60 NIW states that it is entirely reasonable for it to take steps, prior to entering into any Article 161 agreement, to ensure that all conditions set out in the agreement and "Sewers for Adoption" are capable of being met before entering into the agreement and to seek appropriate evidence from the developer if required.¹⁵³

The rights required by NIW

- 6.61 NIW states that, prior to adoption, sewers subject to an Article 161 agreement are private sewers constructed and maintained at the expense of the landowner(s) on whose land they are constructed. Where those sewers discharge into other private sewers in separate ownership, the landowner must secure the appropriate easements and rights to communicate and discharge into those private sewers prior to the preliminary certificate of completion and during the maintenance period.¹⁵⁴

¹⁵¹ The Response (B84), p. 7.

¹⁵² The Response (B84), pp. 7 – 8, and NIW Bundle (B85), p. 116.

¹⁵³ The Response (B84), p. 8.

¹⁵⁴ The Response (B84), p. 4.

- 6.62 NIW states that in large developments, with multiple phases and multiple landowners, it is the responsibility of each landowner and developer to secure sufficient legal rights to allow them to discharge into all of the intervening private sewers until those sewers are adopted. These are matters which are usually addressed in any contracts for sale or transfers of land but can also be resolved by a separate private agreement.¹⁵⁵
- 6.63 NIW states that although one development between that of BD and NIW's network at Templepatrick Road, is subject to a requisition request, the timing of which is under NIW's control, the remaining developments are unlikely to be adopted for many years.¹⁵⁶
- 6.64 NIW states that this demonstrates that sections of the "spine sewer" will remain private sewers for several years and will require to be maintained by their respective owners and where necessary will require the consent of the owners of downstream private infrastructure to discharge into those sewers.¹⁵⁷
- 6.65 Where a sewer terminates before reaching the wider NIW network (i.e. where it meets a private sewer), NIW states that it is necessary to install a treatment plant at that terminus. Such a treatment facility will require planning permission and various environmental consents.¹⁵⁸
- 6.66 The sewer specification and design agreed in the BD Agreement have been designed on the basis that the sewage will flow south into the pumping station and not that it will require treatment or tankering for offsite treatment at some upstream location. The design assumes that BD has the necessary rights to construct and commission the sewers in accordance with clauses 3.3 and S8.2 of the BD Agreement.¹⁵⁹
- 6.67 NIW states that although BD may have the right to physically construct the sewers set out in the BD Agreement, it does not have the right to commission the sewers so that they are "live"

¹⁵⁵ The Response (**B84**), p. 10.

¹⁵⁶ The NIW Clarifications (**B121**), p. 4.

¹⁵⁷ The NIW Clarifications (**B121**), p. 4.

¹⁵⁸ The Response (**B84**), p. 11.

¹⁵⁹ The Response (**B84**), p. 11.

and therefore cannot comply with clause 3.3 or clause S8.2 within the proposed period of construction.¹⁶⁰

6.68 NIW states that if the Utility Regulator is minded to allow the Appeal and require NIW to enter into the BD Agreement this issue remains unresolved.¹⁶¹

6.69 Importantly, NIW can only vest the sewers that are subject to the relevant Article 161 agreement. The BD Agreement does not permit the vesting of sewers or land or easements outside the land identified in the BD Agreement. Whilst NIW may have statutory powers to vest lands or existing sewers in certain limited circumstances, this would result in NIW incurring significant costs and risk of legal challenge.¹⁶²

6.70 NIW states that BD has not adduced any evidence that it has the legal right to discharge sewage from its development into private sewers downstream. In accordance with the standard form Article 161 agreement, an applicant must have these legal rights and easements in place before entering into the BD Agreement (see clause 3 of the BD Agreement).¹⁶³

6.71 NIW states that BD has not adduced any evidence that it has the legal right to commission the sewers (i.e. connect properties and commence discharge into the sewer) prior to adoption as is required by clause S8.2 of the BD agreement.¹⁶⁴

6.72 NIW is cognisant of the reliance placed on the existence of an Article 161 agreement by residential purchasers and their lenders as an assurance that NIW will adopt the sewage infrastructure.¹⁶⁵

6.73 In the Response, NIW states that it would reconsider the application if BD is able to –

¹⁶⁰ The Response (**B84**), p. 11.

¹⁶¹ The Response (**B84**), p. 11.

¹⁶² The Response (**B84**), p. 11.

¹⁶³ The Response (**B84**), p. 2.

¹⁶⁴ The Response (**B84**), p. 2.

¹⁶⁵ The Response (**B84**), p. 2.

- (a) adduce evidence that it has the right to discharge into all receiving downstream sewers that are not adopted at the date of the application for an Article 161 agreement. This is likely to be evidenced by having the owners of receiving infrastructure enter into the agreement, and
- (b) demonstrate that all downstream receiving infrastructure is either adopted or subject to a concluded Article 161 agreement, and
- (c) adduce evidence that all other terms of the BD Agreement can be met.

6.74 In its email to the Utility Regulator of 29 January 2024 **(B91)**, NIW states that in order to conclude the BD Agreement it required the following –

- (a) BD to adduce evidence that it has the legal right to discharge sewage from their site into all private sewers downstream of the site. In accordance with the standard form Article 161 agreement, an applicant must have these legal rights and easements in place before entering into the agreement (clause 3.3).
- (b) BD to adduce evidence that it has the legal right to commission the sewers (i.e. connect properties and commence discharge into the sewer) prior to adoption as is required by clause S8.2 of the BD Agreement.
- (c) In the event of a default by BD, NIW must be able to exercise the legal rights set out at (a) and (b).

6.75 NIW states that, as evidence of satisfaction of these requirements, it asks that the owners of all currently unadopted downstream sewers enter into the Article 161 agreement as “adjoining landowners”.

6.76 NIW points to the following as relevant provisions of the BD Agreement¹⁶⁶ –

¹⁶⁶ Email from NIW to the Utility Regulator, 29 January 2024 **(B91)**.

“3.3 The Developer has sufficient rights in that part of the Site that is outside the Green Land to enable the Works to be carried out therein and to permit the use repair and maintenance thereof and discharge therefrom to any Watercourse prior to the date of the Final Certificate of Adoption (Vesting Declaration) and to enable a valid and effectual declaration to be made in respect of the Works.(emphasis added)

3.5 The Owner and the Adjoining Owner(s) (if such parties have joined in this Agreement) acknowledge that the Works during and after their construction and until the issue of the Final Certificate of Adoption (Vesting Declaration) belong to the Developer.”

“8. The Developer, the Owner or the Adjoining Owner(s) (if there are parties so defined) either own the freehold or the unexpired residue of not less than 200 years of a leasehold term or in the case of the Developer has sufficient interest in the Green Land or land adjoining the Green Land within the Site to enable certain development in relation to the same including the construction of the Works to serve the said development.”

“S.12.2 The Undertaker shall not be obliged to issue a Vesting Declaration (Final Certificate of Adoption) while:-

S.12.2.1 any dispute exists between the Developer and any third party connecting the Works”

Whether BD has evidenced the rights required by NIW

- 6.77 NIW does not consider that the transfers relied on by BD provide the rights that it requires.
- 6.78 NIW notes that BD relies on an easement contained within a transfer between Ballyclare and Nuport dated 8 October 2021. However, NIW submits that the existence of an easement in a

deed of transfer is not itself conclusive of the right to discharge into all downstream private sewers.¹⁶⁷

6.79 NIW states that the case of *Re: Ellenborough Park* [1956] Ch. 131 sets out the four essential characteristics of an easement as follows¹⁶⁸ –

- (a) There must be a dominant and servient tenement.
- (b) The easement must accommodate the dominant tenement.
- (c) The dominant and servient owners must be different people.
- (d) The right must be capable of forming the subject matter of a grant.

6.80 Schedule 1 of the transfer contains a provision which states that the Transferee (Nuport) has¹⁶⁹ –

“The full and free right (in common with all other persons having like rights) to the passage and running of Services through the Conducting Media”

6.81 NIW states that the first step is to identify the extent of the dominant and servient tenements. In this case, it submits that the transfer is not clear as to the extent of the servient tenement. Notably the clause does not include the words “located in the Retained Lands” or some other identifier of the location of the Services and Conducting Media. There is no plan attached which shows the location of the “Services” or “Conducting Media”. The “Relief Road Lands” are defined by reference to a yellow hatched area on the map attached to the transfer. That area is a small section of the “spine road”.¹⁷⁰

6.82 NIW states that in this case the easement granted to Nuport would need to identify that the “servient land” included the downstream lands owned by Ramore/Lotus in addition to the spine sewer lands owned by Ballyclare. It is not clear on the face of the transfer that Ballyclare

¹⁶⁷ The NIW Clarifications (**B121**), p. 5.

¹⁶⁸ The NIW Clarifications (**B121**), p. 5.

¹⁶⁹ The NIW Clarifications (**B121**), p. 5 – 6.

