

APPEAL BY [REDACTED]

UNDER ARTICLE 162(1) OF THE WATER AND SEWERAGE SERVICES (NORTHERN IRELAND)  
ORDER 2006

FINAL DETERMINATION

09 December 2024

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## 1. **SECTION ONE – INTRODUCTION**

- 1.1 On 3 May 2024, the Northern Ireland Authority for Utility Regulation (the **Authority** – and hereafter referred to as the **Utility Regulator**) received an application (the **Application: (B1)**) from a private individual, [REDACTED] [REDACTED] (the **Appellant**), 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(1) of the Water and Sewerage Services (Northern Ireland) Order 2006 (the **Water Order: A1**) and relates to NIW's notice of intention to adopt the private sewer that runs within the Appellant's property boundary of [REDACTED] Knockramer Meadows, Lurgan, BT66 6SA, issued on 22 March 2024 (**B1**), under Article 159(4) of the Water Order (**A1**) (the **Adoption Proposal**).
- 1.3 Following an initial review of the Application, the Utility Regulator acknowledged the Application and informed the Parties (by letter dated 28 May 2024 (**B4**)) that it has jurisdiction to consider and determine the issues in dispute under Article 162 of the Water Order.
- 1.4 The Utility Regulator has appointed me, Barbara Stevenson, (Head of Enforcement and Compliance), to determine the Appeal on its behalf (the **Decision-Maker**).
- 1.5 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)**).
- 1.6 This document is my final determination in respect of the Appeal.
- 1.7 In reaching this final determination, I have reviewed and considered the following materials and documents –
- (a) A Statement of Case (the **Statement**) prepared for me 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 permissible submissions of the Parties.

1.8 The Parties were afforded the opportunity to comment on –

- (a) a draft of the Statement,
- (b) a provisional determination, dated 24 September 2024 (the **Provisional Determination**) and
- (c) a replacement provision determination, dated 18 November 2024 (the **Replacement Provisional Determination**).

1.9 The comments received from the Parties were taken into account by the case management team in preparing the Statement (as reflected within the relevant sections of this final determination).

1.10 The comments received from the Parties were also taken into account in my decision to request external legal advice on the Utility Regulator's jurisdiction to consider the Appeal. Those comments and that advice led to the Replacement Provisional Determination.

1.11 In arriving at my final determination, I have taken into account the submissions received from the Parties on the Provisional Determination and the Replacement Provisional Determination.

1.12 This determination is structured as follows –

- (a) The Parties to the Appeal (at Section 2).
- (b) The applicable legal and regulatory framework (at Section 3).
- (c) The factual and procedural background to the Appeal (at Section 4).

- (d) The views of the Appellant (at Section 5),
- (e) The views of NIW (at Section 6).
- (f) The issues to be determined (at Section 7).
- (g) My 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**

■■■■ ■■■■■■

2.1 ■■■■■ ■■■■■■ (or the **Appellant**) is a private individual who resides at ■■■ Knockramer Meadows, Lurgan, BT66 6SA (the **Property**) to which the Appeal relates.

***NIW***

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

2.3 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.

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 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;*

...

*“owner” , in relation to any premises, means the person who—*

*(a) is for the time being receiving the rack-rent of the premises, whether on his own account or as agent or trustee for another person; or*

*(b) would receive the rack-rent if the premises were let at a rack-rent;*

*“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;*

3.3 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.*

3.4 Article 154 of the Water Order provides (relevantly) –



*(1) It shall be the duty of a sewerage undertaker (in accordance with Article 156) to provide a public sewer to be used for the drainage for domestic purposes of premises in a particular locality in its area if—*

*(a) the undertaker is required to provide the sewer by a notice served on the undertaker by the owner or occupier of any premises in that locality;*

*(b) the premises in that locality the drainage of which would be by means of that sewer are—*

*(i) premises on which there are buildings; or*

*(ii) premises on which there will be buildings when proposals made by any person for the erection of any buildings are carried out; and*

*(c) the conditions specified in Article 155 are satisfied in relation to that requirement.*

*(2) It shall be the duty of a sewerage undertaker (in accordance with Article 156) to provide a lateral drain to communicate with a public sewer and to be used for the drainage for domestic purposes of premises in its area if—*

*(a) the undertaker is required to provide the lateral drain by a notice served on the undertaker by the owner or occupier of premises the drainage of which would be by means of that lateral drain;*

*(b) the premises the drainage of which would be by means of that lateral drain are—*

*(i) premises on which there are buildings; or*

*(ii) premises on which there will be buildings when proposals made by any person for the erection of any buildings are carried out; and*

*(c) the conditions specified in Article 155 are satisfied in relation to that requirement.*

*(3) The duty of a sewerage undertaker under this Article to provide a public sewer or a lateral drain shall be owed to the person who requires the provision of the sewer or lateral drain or, as the case may be, to each of the persons who joins in doing so.*

*(4) Where a duty is owed by virtue of paragraph (3) to any person, any breach of that duty which causes that person to sustain loss or damage shall be actionable at the suit of that person; but, in any proceedings brought against a sewerage undertaker in pursuance of this paragraph, it shall be a defence for the undertaker to show that it took all reasonable steps and exercised all due diligence to avoid the breach.*

...

3.5 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.*

3.6 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;*

*(ia) 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.*

...

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

*(1) An owner of any sewer, lateral drain sustainable drainage system or waste water treatment works may appeal to the Authority if—*

*(a) he is aggrieved by the proposal of a sewerage undertaker to make a declaration under Article 159; or*

*(b) he is aggrieved by the refusal of a sewerage undertaker to make such a declaration.*

...

*(3) The time for the making of an appeal under paragraph (1) by the owner of any sewer, lateral drain, sustainable drainage system or waste water treatment works shall be—*

*(a) in the case of an appeal by virtue of sub-paragraph (a) of that paragraph, any time within two months after notice of the proposal is served on that owner; and*

*(b) in the case of an appeal by virtue of sub-paragraph (b) of that paragraph, any time after receipt of notice of the undertaker's refusal or, if no such notice is given, at any time after the end of two months from the making of the application for the declaration.*

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

*(a) in the case of an appeal under paragraph (1), allow or disallow the proposal of the sewerage undertaker or, as the case may be, make any declaration which the sewerage undertaker might have made;*

*...*

*(5) Where the Authority makes a declaration under paragraph (4)(a), it may, if it thinks fit—*

*(a) specify conditions, including conditions as to the payment of compensation by the sewerage undertaker; and*

*(b) direct that its declaration shall not take effect unless any conditions so specified are accepted.*

*(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.*

3.8 Article 220 of the Water Order provides (relevantly) –

*(1) Subject to the following provisions of this Article, to Article 223(10) and to the provisions of Chapter III, every relevant undertaker shall, for the purpose of carrying out its functions, have power—*

*(a) to lay a relevant pipe (whether above or below the surface) in any land which is not in, under or over a street and to keep that pipe there;*

*(b) to inspect, maintain, adjust, repair or alter any relevant pipe which is in any such land;*

*(c) to carry out any works requisite for, or incidental to, the purposes of any works falling within subparagraph (a) or (b).*

*(2) Nothing in paragraph (1) shall authorise a water undertaker to lay a service pipe in, on or over any land except where—*

*(a) there is already a service pipe where that pipe is to be laid; or*

*(b) the undertaker is required to lay the pipe in, on or over that land by virtue of any of paragraphs (3) to (5) of Article 80.*

...

*(4) The powers conferred by this Article shall be exercisable only after reasonable notice of the proposed exercise of the power has been given to the owner and to the occupier of the land where the power is to be exercised.*

...

*(6) Paragraph (5) shall not apply in the case of any notice given with respect to the exercise of any power in an emergency or for the purpose of—*

*(a) laying or altering a service pipe; or*

*(b) complying with a duty imposed under Article 76 or 154.*

...

3.9 Article 236 of the Water Order provides (relevantly) –

...

*(9) Any person who, without the consent of a relevant undertaker, causes any building to be erected over or in the vicinity of a pipe or sustainable drainage system vested in that undertaker so as to have an effect on the use or operation of the pipe or system shall be guilty of an offence.*

...