¹⁷⁰ The NIW Clarifications (**B121**), p. 6.

has indeed assigned or granted any rights that it might hold over the Lotus/Ramore downstream lands.¹⁷¹

- 6.83 NIW is aware that there are ongoing legal proceedings between Ballyclare and Ramore in respect of the terms of the September 2019 transfer. It states that the existence of this litigation underscores that it is not possible to simply rely upon the existence of an easement in a transfer or other deed.¹⁷²
- 6.84 NIW notes that BD also refers to a transfer between Ballyclare and Six Mile Water as transferors and Ramore as transferee, dated September 2019. In paragraph 1 of Schedule 2 to that transfer Ballyclare retains a right to the free and uninterrupted passage of Services to and from the “retained land” and to connect to pipes on the land owned by Ramore. However, that right is expressly qualified as being subject to the pipes having “*sufficient capacity to serve the transferees land*”.¹⁷³
- 6.85 The transfer map provided in respect of the transfer between Ballyclare and Six Mile Water is black and white and therefore NIW cannot ascertain the site boundary. Furthermore, although the definition of “Retained Land” includes references to certain folio numbers, it is unclear whether at the date of transfer Ballyclare owned all of the land contained within those folios.¹⁷⁴
- 6.86 NIW states that the ambiguity as to the nature and extent of the easements claimed in the two transfers relied on by BD provided underscores the rationality of its position that all downstream owners should be joined in the Article 161 agreements to confirm that they consent to the acceptance of all upstream discharges prior to adoption.¹⁷⁵
- 6.87 NIW states that it is a long-established principle of land law (see *Harris v Flower* 1904), that one cannot “*increase the burden of user over the right of way or easement beyond that which was originally contemplated when the right was granted*”. More recent cases have affirmed

¹⁷¹ The NIW Clarifications (B121), p. 6.

¹⁷² The NIW Clarifications (B121), p. 7.

¹⁷³ The NIW Clarifications (B121), p. 6; NIW SOC Response (B135), p. 58.

¹⁷⁴ The NIW Clarifications (B121), p. 6.

¹⁷⁵ The NIW Clarifications (B121), p. 6.

that the rule in *Harris v Flower* prevents an easement being used for an additional plot of land, unless that land is used for a purpose that is purely subsidiary or ancillary to the use of the land that originally had the benefit of the right when the right was granted. In short, it is not possible to increase the dominant tenement.¹⁷⁶

- 6.88 NIW states that even where there is no increase in the dominant tenement, a change or intensification of user may mean that the dominant owner's right to enjoy the easement will be ended, in other words the servient owner can legitimately block the pipe. In this case, the transfers referred to were executed before any houses were erected on the sites in question.¹⁷⁷
- 6.89 NIW submits that the effect of a change or intensification of user on an easement was considered by the English Court of Appeal in *McAdams Homes Limited v Robinson* [2004] EWCA CIV 214, [2004] 3 EGLR 93. This case has been considered and followed on numerous occasions in Northern Ireland. In *McAdams*, the Court of Appeal considered that there are two issues to be considered. The first is whether there is a radical change in character or change in identity of the land. The second is whether there is a substantial increase in the burden.¹⁷⁸
- 6.90 NIW states that in this case, the transfers were completed prior to the carrying out of development on the sites. A number of upstream development sites are now anticipated. It could be argued that there has been a radical change in character of the land and that this has resulted in a substantial increase in the burden. It could therefore be argued, at some future date, that easements have ended, and where the use of the drains is causing backing up or overloading, it could give rise to a claim in nuisance. Indeed, the easement claimed by Ballyclare is subject to a restriction that the pipes in question have sufficient capacity to serve the servient tenement.¹⁷⁹

¹⁷⁶ The NIW Clarifications (**B121**), p. 6.

¹⁷⁷ The NIW Clarifications (**B121**), p. 6.

¹⁷⁸ The NIW Clarifications (**B121**), pp. 6 – 7.

¹⁷⁹ The NIW Clarifications (**B121**), p. 7.

- 6.91 NIW notes that it is not a party to the transfers and therefore has no privity of contract to allow it to enforce those rights with a downstream landowner. Privity of contract is a common law doctrine which prevents a person who is not a party to a contract from enforcing a term of that contract. In circumstances where, for example Developer A has a contractual right with Developer B and Developer B has a contractual right with Developer C, Developer A cannot sue Developer C for breach of contract even though that breach might directly affect Developer A. Instead, Developer A would be required to sue Developer B who in turn would sue Developer C.¹⁸⁰
- 6.92 The situation becomes even more complicated where one of the developers in the chain becomes insolvent and an administrator is unwilling to take legal action. NIW states that it does not wish to become embroiled in lengthy and complex litigation. This may arise where NIW are required to “step-in” and complete the Article 161 works.¹⁸¹
- 6.93 NIW states that, as a matter of policy it does not wish to carry out a costly legal review and analysis of multiple title documents to assess whether the necessary rights exist and undertake investigations to ascertain whether such rights may be ended at some future date due to a change in circumstances outside of the control or knowledge of NIW. Such an exercise would incur very significant legal costs which fall outside the current scheme of charges and therefore could not be recovered by NIW. As a result of these concerns, NIW has determined that the approach with the least risk is for it to have an express contractual right with each of the downstream landowners which it can enforce directly if necessary.¹⁸²
- 6.94 NIW asserts that in circumstances where BD claims that all necessary legal rights are in place, BD should have no difficulty in securing the necessary agreement from the downstream landowners.¹⁸³

¹⁸⁰ The NIW Clarifications (**B121**), p. 7.

¹⁸¹ The NIW Clarifications (**B121**), p. 7.

¹⁸² The NIW Clarifications (**B121**), p. 7.

¹⁸³ The NIW Clarifications (**B121**), p. 7.

The Revised Agreement

- 6.95 As stated above, NIW has become aware of ongoing litigation between two landowners in the wider Ollar Valley development in respect of the interpretation of a transfer. Whilst NIW is not a party to those proceedings it understands that the proceedings engage issues in respect of rights to discharge into sewage infrastructure and a general duty to co-operate.¹⁸⁴
- 6.96 In light of the commercial disputes arising in the wider Ollar Valley development, an unsuccessful application for judicial review and the Appeal, NIW states that it undertook a review of the standard form Article 161 agreement and decided to amend it to clarify that the owners of all downstream receiving infrastructure must be a party to the agreement and expressly acknowledge that they will receive upstream sewage prior to adoption. It hopes that this will avoid such disputes in the future.¹⁸⁵
- 6.97 NIW states that it was not necessary to require the wording to be amended for agreements NWA-0420, NWA-0382 and NWA-0413 as each of these sites are in the ownership of the same legal entity and the sewers owned by Ramore are subject to a requisition. NIW confirms that agreement NWA-0433, which was issued to Ballyclare in respect of the development upstream of BD's development, contains the same wording as the Revised Agreement.¹⁸⁶
- 6.98 NIW states that the Revised Agreement is the new standard form Article 161 agreement.¹⁸⁷

The NIW PD Response

- 6.99 In response to our statement that we expect NIW to identify any learning points for its efficient management of Article 161 agreements for future multi-developer projects, NIW commented that it had identified a number of learnings from this case and has already introduced a number changes to the Article 161 process and its standard agreement.¹⁸⁸

¹⁸⁴ The NIW Clarifications (**B121**), p. 2.

¹⁸⁵ The NIW Clarifications (**B121**), p. 5.

¹⁸⁶ The NIW Clarifications (**B121**), p. 8; NIW SOC Response (**B135**), p. 61.

¹⁸⁷ The NIW Clarifications (**B121**), p. 8.

¹⁸⁸ The NIW PD Response (**B145**), p. 69.

- 6.100 NIW stated that the expert legal opinion provided by Mills Selig Limited, provided as Annex 2 to this Determination (the **Legal Opinion**), does not materially disagree with NIW's own analysis. Its position is that it is not clear on the face of the transfer that Ballyclare has indeed assigned or granted any rights that it might hold over the Lotus / Ramore downstream lands. NIW noted that the Legal Opinion agrees that there is a lack of clarity but speculates that the court may read the transfer as granting certain rights.¹⁸⁹
- 6.101 In relation to the comments made in the Legal Opinion on intensification of use, NIW states that neither NIW nor Mills Selig had had access to all the title documents or conducted a full title review.
- 6.102 NIW stated that its analysis remains an accurate statement of the law and that intensification of use is one of the factors that must be considered, even if to rule it out, when trying to ascertain the rights granted by a transfer.
- 6.103 In the absence of a full title review and due diligence exercise, NIW stated that it is difficult to reach a definitive conclusion on the relevance of the intensification of use. In this case, intensification is possibly relevant, as the rights are "*subject to available capacity*", which indicates that there may be some ancillary agreements or documents which record what the extent or limits of that capacity was intended to be at the date of the transfer.¹⁹⁰
- 6.104 NIW noted that the points made in the Legal Opinion in respect of the lack of clarity in the wording of the transfers and the possibility of the need for judicial intervention to clarify the nature and extent of the rights granted to developers, underscore the difficulties in relying on title documents alone to ascertain the nature of the developer's rights.¹⁹¹
- 6.105 NIW agreed with our proposed remedy.¹⁹²

¹⁸⁹ The NIW PD Response (**B145**), p. 71.

¹⁹⁰ The NIW PD Response (**B145**), p. 72.

¹⁹¹ The NIW PD Response (**B145**), p. 73.

¹⁹² The NIW PD Response (**B145**), p. 77.

7. SECTION SEVEN – THE ISSUES TO BE DETERMINED

7.1 The Statement set out the issue for determination. We agree with the issues as set out in the Statement.

7.2 The issues to be determined in the Appeal are as follows –

- (a) Whether the sewers to which the BD Agreement relate are under construction or proposed to be constructed such that Article 161 is engaged.
- (b) If so, whether in determining the Appeal the Utility Regulator should consider the issue of whether it was reasonable for NIW to refuse to enter into the BD Agreement on the basis that Article 161 agreement NWA-0420 had not yet been executed. If the Utility Regulator should consider that issue, whether NIW's position in that regard was reasonable.
- (c) Whether before entering into an Article 161 agreement with BD it is reasonable for NIW to require that BD provides NIW with evidence of the following rights –
 - (i) BD has the legal right to discharge sewage from its development into all private sewers downstream.
 - (ii) BD has the legal right to commission the sewers (i.e. connect properties and commence discharge into the sewer) following completion of an Article 161 agreement but prior to adoption by NIW.
 - (iii) In the event of a default by BD, NIW can exercise the legal rights set out at (i) and (ii).
- (d) If it is reasonable for NIW to require the legal rights set out in (c), whether those rights are provided by the following Deeds of Transfer, taken together –
 - (i) The Deed of Transfer from Ballyclare to Nuport, dated 8 October 2021, and

- (ii) The Deed of Transfer from Ballyclare to Ramore, dated 14 October 2019.
- (e) Whether, in all the circumstances of the case, it is reasonable for NIW to have made the amendments to the BD Agreement which resulted in the Revised Agreement.

8. SECTION EIGHT – FINAL DETERMINATION

8.1 The Parties have made a number of points in their various submissions. We have not sought to address every point made in our discussion below. Where we do not mention a particular point, this does not mean that we either agree or disagree with it. We did not find it necessary to come to a clear finding on every point made in order to come to our decision on the issue for determination. Instead, we refer below only to what we consider to be those points which are most relevant to our decision. We have, however, carefully considered all points made by the Parties.

8.2 We note that the Statement of Case draws attention to the submission in the BD Clarifications and the NIW Clarifications of material that had not been requested from the Parties. It is important that the parties to appeals confine their submissions to those that are permissible at the relevant point in the procedure. This is to ensure both efficiency and fairness in the Utility Regulator's processes. We have had regard to all of the material sent to the Utility Regulator but have placed no weight on the material included in the BD Clarifications and the NIW Clarifications that was not in response to the questions asked by the Utility Regulator in its letter of 15 February 2024. However, we are content that our determination would not have been different had we placed weight on that material.

Issue 1 – Whether the sewers to which the BD Agreement relate are under construction

8.3 We note that in the BD SOC Response, BD suggested that we should not determine whether or not the sewers to which the BD Agreement relates are still under construction. However, as the point was raised by NIW in its submissions, and goes to the heart of whether an Article 161 Agreement is actually available to BD, we consider it appropriate to determine the issue.

8.4 We note that both BD and NIW agree that drainage has been constructed for 15 houses on BD's site, with some being occupied. BD states that its development is for 49 units. We accept

that submission. We also note that NIW itself refers to the development being '*currently under construction*'¹⁹³ albeit with the sewers at an '*advanced stage of construction*'.¹⁹⁴

- 8.5 It is therefore our view that BD is still 'constructing' the sewers to which the BD Agreement relates within the meaning of Article 161(1) and an Article 161 agreement is therefore still available to it.

Issue 2 – Whether we should consider NIW's refusal to enter into the BD Agreement on the basis that Article 161 agreement NWA-0420 had not yet been executed.

- 8.6 We note that a central plank of the Application was the issues raised by BD in relation to NIW's refusal to enter into the BD Agreement until the execution of agreement NWA-0420.

- 8.7 Agreement NWA-0420 has now been executed and its absence is no longer a reason maintained by NIW for refusing to enter into the BD Agreement. As such, this is no longer a live issue in relation to the agreement which is the subject of the Appeal.

- 8.8 The issue is now academic and we decline to make a determination on it. There will be occasions in which the issues that are set out in an application for an appeal or dispute to be determined by the Utility Regulator are either resolved by the parties between themselves or by changes in circumstances. The Utility Regulator has finite resources and these would not be best deployed by considering the issue in the present appeal.

- 8.9 Each multi-developer site will be different, and whether NIW's approach to managing applications for Article 161 agreements is reasonable will depend on the circumstances of each individual case. If the same issue arises in respect of a future development, the relevant applicant for an agreement will be entitled to appeal any refusal by NIW to the Utility Regulator, and any such appeal will be determined on the facts as they stand in that case.

¹⁹³ The Response (B84), p. 1.

¹⁹⁴ The Response (B84), p. 1.

8.10 However, we do note BD's frustration with the way in which it considers that NIW has behaved, and we will expect NIW to identify any learning points for its efficient management of Article 161 agreements for future multi-developer projects.

Issue 3 – Are the rights required by NIW reasonable?

8.11 BD states that NIW had not previously made it clear to BD that it would require the three rights set out in Issue 3. However, NIW's email to BD dated 14 November 2022 (**B6**) to which it attached the BD Agreement stated –

"Third party land signatures will be required on Page 3 for the receiving foul infrastructure including the Pumping Station. We refer to downstream Agreements in the name of Ballyclare Developments Limited & Lotus Homes (UK) Ltd...."

8.12 NIW made the same point by email on 20 January 2023¹⁹⁵ –

"The issue here is that this phase will be connecting in to phases owned by other developers which aren't yet adopted, and as such we need them to provide the developer for this phase with written authorisation to discharge through what will be private sewers until such times as they are adopted. Normally this isn't an issue as all phases in a development are normally under the same developer, but in this case, there are multiple phases owned by different developers...."

8.13 Both of these emails are quoted in the Application. Therefore, we consider that NIW had indeed made clear to BD that it would require the relevant rights. However, we note BD's point that the BD Agreement itself may not have clearly reflected this in its drafting.

8.14 Although we accept that the parts of the BD Agreement referring to third party signatures may be somewhat unclear –

¹⁹⁵ The Application (**B1**), p. 4.

- (a) under clause S.8.2.2, a minimum of 51% of any stage of the sewerage system offered for preliminary adoption must be live, and
 - (b) under clause S.8.2.3, in order to be deemed completed such that a Preliminary Certificate of Completion can be granted, all necessary connections must have been made to properly drain occupied premises.
- 8.15 In order to fulfil those requirements it must be implied that the developer has the legal right to connect to, and discharge through, any downstream sewers.
- 8.16 However, we do not follow NIW's reference to clause 3.3 as this seems to refer to situations in which a developer needs to undertake Works on areas of the Site which fall outside its ownership (the Green Land in the relevant agreement), which we do not understand to be the case here.
- 8.17 BD also states that the legal rights sought by NIW are not referenced in Article 161(6) of the Water Order. Article 161(6) specifically states that the examples it provides of what an Article 161 agreement may contain are "*without limiting the terms which may be included in an agreement under this Article*". Therefore, the fact that the relevant rights are not set out in that Article is no bar to NIW requiring them.
- 8.18 BD accepts that, under Article 161(3), NIW may request an application for an Article 161 agreement to include such information as it may reasonably require. But BD states that it is unreasonable to put the responsibility for obtaining third-party permissions or signatures on BD in this case as, had NIW followed its own procedures, the need for third party signatures would not be required.
- 8.19 However, we note NIW's submission that once an Article 161 agreement is signed the sewers in question will enter a maintenance period following completion and it may be several years before they are vested in NIW. During that maintenance period the sewers continue in private ownership. Therefore, even if NIW had followed the process which BD argues it should have, there would still be a period during which BD's sewers were connected to and discharging through sewers in private ownership.

- 8.20 NIW states that this period may stretch to some years. Clause S.12.4 of the BD Agreement states that NIW shall not be obliged "*to vest sewers in itself until all intervening private sewers which link the Works to the receiving public sewerage system are themselves public sewers*". NIW states that the stretch of sewer to which Article 161 agreement NWA-0413 relates (coloured orange on the map at p. 3 of the NIW Bundle **(B4)**) will not be vested in NIW until after 2025, and that this will be the first stretch to be vested. Given that the sewers covered by agreements NWA-0382, NWA-0420 and NWA-0414 will then need to be vested, we agree with NIW that it may be some years before the sewers to which the BD Agreement relates are vested.
- 8.21 We agree with NIW that it is reasonable for it to seek to ensure that the conditions set out in an Article 161 agreement are capable of being met prior to entering into it, and to seek information from applicants for that purpose.
- 8.22 We also agree that it is reasonable for NIW to seek to ensure that it too has the relevant rights as it may need to exercise them in the event of any default by a developer during the time when intervening sewers are in private ownership.