3.10 Article 242 of the Water Order provides (relevantly) –

*(1) In executing any works under this Part a relevant undertaker shall—*

*(a) cause as little detriment and inconvenience and do as little damage as possible; and*

*(b) make good, or pay compensation for, any loss or damage caused by, or in consequence of, the execution of the works.*

*(2) Compensation shall not be payable to any person under paragraph (1)(b) in relation to any matter as to which he has been in default.*

(3) Any question arising as to—

(a) the entitlement of any person to compensation under this Article; or

(b) the amount payable by way of that compensation, shall, in default of agreement, be referred to and determined by the Lands Tribunal; and Articles 4 and 5 of the Land Compensation (Northern Ireland) Order 1982 (NI 9) shall apply with appropriate modifications to such determination.

...

***The Water and Sewerage Services (Northern Ireland) Order 1973 (A3)***

3.11 Article 17 of the Water and Sewerage (Northern Ireland) Order 1973 provides (relevantly) –

(1) Where the owner or occupier of any premises desires—

(a) to have his service pipe connected with a main vested in the Ministry and to have a supply of water from the Ministry; or

(b) to have his drain connected with, and to discharge domestic sewage and surface water into, a sewer or sewage disposal works vested in the Ministry; he shall make a written application in that behalf to the Ministry for its consent.

(2) The Ministry shall, within twenty-eight days from the date on which it receives an application under paragraph (1), refuse its consent or grant its consent unconditionally or subject to such conditions (including conditions as to charges) as it thinks fit to impose.

(3) Any person aggrieved by a decision of the Ministry under this Article may appeal to the Appeals Commission within twenty-eight days from the date of the Ministry's decision under paragraph (2).

...

***Practice and procedure***

- 3.12 The practice and procedure being followed by the Utility Regulator for the purposes of the determination of the Appeal is that set out in the Dispute Policy – supplemented as required in order to ensure good governance and best practice.<sup>1</sup>
- 3.13 For completeness, I note that, in determining appeals under Article 162(1), 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).

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<sup>1</sup> The Dispute Policy (A2).

#### 4. SECTION FOUR – FACTUAL AND PROCEDURAL BACKGROUND

- 4.1 The following summary of the factual background is derived mainly from the relevant section of the Statement and I note that it is not in contention between the Parties. I take the following summary to be accurate and adopt it for the purposes of this determination.
- 4.2 The Appellant is the owner of the Property. Both an adopted foul sewer and an unadopted storm sewer pipe (the **Storm Pipe**) run through the garden of the Property. I was referred to the maps provided by NIW which show the pipes running through the garden of the Property.<sup>2</sup> The section of the Storm Pipe which runs through the Property is owned by the Appellant.<sup>3</sup>
- 4.3 On 24 September 2018, Armagh, Banbridge and Craigavon Council approved planning permission for 10 new properties to be constructed near the Property (the **Development**). The Development requires sewerage infrastructure to be in place to serve the new properties.<sup>4</sup>
- 4.4 Article 161 of the Water Order provides that NIW may enter into an agreement with any person constructing or proposing to construct a sewer or drain, to adopt that sewer or drain at a future date. On 15 June 2021 Greg Seeley Consulting Ltd (the **Developer's Consultant**), on behalf of B&J Coleman (the **Developer**), applied for an Article 161 agreement to connect proposed sewerage infrastructure to NIW's sewerage network (the **Article 161 Application**).<sup>5</sup> The Article 161 Application included the Storm Pipe as it was not evident from the drawings available at the time that the Storm Pipe had already been fully constructed.<sup>6</sup>
- 4.5 The Article 161 Application was closed in March 2023 due to lack of progress by the Developer but was reopened on 3 July 2023.<sup>7</sup>

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<sup>2</sup> Please see the various maps provided at **B9, B11, B12** and **B19**. See also the maps enclosed within the emails between the Developer's Consultant and the Appellant, 27 September 2023 to 13 October 2023 (**B30**).

<sup>3</sup> The NIW Clarifications (**B15**), p. 1.

<sup>4</sup> The Response (**B7**), p. 1.

<sup>5</sup> The Article 161 Application Form (**B18**).

<sup>6</sup> The Response (**B7**), p. 1.

<sup>7</sup> The Response (**B7**), p. 1.

4.6 In late September 2023, the Developer hand-delivered an Article 161 agreement to the Appellant for their review and signature (the **Article 161 Agreement**). On review, the Appellant requested copies of documentation referred to within the Article 161 Agreement (including, amongst other things, the accompanying maps).<sup>8</sup>

4.7 On or around 26 September 2023, the Appellant was provided with a letter from the Developer's Consultant (**B31**) accompanied by the draft Article 161 Agreement, with maps attached, for signature at page 3.<sup>9</sup> The letter stated as follows<sup>10</sup> –

*"As part of the Article 161 Agreement, the landowners of Nos. ■■■, ■■■ & ■■■ are being requested to agree to the storm sewer being adopted by NI Water and grant a wayleave to NI Water and sign page 3 of the draft Article 161 Agreement."*

4.8 On 27 September 2023, the Appellant contacted the Developer's Consultant by email seeking further clarity on the proposals. The Developer's Consultant's response states that<sup>11</sup> –

- (a) the Appellant's storm drainage is not connected to the Storm Pipe but rather to an adopted storm sewer in the main road outside of the Property,
- (b) the Storm Pipe currently serves the Goodyear Social Club,
- (c) the existing foul sewer is adopted and maintained by NIW (and it is assumed that NIW have a wayleave over the adopted foul sewer),
- (d) the Storm Pipe is not adopted or maintained by NIW (although NIW has indicated that it will adopt the Storm Pipe as part of the drainage for the Development),

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<sup>8</sup> The Reply to the Response (**B28**), p. 1.

<sup>9</sup> The Reply to the Response (**B28**), p. 1.

<sup>10</sup> Letter from the Developer's Consultant to the Appellant, 26 September 2023 (**B31**).

<sup>11</sup> Emails between the Developer's Consultant and the Appellant, 27 September 2023 to 13 October 2023 (**B30**).

- (e) if the Storm Pipe is adopted by NIW and the Appellant wishes to extend the Property the Appellant would be allowed to connect to the adopted Storm Pipe without having to connect to the storm pipe which runs along the main road; and
- (f) the Appellant is currently responsible for the maintenance of the Storm Pipe, as it is currently a private sewer, but if the Storm Pipe is adopted by NIW then NIW will be responsible for its maintenance.

4.9 When it became apparent that the Storm Pipe was already fully constructed, NIW informed the Developer that the Storm Pipe could not be adopted under Article 161 of the Water Order and that it would have to be adopted via an alternative route. NIW advised the Developer that the Storm Pipe could be adopted under Article 159 instead.<sup>12</sup>

4.10 Accordingly, the Developer revised the drainage drawings accompanying the draft Article 161 Agreement so as to omit the Storm Pipe and sought to arrange meetings between NIW and the owners of properties ■■■, ■■■ and ■■■ Knockramer Meadows to explain the background to the Adoption Proposal and the options available.<sup>13</sup>

4.11 It is noted that the Developer is the owner of ■■■ Knockramer Meadows.<sup>14</sup>

4.12 On 29 November 2023, the Developer's Consultant, on behalf of the Developer, contacted NIW to confirm that the owner of house number ■■■ Knockramer Meadows is agreeable to meet with NIW but that the owners of properties ■■■ and ■■■ Knocktaker Meadows had '*not been responsive to [the Developer's] calls*'.<sup>15</sup>

4.13 On 1 December 2023, the Developer's Consultant confirmed that meetings had been arranged between the Developer, NIW and the owners of properties ■■■ and ■■■ Knockramer Meadows for the evening of Tuesday 5 December 2023. It was noted that the Developer's

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<sup>12</sup> The Response (B7), p. 1.

<sup>13</sup> Emails between the Developer's Consultant and NIW, 30 October 2023 to 2 November 2023 (B16).