Issue 4 – Are the rights required by NIW provided in the Deeds of Transfer?

- 8.23 We have commissioned an expert legal opinion provided by Mills Selig Limited, provided as Annex 2 to this Determination (the **Legal Opinion**), in order to assist with our determination of Issue 4.
- 8.24 The Legal Opinion disagrees with various points put forward by NIW in terms of the rights which accrue to Nuport (and hence BD) under the Deeds of Transfer.
- 8.25 NIW states that in this case the easement granted to Nuport would need to identify that the "servient land" included the downstream lands owned by Ramore/Lotus in addition to the spine sewer lands owned by Ballyclare. It is not clear on the face of the transfer that Ballyclare

has indeed assigned or granted any rights that it might hold over the Lotus/Ramore downstream lands.¹⁹⁶

- 8.26 The Legal Opinion agrees that the deed of transfer between Ballyclare and Nuport does not refer to the land through which the services and conducting media are to run. However, it states that a court is likely to conclude that the intention of the parties was to grant Nuport the right to use the conducting media in the 'Relief Road Lands' shown at Map 2 of Schedule 2 to the Legal Opinion.
- 8.27 The Legal Opinion states that when Ballyclare transferred 'Doagh Road North' to Nuport, Ballyclare's rights over 'Doagh Road South' continued to benefit Doagh Road North despite the change in ownership, as Nuport is a successor in title of Ballyclare.
- 8.28 It also disagrees with NIW that a change or intensification of user may mean that Nuport's right to enjoy the easement will be ended as the Transfer Deeds were executed before any houses were erected on Doagh Road North. It states that intensification of an existing right only arises where the right is originally limited to a specific purpose. However, the rights granted in the Transfer Deeds are not limited – by limiting Nuport's development to a specified number of houses, for example – and therefore the concept of intensification is not relevant.
- 8.29 We note that in the NIW PD Response, NIW asserts that intensification is a relevant factor to be considered in each case. We agree. There is a difference of opinion between the Legal Opinion and NIW on the relevance of intensification in this case. We do not need to resolve that difference as, if NIW is correct that intensification is relevant in this case, this simply underscores our overall conclusion on the rights afforded by the Deeds of Transfer.
- 8.30 The Legal Opinion agrees with NIW that the rights granted in the transfer between Ballyclare and Ramore are subject to the pipes in Doagh Road South having sufficient capacity.

¹⁹⁶ The NIW Clarifications (**B121**), p. 6.

- 8.31 The Legal Opinion also agrees with NIW that the rights in the Deeds of Transfer cannot benefit NIW as it is not a successor or assign of Nuport unless land is transferred to or vested in NIW, or onward rights are granted to NIW. Therefore, NIW cannot avail of the rights granted to Nuport while the relevant sewers remain unadopted.
- 8.32 We accept the analysis in the Legal Opinion as outlined above.
- 8.33 We note that the Legal Opinion also states that there is a question over whether the Deeds of Transfer grant Nuport rights in relation to (i) an area shown on Map 3 at Schedule 2 to the Legal Opinion, and (ii) land lying between Doagh Road South and the Templepatrick Road.
- 8.34 We are aware that these were not issues raised by NIW itself as part of its submissions in this appeal. We have not found it necessary to form a view on whether the Legal Opinion is correct in its analysis of gaps in the rights provided to Nuport (and hence BD) in the Deeds of Transfer.
- 8.35 For present purposes –
- (a) the points made in the Legal Opinion in relation to gaps in Nuport's rights indicate that ascertaining the rights granted to developers is sometimes not a straight-forward process and requires close consideration, and
 - (b) even if Nuport has all of the rights claimed, these cannot be relied upon by NIW in the period before vesting.

Issue 5 – Are the terms set out in the Revised Agreement reasonable?

- 8.36 Having determined that the rights required by NIW are reasonable, and that it is at least open to question whether they are provided by the Deeds of Transfer, we consider that it is reasonable for NIW to seek to make those rights clear by incorporating them into the Revised Agreement. In making that determination we do not necessarily endorse the method chosen by NIW as being the most effective means of meeting the concerns that it has. However, we note that BD has not sought to argue that the amendments in the Revised Agreement would not in fact secure the rights that NIW requires.

- 8.37 We also note that BD's appeal relates only to the terms in the Revised Agreement that require third party signatures. We have not therefore considered any of the other terms in the Revised Agreement. Our determination on this issue is confined to the amendments made in the Revised Agreement as set out in section 4 above.
- 8.38 Firstly, as outlined above, we consider that the rights sought are implicit in the BD Agreement. Therefore, the amendments sought do not relate to entirely new obligations.
- 8.39 Secondly, NIW has pointed to ongoing litigation (to which it is not a party) between two landowners in the wider Ollar Valley development in respect of the interpretation of a transfer. It understands that the proceedings engage issues in respect of rights to discharge into sewage infrastructure and a general duty to co-operate.
- 8.40 In light of that litigation, it is reasonable for NIW to make the amendments in the Revised Agreement to reduce the risk of future disputes about rights to discharge sewerage to downstream infrastructure which may affect sewers that are subject to an Article 161 agreement. This is particularly so where under clause S.12.2.1 of the BD Agreement, NIW is not required to vest any sewer which is the subject of ongoing litigation. Read together with clause S.12.4 (which requires downstream sewers to be vested in NIW) disputes as to the relevant rights therefore have the ability of holding up vesting of sewers further upstream.
- 8.41 Thirdly, we accept that it is reasonable for NIW to seek to secure its own position by being party to an agreement that provides it with a clear route to enforce the relevant rights where the Deeds of Transfer do not provide it with those rights before vesting.
- 8.42 Fourthly, we agree that it would be undesirable for NIW to have to expend legal fees in analysing title documents to assess whether the relevant rights are provided and afford NIW the necessary protections. The points raised by the Legal Opinion in relation to potential gaps in the rights accorded to Nuport in the Deeds of Transfer show that such an analysis may entail some work in getting to the bottom of whether all relevant rights are provided by existing title documents. We note NIW's submission that its ability to recover the cost of doing so is limited by the current scheme of charges. Even where such a legal review is undertaken, the

result may not provide a clear answer. As such it is reasonable to seek clearly expressed rights in the Article 161 agreement.

- 8.43 We recognise BD's frustration that NIW has sought to amend the agreement originally issued to it. However, we note that the litigation means that circumstances have changed since the BD Agreement was issued and that the BD Agreement had not yet been executed. We also note that the same agreement has been offered to Ballyclare (reference NWA-0433) in respect of its development further upstream and that it now forms the standard agreement offered to everyone. We accept the point made by NIW that such amendments would not have been required to agreements NWA-0420, NWA-0382 and NWA-0413 as they are in common ownership.
- 8.44 In terms of the drafting of the amendments, we agree with BD that it was not clear in the BD Agreement that the signatures of Adjoining Landowners were required where a developer was not laying any part of its sewers outside the Green Land (defined as land within its ownership and specified in the Article 161 Agreement).
- 8.45 We accept that the amendments in the Revised Agreement go some way to making it clearer that an Adjoining Landowner will be agreeing to the discharge through any of its sewers which lie between the sewers on the Green Land and a public sewer. We agree with BD that the fact that those amendments were made indicates that NIW itself was not wholly confident that the drafting of the BD Agreement secured the rights that it required.
- 8.46 However, we consider that some of the drafting in the Revised Agreement still lacks clarity with respect to when the signatures of Adjoining Landowners are required.
- 8.47 On page 3 of the Revised Agreement, clause 3 states –

""The Adjoining Owner(s)" defined as the sole beneficiary or joint freehold owner of the land located adjacent to or downstream of the Site containing the development and [specifically where the connecting pipe will be laid] [and/or] on which there are intervening private sewers which link the Works to the public sewerage system

*which are required to receive discharge from the Works prior to Vesting. (Needed if the Works are being constructed within the Site but outside the Green Land)*¹⁹⁷
(Emphasis added)

8.48 The drafting in parentheses at the end of this clause still suggests that signatures of Adjoining Landowners are only required where construction is taking place on their land. This is because the drafting added into the clause in the Revised Agreement was inserted before the parenthesis instead of after. To give effect to NIW's intention, we consider that the clause should read as follows –

""The Adjoining Owner(s)" defined as the sole beneficiary or joint freehold owner of the land located adjacent to or downstream of the Site containing the development and [specifically where the connecting pipe will be laid] (Needed if the Works are being constructed within the Site but outside the Green Land) [and/or] on which there are intervening private sewers which link the Works to the public sewerage system which are required to receive discharge from the Works prior to Vesting."

Conclusion

8.49 For the reasons given above, we have found that it was reasonable for NIW to refuse to enter into an Article 161 agreement with BD in the absence of the signatures of Adjoining Landowners as required in the Revised Agreement.

8.50 As such, we uphold the refusal of NIW to grant BD's application for this reason.

8.51 However, we consider that clause 3 on page 3 of the Revised Agreement should be amended as set out above in order to make clearer when such signatures are required. An amended

¹⁹⁷ "Green Land" is defined as follows: "The land in the Developer's ownership and situate at [Rectory Park, Phase 1, Ballyclare Spine Road, Ballyclare, Antrim, BT39] and which is shown edged green on the Layout Plan of the works."

"Site" is defined as follows: "Shall comprise the Green Land and other land (if any) on under in or through which the Works are proposed to be executed."

"Works" is defined as follows: "Subject to any variation in accordance with S.2 of the First Schedule this expression shall mean all those works being Sewers, Lateral Drains, Pumping Stations and Accessories, and shall include valve chambers, overflow chambers, outfall structures as shown on the Drawings and includes any part or parts of the works within the Site and specified in this Agreement."

version should be issued to BD. We suggest that the same amendment is made to NIW's template Article 161 agreement for use going forward. We note that NIW has agreed to do so.

Appendix 1 – Bundle of documents

Doc ref	Document title
A1	Water and Sewerage Services (Northern Ireland) Order 2006 – https://www.legislation.gov.uk/nisi/2006/3336/contents
A2	Complaints Disputes and Appeals Policy and Guide – https://www.uregni.gov.uk/publications/resolution-complaints-disputes-and-appeals-policy-and-guide-applicants

Doc ref	From	To	Date	Document title
B1	BDL	UR	16/06/2023	B1 - 2023-06-16 - Initial dispute cover letter
B2	DfI		06/11/2018	B2 - 1. Approval of reserved matters amended
B3	NIW	BDL	26/05/2022	B3 - 2. Article 161 Agreement amended
B4	BDL	UR	19/05/2023	B4 - 3. Illustrative Map
B5	BDL	Sheehy Consulting	30/05/2022	B5 - 4. Email 30 May 2022
B6	NIW	BDL	14/11/2022	B6 - 5. Email 14 November 2022
B7	NIW	BDL	20/01/2023	B7 - 6. Email 20 January 2023
B8	NIW	Sheehy Consulting	22/04/2022	B8 - 7. Email 22 April 2022
B9	UR	BDL	24/07/2023	B9 - 2023-07-24 - Email to complainant requesting emails

B10	BDL	UR	24/07/2023	B10 - 2023-07-24 - Email containing a batch of requested emails
B11	BDL	UR	24/07/2023	B11 - Requested documents batch 1
B12	BDL	UR	03/10/2023	B12 - 2023-10-03 - second batch of documents received from complainant
B13	BDL		N/A	B13 - Winst Form
B14	NIW	Sheehy Consulting	22/04/2022	B14 - A076 Approval Letter APR2022
B15	NIW		22/04/2022	B15 - NWA-0433_Overall Watermain Design_North of Doagh Rd Ballyclare
B16	BDL	NIW	08/03/2022	B16 - Watermain _signed
B17	Sheehy Consulting	NIW	20/01/2023	B17 - Re 21-1642 Rectory Park (Phase 1) Ballyclare Art.161 Agreement
B18	UR	BDL	03/10/2023	B18 - 2023-10-03 - UR confirming receipt and requesting final two documents
B19	BDL	UR	04/10/2023	B19 - 2023-10-04 - third batch of documents received
B20	NIW	BDL	19/01/2023	B20 - 1041589 - sites 1-15 Doagh Road North Ballyclare
B21	NIW		N/A	B21 - Explanation of charges 2022-23
B22	NIW	BDL	N/A	B22 - BACs 20210309 No 3 bank account details
B23	UR	BDL	04/10/2023	B23 - 2023-10-04 - UR confirming receipt of content
B24	UR	BDL	24/10/2023	B24 - 2023-10-24 - Email to complainant with query on Article 161 application
B25	BDL	UR	24/10/2023	B25 - 2023-10-24 - Complainant response to UR query

B26	NIW		N/A	B26 - INSTRUCTIONS ON PRINTING YOUR ARTICLE 161
B27	NIW		N/A	B27 - NWA-0436_A161_Agreement_PDF
B28	NIW	Sheehy Consulting	14/11/2022	B28 - NWA-0436_A161_Approval_Letter_PDF
B29	Sheehy Consulting	N/A	01/03/2022	B29 - 21-1642 C-01E Drainage Layout - Ph.1
B30	Sheehy Consulting	N/A	01/03/2022	B30 - 21-1642 C-02B Storm L.Sections 1 of 2
B31	Sheehy Consulting	N/A	01/03/2022	B31 - 21-1642 C-03C Storm L.Sections 2 of 2 (Ph.1)
B32	Sheehy Consulting	N/A	01/03/2022	B32 - 21-1642 C-04C Foul L.Sections 1 of 2
B33	Sheehy Consulting	N/A	01/03/2022	B33 - 21-1642 C-05C Foul L.Sections 2 of 2 (Ph.1)
B34	Sheehy Consulting	N/A	01/09/2022	B34 - 21-1642 C-12A Flow Control MH Detail- S7
B35	Sheehy Consulting	N/A	01/09/2022	B35 - 21-1642 C-13 Flow Control MH Detail- S12
B36	Sheehy Consulting	N/A	01/10/2022	B36 - 21-1642 L-02A Stat Charges Map - Ph.1
B37	Sheehy Consulting	N/A	01/10/2022	B37 - 21-1642 L-03A Greenland Map - Ph.1
B38	UR	BDL	24/10/2023	B38 - 2023-10-24 - UR confirming receipt of complainant response
B39	BDL	UR	08/11/2023	B39 - 2023-11-08 - Complainant providing unsigned Article 161 application
B40	BDL		30/11/2022	B40 - 2023-11-08 - NWA-0436 unsigned
B41	UR	BDL	15/11/2023	B41 - 2023-11-15 - UR email to complainant requesting clarity on build status of pipework

B42	BDL	UR	15/11/2023	B42 - 2023-11-15 - Complainant confirming pipework is 95 percent complete
B43	BDL	UR	15/11/2023	B43 - 2023-11-15- Complainant initial response to UR query
B44	UR	BDL	16/11/2023	B44 - 2023-11-16 UR to BDL - UR request for further clarity
B45	BDL	UR	16/11/2023	B45 - 2023-11-16 BDL to UR- Further clarity from complainant
B46	BDL	UR	22/11/2023	B46 - 2023-11-22 BDL to UR - complainant requesting update
B47	BDL	UR	24/11/2023	B47 - 2023-11-24 UR to BDL - UR providing clarity on submission status
B48	UR	BDL	01/12/2023	B48 - 2023-12-01 UR to BDL - RE Rectory Park Ballyclare Art .161 Phase 1
B49	BDL	UR	05/12/2023	B49 - 2023-12-05 - BDL requesting further guidance from UR on Art 159 application
B50	UR	BDL	07/12/2023	B50 - 2023-12-07 - Email to BDL outlining we cannot provide guidance on application
B51	BDL	UR	07/12/2023	B51 - 2023-12-07 - BDL response requesting short meeting and outlining they have contacted NIW
B52	BDL	UR	07/12/2023	B52 - 2023-12-07 - BDL response on why Article 161 is not applicable
B53	UR	BDL	11/12/2023	B53 - 2023-12-11 - UR to BDL outlining we will not meet currently
B54	BDL	UR	11/12/2023	B54 - 2023-12-11 - BDL outlining why Article 159 approach is not possible
B55	BDL	UR	12/12/2023	B55 - 2023-12-12 - BDL email to NIW

B56	BDL	NIW	11/12/2023	B56 - RE Doagh Road Ballyclare
B57	BDL	NIW	11/12/2023	B57 - RE Rectory Park Ballyclare Art .161 Phase 1
B58	NIW		N/A	B58 - ESA-A159_guidance
B59	NIW	BDL	12/12/2023	B59 - 2023-12-12 - NIW response to BDL
B60	BDL	NIW	12/12/2023	B60 - 2023-12-12 - Rafferty solicitors email to NIW
B61	BDL	UR	13/12/2023	B61 - 2023-12-13 - Confirmation NIW have rejected the Article 159 application
B62	NIW		N/A	B62 - doc04247720231213162407
B63	UR	BDL	19/12/2023	B63 - 2023-12-19 - Response to complainant
B64	BDL	UR	19/12/2023	B64 - 2023-12-19 - Complainant confirming pipework is not complete
B65	BDL	UR	19/12/2023	B65 - 2023-12-19 - Complainant requesting further guidance
B66	UR	BDL	22/12/2023	B66 - 2023-12-22 - UR response to contradictory statements
B67	BDL	UR	22/12/2023	B67 - 2023-12-22 - Complainant response to UR question
B68	BDL	UR	22/12/2023	B68 - 2023-12-22 - Complainant response with site visit request
B69	UR	All Parties	03/01/2024	B69 - 2024-01-03 - Email to parties outlining timeline and jurisdiction
B70	UR	All Parties	03/01/2024	B70 - 2024-01-03 - Letter to parties on jurisdiction
B71	UR	NIW	03/01/2024	B71 - 2024-01-03 - Email to NIW with complainant submission attached
B72	UR	NIW	03/01/2024	B72 - 2024-01-03 - Email to NIW to confirm they have received the complainant submission