<sup>14</sup> Email from the Developer's Consultant to NIW, 29 November to 7 December 2023 (B20).

<sup>15</sup> Email from the Developer's Consultant to NIW, 29 November to 7 December 2023 (B20).

Consultant had been unable to confirm the availability of the Appellant and it was suggested that NIW try to meet with the Appellant after the meetings with the other properties.<sup>16</sup>

- 4.14 On 7 December 2023, the Developer's Consultant confirmed that the owners of properties ■■■ and ■■■ Knockramer Meadows were both agreeable to NIW's proposals. No update was provided on the Appellant's position, but the Appellant's email address was passed to NIW to initiate direct contact.<sup>17</sup>
- 4.15 NIW contacted the Appellant on 7 December 2023 via email.<sup>18</sup> The email explained that NIW had called at the Property on 5 December 2023 but had been unable to speak to them. The email asked the Appellant to reply with some suitable times to discuss the proposals if they wish to do so.
- 4.16 There was no further correspondence between NIW and the Appellant until 22 March 2024.
- 4.17 On 22 March 2024, the Appellant received a letter from NIW (the Adoption Proposal) notifying them of NIW's intention to adopt the Storm Pipe under Article 159 as the undertaker for public sewers within Northern Ireland and in order to serve the Development.<sup>19</sup>
- 4.18 The Adoption Proposal further notes that "*this vesting will include a Wayleave over the ground to a distance of 3 meters or 1.5 times the depth of the sewer, either side of the pipe, in order to allow access for any future maintenance or repairs*" (the **Wayleave**).<sup>20</sup>

#### Procedural background

- 4.19 The Appellant lodged the Appeal with Utility Regulator on 3 May 2024.<sup>21</sup>

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<sup>16</sup> Email from the Developer's Consultant to NIW, 29 November to 7 December 2023 (**B20**).

<sup>17</sup> Email from the Developer's Consultant to NIW, 29 November to 7 December 2023 (**B20**).

<sup>18</sup> Email from NIW to the Appellant (**B21** and **B32**).

<sup>19</sup> The Adoption Proposal (**B1**), p. 2.

<sup>20</sup> The Adoption Proposal (**B1**), p. 2.

<sup>21</sup> The Application (**B1**), p. 1.



- 4.20 On 17 May 2024, the Utility Regulator notified NIW that an appeal had been lodged.<sup>22</sup>
- 4.21 Following an initial review of the Application, the Utility Regulator acknowledged the Application and informed the Parties (by letter dated 28 May 2024) that it has jurisdiction to consider and determine the issues in dispute under Article 162 of the Water Order.<sup>23</sup>
- 4.22 On 10 June 2024, NIW provided its initial representations in respect of the Appeal (the **Response**).<sup>24</sup>
- 4.23 Upon consideration of NIW's representations, the Utility Regulator sought further information from NIW.<sup>25</sup>
- 4.24 By letter dated 24 June 2024, NIW provided its response, together with supporting documentation.<sup>26</sup>
- 4.25 The Utility Regulator extended the deadline for the Appellant's representations from 25 June 2024 to 3 July 2024 in order to allow the Appellant sufficient time to review the additional documentation provided by NIW.<sup>27</sup>
- 4.26 The Appellant provided their representations on 3 July 2024 (the **Reply to the Response**).<sup>28</sup>
- 4.27 The Utility Regulator provided its initial draft of the Statement on 30 July 2024.<sup>29</sup> In accordance with the previously applicable timetable, the Parties were invited to provide any comments on the draft Statement by 5pm on 20 August 2024.<sup>30</sup>

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<sup>22</sup> Email from the Utility Regulator to NIW, 17 May 2024 (**B2**).

<sup>23</sup> Letter from the Utility Regulator to the Parties, 28 May 2024 (**B4**).

<sup>24</sup> The Response (**B7**).

<sup>25</sup> Letter from the Utility Regulator to the Parties, 17 June 2024 (**B13**).

<sup>26</sup> Letter from NIW to the Utility Regulator, 24 June 2024 (**B15**).

<sup>27</sup> Email from the Utility Regulator to the Parties, 25 June 2024 (**B25**), email from the Appellant to the Utility Regulator, 25 June 2024 (**B26**) and email from NIW to the Utility Regulator, 25 June 2024 (**B27**).

<sup>28</sup> The Reply to the Response (**B28**).

<sup>29</sup> Initial Statement of Case, 30 July 2024 (**B39**).

<sup>30</sup> Letter from the Utility Regulator to the Parties, 3 July 2024 (**B36**).

- 4.28 On 19 August 2024, NIW confirmed by email that it was content with the draft Statement and had no comments to return.<sup>31</sup> The Appellant did not provide any comments at this stage.
- 4.29 However, on 20 August 2024, NIW submitted additional information and documentation to the Utility Regulator which had been provided to it by the Developer and which it considered to have a bearing on the Appeal (the **Additional Information**).<sup>32</sup>
- 4.30 In light of the relevance of the Additional Information, on 21 August 2024, the Utility Regulator granted the Appellant an additional week to provide any comments they had in response to the Additional Information, or any reason why that information should not be taken into account.<sup>33</sup>
- 4.31 On 29 August 2024, the Appellant provided their response to the Additional Information (the **Reply to the Additional Information**).<sup>34</sup>
- 4.32 The Additional Information and the Reply to the Additional Information were incorporated into the updated Statement.<sup>35</sup>
- 4.33 On 24 September 2024, I issued my Provisional Determination in the Appeal.<sup>36</sup>
- 4.34 In the Provisional Determination, I concluded that, in light of the Additional Information and the Reply to the Additional Information, the Utility Regulator did not have the jurisdiction to determine the Appeal.
- 4.35 Specifically, in the Additional Information,<sup>37</sup> NIW provided evidence that the Appellant holds the Property on a long lease. In the Reply to the Additional Information, the Appellant did not dispute that she was a leaseholder.<sup>38</sup> As such, I concluded that she was not the owner of the

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<sup>31</sup> Email from NIW to the Utility Regulator, 19 August 2024 (**B40**).

<sup>32</sup> Email from NIW to the Utility Regulator, 20 August 2024 (**B41**).

<sup>33</sup> Email from the Utility Regulator to the Parties, 21 August 2024 (**B47**).

<sup>34</sup> Email from the Appellant to the Utility Regulator, 29 August 2024 (**B43**).

<sup>35</sup> Updated Statement of Case, 3 September 2024 (**B50**).

<sup>36</sup> Provisional Determination, 24 September 2024 (**B51**).

<sup>37</sup> Email from NIW to the Utility Regulator, 20 August 2024 (**B41**).

<sup>38</sup> Email from the Appellant to the Utility Regulator, 29 August 2024 (**B43**).

Storm Pipe and did not have the right to bring the Appeal under Article 162(1) of the Water Order.

- 4.36 Notwithstanding that finding, I concluded that, had the Utility Regulator the jurisdiction to determine the Appeal, I would have found against the Appellant on the merits of her case.
- 4.37 In accordance with the applicable timetable as set out in the letter dated 29 August 2024,<sup>39</sup> the Parties were invited to provide any comments on the Provisional Determination by 5pm on 8 October 2024.
- 4.38 NIW provided comments in response to the Provisional Determination on 3 October 2024 (the **NIW Response to the PD**).
- 4.39 On 8 October 2024, the Appellant provided their comments in response to the Provisional Determination (**Reply to the PD**) with a map from NIW enclosed.<sup>40</sup>
- 4.40 NIW responded to the Reply to the Initial Provisional Determination by email on 11 October 2024 (**NIW's Response to the Appellant**). As NIW's Response to the Appellant fell outside the specified window for representations, and no reasonable request for an extension of the deadline was made, I have had no regard to it.
- 4.41 On 15 October 2024, the Appellant provided further comments in response to NIW's Response to the Appellant's Reply (the **Appellant's Response to NIW**). Again, I have not had regard to these comments as the Appellant was not invited to provide representations on NIW's submission (which itself has not been taken into account).
- 4.42 On the basis of the Reply to the Initial Provisional Determination, I considered it appropriate to obtain specific legal advice (a summary of which is provided at [Appendix 2](#), the **Summary of the Legal Opinion** ) in order to clarify the legal owner of the Storm Pipe and as such to

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<sup>39</sup> Letter from the Utility Regulator to the Parties, 29 August 2024 (**B49**).