B73	BDL	UR	04/01/2024	B73 - 2024-01-04 - Complainant acknowledgement of jurisdiction letter
B74	NIW	UR	04/01/2024	B74 - 2024-01-04 - NIW confirmation they have received the dispute documents
B75	NIW	UR	10/01/2024	B75 - 2024-01-10 - NIW requesting correspondence between UR and complainant and appeals confirmation
B76	UR	NIW	10/01/2024	B76 - 2024-01-10 - UR to NIW confirming we will provide correspondence and of additional appeal
B77	UR	NIW	10/01/2024	B77 - 2024-01-10 - Correspondence email 1 of 3
B78	UR	NIW	10/01/2024	B78 - 2024-01-10 - Correspondence email 2 of 3
B79	UR	NIW	10/01/2024	B79 - 2024-01-10 - Correspondence email 3 of 3
B80	NIW	UR	11/01/2024	B80 - 2024-01-11 - NIW requesting a numbered index
B81	UR	NIW	11/01/2024	B81 - 2024-01-11 - UR response to NIW request
B82	NIW	UR	11/01/2024	B82 - 2024-01-11 - NIW response
B83	NIW	UR	17/01/2024	B83 - 2024-01-17 - NIW response to initial application
B84	NIW	UR	17/01/2024	B84 - Beechview Appeal - submission to regulator - 170124
B85	NIW	UR	17/01/2024	B85 - Appeal Bundle- NIW
B86	UR	NIW	17/01/2024	B86 - 2024-01-17 - UR confirming receipt of NIW response
B87	UR	BDL	17/01/2024	B87 - 2024-01-17 - Email to complainant confirming they have received NIW attachments

B88	BDL	UR	18/01/2024	B88 - 2024-01-18 - Complainant confirming they have received NIW submission
B89	UR	NIW	18/01/2024	B89 - 2024-01-18 - UR to NIW to clarify absence of sent email in appeals bundle
B90	NIW	UR	19/01/2024	B90 - 2024-01-19 - NIW confirmation they had received 22 December emails
B91	NIW	UR	30/01/2024	B91 - 2024-01-29 - NIW confirming they have received executed Art 161 for NWA0420
B92	UR	NIW	30/01/2024	B92 - 2024-01-30 - UR acknowledging receipt of email
B93	UR	All Parties	30/01/2024	B93 - 2024-01-30 Telecon Note 1
B94	UR	All Parties	30/01/2024	B94 - 2024-01-30 - Email to parties to outline options
B95	BDL	UR	31/01/2024	B95 - 2024-01-31 - Complainant response with 2 week extension request
B96	UR	All Parties	31/01/2024	B96 - 2024-01-31 - Email to parties granting extension approval
B97	UR	All Parties	31/01/2024	B97 - 2024-01-31 - Letter to parties on updated timeline
B98	BDL	UR	12/02/2024	B98 - 2024-02-12 - Rafferty's submission response email
B99	BDL	UR	12/02/2024	B99 - 1) INDEX
B100	BDL	UR	12/02/2024	B100 - A) Introduction for UR
B101	BDL	UR	12/02/2024	B101 - B) SC FINAL DRAFT TO CR_08.02.24.docx 2
B102	BDL	UR	12/02/2024	B102 - C) Addendum to submission_07.02.24

B103	BDL	UR	12/02/2024	B103 - D) UR Conclusions_SC 09.02.24
B104	BDL	UR	12/02/2024	B104 - E) APPENDIX A-D
B105	BDL	UR	12/02/2024	B105 - F) APPENDIX E
B106	BDL	UR	12/02/2024	B106 - G) Appendix F
B107	BDL	UR	12/02/2024	B107 - H) Appendix G
B108	UR	BDL	12/02/2024	B108 - 2024-02-12 - UR confirming receipt of Beechview email
B109	UR	NIW	12/02/2024	B109 - 2024-02-12 - UR to NIW providing BDL second response info
B110	NIW	UR	14/02/2024	B110 - 2024-02-14 - NIW confirmation they have received and can access second submission
B111	UR	All Parties	15/02/2024	B111 - 2024-02-15 - UR email to parties requesting more information
B112	NIW	UR	15/02/2024	B112 - 2024-02-15 - NIW advising they may need more time to provide answers to queries
B113	UR	NIW	15/02/2024	B113 - 2024-02-15 - UR response to NIW
B114	NIW	UR	19/02/2024	B114 - 2024-02-19 - NIW extension request
B115	UR	All Parties	19/02/2024	B115 - 2024-02-19 - UR providing extension approval to the parties
B116	BDL	UR	26/02/2024	B116 - 2024-02-26 - BDL response to UR queries
B117	BDL	UR	26/02/2024	B117 - 21-1642 DRAFT_22.02.24
B118	BDL	UR	26/02/2024	B118 - 6no. Art.161s issued since 06.02.24
B119	BDL	UR	26/02/2024	B119 - Revised Art.161 Agreement NWA-0436

B120	NIW	UR	26/02/2024	B120 - 2024-02-26 - NIW response to additional UR queries
B121	NIW	UR	26/02/2024	B121 - Response Queries to Utility Regulator due 26 Feb
B122	UR	BDL	27/02/2024	B122 - 2024-02-27 - UR confirming receipt of email to BDL
B123	UR	NIW	27/02/2024	B123- 2024-02-27 - UR confirming receipt of email to NIW
B124	UR	NIW	27/02/2024	B124 - 2024-02-27 - Email to NIW with BDL response submission
B125	UR	All Parties	29/02/2024	B125 - 2024-02-29 - Email to parties with updated timeline
B126	UR	All Parties	29/02/2024	B126 - 2024-02-29 - Letter to parties on updated timeline
B127	BDL	UR	29/02/2024	B127 - 2024-02-29 - BDL confirming receipt of timeline
B128	NIW	UR	29/02/2024	B128 - 2024-02-29 - NIW confirming receipt of UR email
B129	UR	All Parties	20/03/2024	B129 - 2024-03-20 - Email to Parties with SOC attached
B130	UR	N/A	20/03/2024	B130 - Beechview appeal - Statement of Case
B131	UR	N/A	20/03/2024	B131 - 2024-03-20 - Statement of Case letter
B132	NIW	UR	21/03/2024	B132 - 2024-03-21 - NIW confirming receipt of Statement of Case
B133	BDL	UR	23/03/2024	B133 - 2024-03-23 - Complainant confirming receipt of SOC
B134	BDL	UR	10/04/2024	B134 - 2024-04-10 - Complainant response to SOC
B135	NIW	UR	10/04/2024	B135 - 2024-04-10 - NIW response to SOC
B136	UR	All Parties	12/04/2024	B136 - 2024-04-12 - Final SoC sent to both parties

B137	UR	All Parties	30/04/2024	B137 - 2024-04-30 - Email to parties to inform them of timetable extension
B138	UR	All Parties	30/04/2024	B138 - 2024-04-30 - Letter to parties on updated timetable
B139	BDL	UR	30/04/2024	B139 - 2024-04-30 - Complainant confirming receipt of extension email
B140	BDL	UR	01/05/2024	B140 - 2024-05-01 - Complainant requesting clarity on who is providing external legal advice
B141	UR	BDL	01/05/2024	B141 - 2024-05-01 - UR response to complainant query
B142	UR	All Parties	22/05/2024	B142 - 2024-05-22 - Email to parties with draft determination
B143	BDL	UR	22/05/2024	B143 - 2024-05-22 - BDL confirming receipt of draft determination
B144	NIW	UR	22/05/2024	B144 - 2024-05-22 - NIW confirming receipt of draft determination
B145	NIW	UR	05/06/2024	B145 - 2024-06-05 - NIW draft determination comments
B146	UR	BDL	05/06/2024	B146 - 2024-06-05 - Email to complainant with NIW DD comments

Appendix 2 – Legal Opinion

Utility Regulator
Queens House
14 Queen Street
Belfast
BT1 6ED
("Addressee")

Your ref

Our ref N00199-00001

Email ciara.campbell@millsselig.com
anne.skeggs@millsselig.com

Date 15 May 2024

Dear Sirs

Appeal by Beechview Developments Limited under Article 162(2) of the Water and Sewerage Services (Northern Ireland) Order 2006 ("the Appeal")

1. Background

a. We have been asked to provide you with a legal opinion in relation to Section 7.1(d) of the Statement of Case in the Appeal. You have asked us to determine if the Transfer Deeds furnished by BD are sufficient evidence of the following rights:

- (i) BD has the legal right to discharge sewage from its development into all private sewers downstream;
 - (ii) BD has the legal right to commission the sewers (ie connect properties and commence discharge into the sewer) prior to adoption by NIW;
 - (iii) In the event of default by BD, NIW can exercise the legal rights set out at (i) and (ii) and
- ((i) – (iii) above together being "the Rights").