<sup>40</sup> Reply to the PD, 8 October 2024 (**B52**) and marked NIW map, 23 August 2021 (**B53**).

clarify whether or not the Appellant does indeed have the right to bring the Appeal under Article 162(1).

- 4.43 The advice confirmed that the Appellant is the 'owner' of the Storm Pipe for the purposes of Article 2 of the Water Order. I have accepted that legal advice.

5. **SECTION FIVE – VIEWS OF THE APPELLANT**

5.1 The Appellant's views are set out in –

- (a) the Application **(B1)**,
- (b) the Reply to the Response **(B28)**,
- (c) the Reply to the Additional Information **(B48)**,
- (d) the Reply to the PD **(B52)**,
- (e) the Appellant's Response to NIW, and
- (f) a response to the Replacement Provisional Determination dated 25 November 2024 (the **Reply to the Replacement PD (B58)**).

5.2 As stated in Section Four, NIW's Response to the Appellant's Reply was provided out of time and has not been taken into consideration in this provisional determination. Likewise, the Appellant was not invited to make submissions on that response. As such, I have had no regard to the Appellant's Response to NIW and do not provide a summary of it in this provisional determination.

5.3 With the exception of the Appellant's Response to NIW, I have read the above documents in full and have had full regard to all of these submissions. In doing so, I have borne in mind that my 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, save in relation to those documents that were provided after the Statement. I adopt it as accurate for the purposes of this determination.

***The Application***

5.5 The Application sets out the following three reasons why the Appellant does not wish the Storm Pipe to be adopted<sup>41</sup> –

- (a) The adoption of the Storm Pipe will impact upon the value of the Property.
- (b) The adoption of the Storm Pipe will impact upon the Appellant's use and enjoyment of the rear garden to the Property. The Appellant notes that the Storm Pipe is situated beneath a number of flower beds and runs under mature trees.
- (c) The granting of the Wayleave will impact upon the use and enjoyment of the Property without benefiting it in any way while being "*seriously detrimental*" to the Appellant. The Appellant states that there are currently no access rights onto the Property and that the Storm Pipe does not currently benefit from any wayleave.

#### ***The Reply to the Response***

5.6 In the Reply to the Response, the Appellant sets out the sequence of events relating to the delivery and review of the Article 161 Agreement (as outlined in Section Four).

5.7 The Appellant states that the first time they heard anything from NIW was on 7 December 2023, that they did not know that NIW would be calling at their door, and that they are "*at a loss*" as to why they were the only resident left out of the meeting on 5 December 2023.<sup>42</sup>

5.8 The Appellant states that the next correspondence they received after 7 December was NIW's letter dated 22 March 2024 communicating the Adoption Proposal.<sup>43</sup>

5.9 In support of the Application, the Appellant provides two photographs of the rear garden showing the mature trees and plants and further notes that the oil tank is positioned in the flower beds.<sup>44</sup>

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<sup>41</sup> The Application (**B1**), p. 1.

<sup>42</sup> The Reply to the Response (**B28**), p. 2.

<sup>43</sup> The Reply to the Response (**B28**), p. 2 and the Adoption Proposal (**B1**), p. 2.

<sup>44</sup> The Reply to the Response (**B28**), p. 2 and the photographs (**B34**).