For the sake of clarity, we have been asked to opine on BD'S rights but please note that the rights in the Transfer Deeds are for the benefit of Nuport as the owner of Doagh Road North. As we understand it BD are the developer. In this opinion we will refer to the rights granted to Nuport.

2. Definitions

a. The definitions in this paragraph apply in this opinion.

Ballyclare	means Ballyclare Developments Limited
BD	means Beechview Developments Limited
Doagh Road North	means the land shown shaded blue on Map 1 at Schedule 2
Doagh Road South	means the land shown shaded red on Map 1 at Schedule 2
NIW	means Northern Ireland Water Limited
Nuport	means Nuport Homes Ltd
Ramore	means Ramore Investments Limited
Relief Road Lands	means the land shown yellow on Map 2 at Schedule 2
Six Mile Water	means Six Mile Water Developments Limited
Statement of Case	means the Statement of Case provided by email to Mills Selig on 15 th March 2024
The Transfer Deeds	means Transfer 1 and Transfer 2 and the term Transfer Deed shall mean either one of them as the context admits
Transfer 1	means the Transfer Deed dated 14 th October 2019 between Ballyclare Developments Limited & Six Mile Water Developments Limited (the Transferor) and Ramore Investments Limited (the Transferee)
Transfer 2	means the Transfer Deed dated 8 th October 2021 between Ballyclare Developments Limited (the Transferor) and Nuport Homes Ltd (the Transferee)

- b. The headings in this opinion do not affect its interpretation.
- c. References to paragraphs and schedules are to paragraphs of, and schedules to, this opinion.

3. Documents examined made

For the purpose of issuing this opinion, we have only examined the documents listed in Schedule 1 and only made and relied on the searches listed in Schedule 3.

4. Assumptions and qualifications

The opinions in this opinion are given on the basis of the assumptions set out in Schedule 4 and are subject to the qualifications set out in Schedule 5 and to any other matters not disclosed to us. The opinions in this opinion are strictly limited to the matters stated in paragraph 5 and do not extend to any other matters.

5. The Rights granted for the benefit of Doagh Road North/ Nuport in relation to all private sewers downstream

By Transfer 1, Ballyclare & Six Mile Water transferred Doagh Road South to Ramore. In Transfer 1, Ballyclare & Six Mile Water reserved the following rights for the benefit of land which included Doagh Road North:

- (i) the free and uninterrupted passage and running of water, soil, gas, electricity, telecommunications and other services from and to the lands retained by Ballyclare and Six Mile Water through the pipes, sewers, drains, mains ducts, conduits, gutters, watercourses, wires, cables, channels, flues and all other conducting media ("Pipes") which now are or may within 80 years of Transfer 1 be in under or passing through Doagh Road South (subject to capacity); and
- (ii) the right (with servants and workmen) to enter Doagh Road South for the purpose of repairing cleansing maintaining or renewing the Pipes and of laying down new Pipes in place thereof.

When Doagh Road North was transferred to Nuport by Transfer 2 the above rights granted in Transfer 1 over Doagh Road South continued to benefit Doagh Road North despite the change in ownership.

In Transfer 2 the following additional rights were granted to Nuport for the benefit of Doagh Road

North only:

- A right to enter on the Relief Road Lands for the purposes of connecting into all pipes, cables, sewers, drains, wires, conduits, apparatus and all other conducting media (“the Conducting Media”);
- The full right to the passage and running of water, electricity, gas, sewerage, surface water, drainage, telecommunications services (“Services”) through the Conducting Media in the Relief Road Lands; and
- The right to enter the Relief Road Lands for maintaining repairing renewing and cleansing the Conducting Media serving Doagh Road North or any part thereof.

So, Nuport have sufficient rights to connect up to sewer pipes in the Relief Road Lands and then a right to lay pipes in the Doagh Road South lands.

Nuport have not evidenced rights over the area shaded yellow on Map 3 at Schedule 2 (“the Gap”).

There is also no evidence of any right granted in favour of Nuport or Doagh Road North over the land lying between Doagh Road South and the Templepatrick Road (“Templepatrick Road Lands”).

Without rights over the Gap, or the Templepatrick Road Lands Nuport have (a) no right to connect Pipes laid in the Relief Road Lands to Doagh Road South or from Doagh Road South to Templepatrick Road, or (b) for services to flow through any pipes laid in the Gap or the Templepatrick Road Lands.

The Transfers state that the rights granted benefit assigns and successors in title. NIW is not a successor or assign of Nuport unless land is transferred to or vested in NIW, or onward rights are granted to NIW. Therefore on the face of the Transfer Deeds NIW cannot avail of the rights granted to Nuport while the pipes remain unadopted.

6. The rights granted for the benefit of Doagh Road North/Nuport in the Transfer Deeds

We have been further asked to opine on whether the Transfer Deeds are sufficient as evidence of the rights in relation to the land that does fall within them (Doagh Road South and the Relief Road Lands).

The Statement of Case sets out NIW's position in relation to the essential characteristics of an easement at paragraph 6.78.

One of the characteristics is that there must be a dominant and servient tenement. We note NIW's submission that Transfer 2 does not meet the necessary criteria defining the extent of the servient tenement because it does not define the location of the Services and the Conducting Media. It is correct that the right does not specifically refer to the land through which the Services and Conducting Media are to run. But this becomes a matter of construction and interpretation of Transfer 2. The question is whether a court would construe that the parties to Transfer 2 intended that the Conducting Media was to be in the Relief Road Lands.

The main principles of interpretation are:

- Importance of the document text;
- Whole document approach;
- Wider context;
- Business common sense; and
- The role of reasonableness.

Looking at Transfer 2 as a whole, the intention to develop Doagh Road North is clear and Ballyclare were to lay Conducting Media in the Relief Road Lands to allow that development to take place. Taking the above principles of interpretation into account it is our view that it is fair to construe that the meaning of Conducting Media is the Conducting Media in the Relief

Road Lands. Therefore we consider it would be interpreted that Nuport has the right to connect into same for the purpose of serving Doagh Road North.

NIW submitted that it is not clear that Ballyclare assigned or granted any rights that it held over Doagh Road South. As stated at paragraph 5 above, when Ballyclare transferred Doagh Road North to Nuport, Ballyclare's rights over Doagh Road South continued to benefit Doagh Road North despite the change in ownership, as Nuport are a successor in title of Ballyclare.

NIW further submitted that a change or intensification of user may mean that Nuport's right to enjoy the easement will be ended as the Transfer Deeds were executed before any houses were erected on Doagh Road North. Intensification of an existing right only arises where the right is originally limited to a specific purpose. For example if Transfer 2 had stated that Nuport's development was to be limited to a certain number of dwelling houses and they had gone beyond this, then this principle would apply. The rights granted in the Transfer Deeds are not limited and therefore intensification is not relevant.

NIW have noted that the rights granted in Transfer 1 were subject to the Pipes in Doagh Road South having sufficient capacity. This is correct and the rights over Doagh Road South will depend on capacity being available.

Taking the Transfer Deeds together as a whole, it is our view that, subject to capacity, Nuport have the right to connect up to sewer pipes in the Relief Road Lands and then a right to lay pipes in the Doagh Road South lands.

7. The opinions

We are of the opinion that on the face of the Transfer Deeds presented there is not sufficient evidence of the Rights for the following reasons:

- a. We have not been presented with evidence of any right benefitting Doagh Road North or its owners over the lands between Doagh Road South and the Templepatrick Road;
- b. There is a gap between the Relief Road Lands and Doagh Road South over which there are no rights; and
- c. The rights granted in the Transfer Deeds do not benefit NIW while the pipes remain unadopted.

8. Scope of opinion

- a. This opinion relates only to the laws of Northern Ireland as applied by the courts of Northern Ireland at the date of this opinion. By giving this opinion, we do not assume any obligation to notify you of future changes in law which may affect the opinions expressed in this opinion, or otherwise to update this opinion in any respect.
- b. We have not been responsible for investigating or verifying the accuracy of the facts, or the reasonableness of any statement of opinion or intention, contained in or relevant to any document referred to in this opinion, or that no material facts have been omitted therefrom.
- c. This opinion and any non-contractual obligations arising out of it are governed by and shall be construed in accordance with the laws of Northern Ireland as at the date of this opinion.

9. Who may rely on the opinion

- a. This letter is addressed to you solely for your benefit ("**Addressee**").
- b. This letter may be attached to the draft and final determination in the Appeal.
- c. In addition, this letter may be disclosed for information purposes only by any Addressee:
 - i. to its affiliates;
 - ii. to its and its affiliates' legal and other professional advisers, regulators and auditors;
 - iii. where required by law, order, rule or regulation, or a court of competent jurisdiction;
 - iv. in seeking to establish any defence in any legal or regulatory proceeding or investigation relating to the matters set out herein; and/or
 - v. in connection with any actual or potential dispute or claim to which it may be a party and which relates to the matters set out herein, in each case, on the strict understanding that we assume no duty or liability whatsoever to any such recipient as a result of any such

disclosure and provided that it is understood by each such recipient that: (i) it may not rely on this letter by virtue of such disclosure, and (ii) it is not permitted to disclose or quote this letter to any other person without our prior written consent or regulation, or a court of competent jurisdiction).

- d. This letter may not be relied upon by any Addressee for any other purpose and, other than as set out in this paragraph 7, may not be furnished to, or assigned to or relied upon by any other person, firm or entity for any purpose other than as set out in this paragraph 7, without our prior written consent, which may be granted or withheld in our discretion.
- e. This opinion is given by Mills Selig and no partner, member, director or employee assumes any personal responsibility for it, nor shall owe any duty of care in respect of it. Our liability in respect of the matters addressed in this opinion is limited to the sum of £3 million and to the extent permitted by applicable law and regulation, any person entitled to rely on this opinion shall only be entitled to do so on the condition that their recourse to us in respect of the matters addressed in this opinion is against the firm's assets only and not against the personal assets of any individual, partner or director. The firm's assets for this purpose consist of all assets with the firm's business, including any right of indemnity of the firm or its partners or directors under the firm's professional indemnity insurance policies, but excluding any right to seek contribution or indemnity from or against any partner or director of the firm or member or person working for the firm or similar right.

In addition, where our liability in respect of the matters addressed in this opinion could be joint and several with any other person, our liability to any person entitled to rely on this opinion shall be limited to such sum as we ought reasonably to pay having regard to our responsibility for the damage in question.

SCHEDULE 1

DOCUMENTS EXAMINED

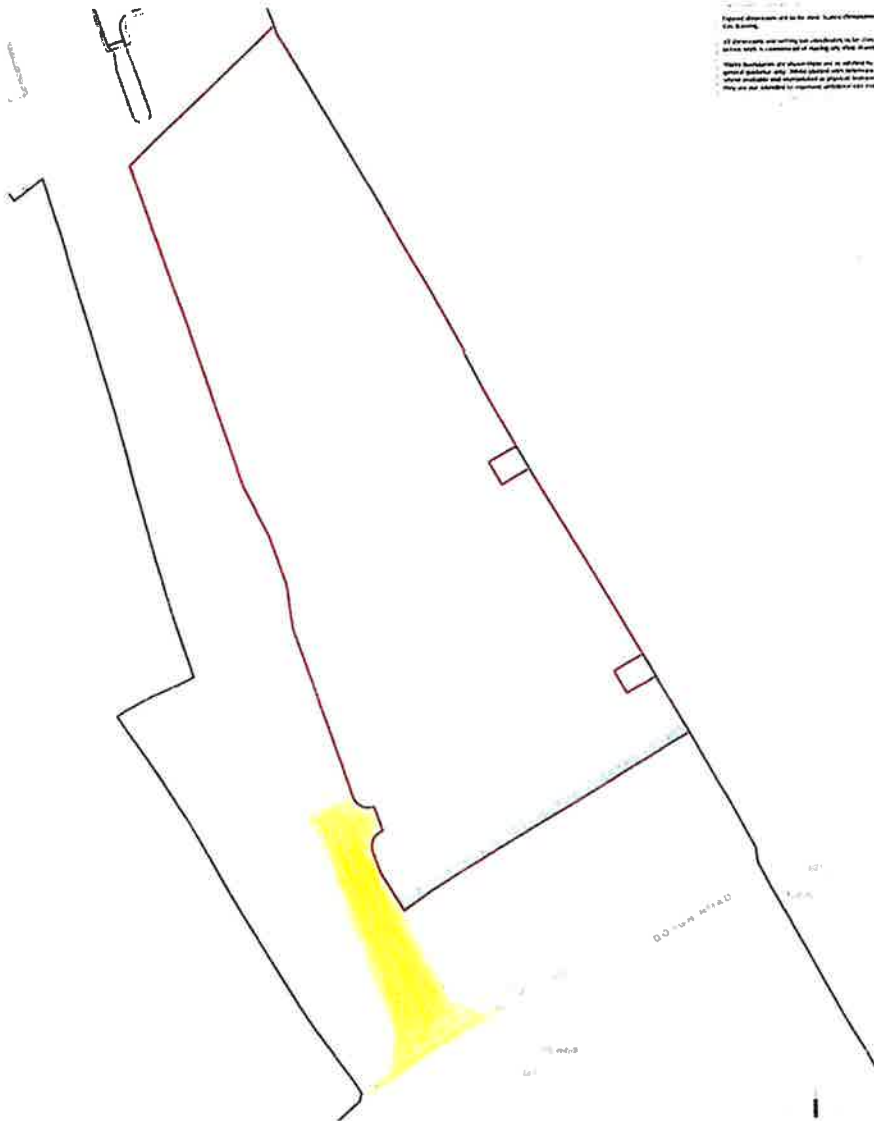
We have only examined the following documents for the purpose of this opinion:

1. A pdf copy of Transfer 1.
2. A pdf copy of Transfer 2.
3. A pdf, undated copy of the Statement of Case.

Map 1:



Map 2:



SCHEDULE 3

SEARCHES

We have only made the following searches in Northern Ireland for the purpose of this opinion:

1. Land Registry Map Search. An extract of same is shown at Map 3 of Schedule 2.

ASSUMPTIONS

The opinions in paragraph 5 above have been made on the following assumptions:

1. All signatures and seals on all documents are genuine and, in the case of the Transfer Deeds, the signatures and seals of the parties were made or affixed on a single, complete, physical version of that deed which has remained intact since those signatures or seals were made or affixed. All copy documents are complete and conform to the originals.
2. Where we have been provided with one of two Counterparts, the unseen Counterpart is duly executed.
3. Where a document has been examined by us in draft or specimen form, it will be or has been executed in the form of the draft or specimen.
4. Each party to the Transfer Deeds has the capacity, power and authority:
 - 4.1. to execute and deliver the Transfer Deeds ; and
 - 4.2. to exercise its rights and perform its obligations under the Transfer Deeds..
5. Each party to the Transfer Deeds has duly authorised, executed and delivered the Transfer Deeds in accordance with all applicable laws.
6. The Transfer Deeds have been duly registered in the Land Registry of Northern Ireland.
7. The information disclosed by the searches referred to in Schedule 3 is true, accurate, complete and up-to-date in all respects.

8. There has been no bad faith or fraud, coercion, duress or undue influence on the part of any of the parties to the Transfer Deeds or their respective directors, employees, agents and advisers.

9. There is no other fact, matter or document which would, or might, affect this opinion and which was not revealed by the documents examined or the searches made.

SCHEDULE 5

QUALIFICATIONS

The opinions in paragraph 5 above are subject to the following qualifications:

1. Enforceability

The term "enforceable" as used in this opinion means that an obligation is of a type and form which the courts of Northern Ireland generally enforce. This opinion is not to be taken to imply that any obligation would necessarily be capable of enforcement in all circumstances in accordance with its terms. In particular:

1.1. A court of Northern Ireland will not necessarily grant a particular remedy because:

1.1.1 the principles of equity may dictate otherwise (for example, an order for the equitable remedy of specific performance may not be made where damages are considered to be an adequate remedy);

1.1.2 it may be incompatible with the Human Rights Act 1998;

1.1.3 public policy requires otherwise; or

1.1.4 the court otherwise has discretion as to what remedy it grants.

1.2. The procedural rules to which any action brought in a court of Northern Ireland is subject may be such that a court declines jurisdiction or stays an action. For example, a court of Northern Ireland will only assume jurisdiction to hear a case, and give judgment against a defendant, where proceedings have been validly served.

1.3. Where the defendant cannot be validly served, the courts of Northern Ireland will not assume jurisdiction.

- 1.4. A court of Northern Ireland may (or, in certain cases, must) stay or strike out proceedings if concurrent proceedings are being brought elsewhere and may or must decline to accept jurisdiction in certain cases. A court of Northern Ireland may refuse to stay or set aside its own proceedings notwithstanding that there is some other forum having competent jurisdiction which is more appropriate for the trial of the action where the defendant has taken steps in the proceedings before the courts of Northern Ireland or to do so would be inconsistent with laws governing jurisdiction.
- 1.5. The enforcement of obligations may be limited by the provisions of the laws of Northern Ireland, which may hold an agreement to have been frustrated by a supervening event.
- 1.6. The law relating to misrepresentation, mistake and fraud may mean that an agreement, or part of it, is rescinded and therefore unenforceable.
- 1.7. Under the rules of procedure, a court of Northern Ireland may, in certain circumstances, order a claimant in an action to provide security for costs.
- 1.8. The enforceability of provisions in the Transfer Deeds will be subject to any obligations mandatorily preferred by applicable law.

Mills Selig
Signed on behalf of Mills Selig