***The Reply to the Additional Information***

- 5.10 On 20 August 2024, NIW submitted the Additional Information to the Utility Regulator.<sup>45</sup> The Additional Information is set out in more detail at Section Six below.
- 5.11 As noted in Section Four above, the Utility Regulator granted the Appellant an additional week to respond to the Additional Information, or provide any reason why that information should not be taken into account.<sup>46</sup>
- 5.12 In the Reply to the Additional Information, the Appellant states that the Additional Information does not in any way assist the Developer.<sup>47</sup> They note the following –
- (a) The 'Exceptions and Reservations' in the lease are effective for properties within the Knockramer development and any adjoining lands or property owned by the Developer at the time that the lease was granted.
  - (b) The Developer acquired the adjoining development almost two decades after the grant of the lease. This acquired property cannot have the benefit of the 'Exceptions and Reservations' reserved in 1999.
  - (c) Even if the Developer had owned the adjoining development in 1999, the subject rights could not have been dealt with as 'Exceptions and Reservations' as no part of the new adjoining development was being assured to enable reservations to be made and, properly done, the Developer would have been required to expressly grant rights for the benefit of the adjoining title.

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<sup>45</sup> Email from NIW to the Utility Regulator, 20 August 2024 (B41).

<sup>46</sup> Email from the Utility Regulator to the Parties, 21 August 2024 (B47).

<sup>47</sup> Email from the Appellant to the Utility Regulator, 29 August 2024 (B48).

5.13 The Appellant also noted the following<sup>48</sup> –

- (a) On purchasing the Property, the Developer did not make them or their solicitor aware of the existence of the Storm Pipe.
- (b) The Developer placed the Appellant's oil tank over the Storm Pipe and, over the years, the Appellant cultivated mature shrubbery along its path, oblivious to its existence.
- (c) While a service strip is marked on the map and provisions relating to it are included in the lease at paragraph 2(xii), nothing whatsoever was recorded for the Storm Pipe.

5.14 The Appellant made several other points in relation to the process followed by the Developer in relation to the adoption of the Storm Pipe. However, as the opportunity provided by the Utility Regulator was only to comment on the Additional Information, I was invited to disregard these and have done so. They were not set out in the Statement and have not been addressed in this provisional determination.

***The Reply to the PD***

5.15 On 24 September 2024, I issued my initial provisional determination.<sup>49</sup>

5.16 On 8 October 2024, the Appellant stated as follows<sup>50</sup> –

- (a) NIW does not already have access to her rear garden. The foul sewer runs along the front of the property adjacent to Knockramer Meadows as highlighted green on the map provided.<sup>51</sup>

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<sup>48</sup> Email from the Appellant to the Utility Regulator, 29 August 2024 (**B48**).

<sup>49</sup> Provisional Determination, 24 September 2024 (**B51**).

<sup>50</sup> Reply to the PD, 8 October 2024 (**B52**) and marked NIW map, 23 August 2021 (**B53**).

<sup>51</sup> Marked NIW map, 23 August 2021 (**B53**).



- (b) The Appellant is the owner of the Storm Pipe. The Property is held under a 999-year lease at a nominal rent of 5p. Article 2 of the Water Order defines an 'owner' as the person receiving the rack-rent of the premises. As 5p is not rack rent, the Developer is not the 'owner' of the Storm Pipe. The Utility Regulator therefore has jurisdiction to determine the appeal.
- (c) Paragraph 8.14 of the initial provisional determination states that the area shaded green is that under which the foul sewer and Storm Pipe run.<sup>52</sup> This is incorrect. The Storm Pipe is in the rear garden – not in the green strip along the front of the Property.
- (d) The Appellant has not planted mature trees or in any other way prevented access to the Wayleave. In any event, the sewers were laid in the public road rather than within the service strip.
- (e) The Wayleave is in relation to the green strip and does not relate to the Storm Pipe. The 'Exceptions and Reservations' in the lease relate only to properties within Knockramer and not the proposed development.<sup>53</sup>

5.17 The Appellant also points out that in the Developer's Consultant's email dated 3 October, it is stated that NIW called at the Appellant's home on several occasions when no-one was home and left a note for the Appellant to get in touch. The Appellant did not receive a note from NIW.

#### **Reply to the Replacement PD**

5.18 In the Reply to the Replacement PD, the Appellant repeated points made in previous submissions and stated the following in addition<sup>54</sup> –

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<sup>52</sup> Initial Provisional Determination, 24 September 2024 (B51), page 42.

<sup>53</sup> Lease between the Developer and the Appellant, 26 August 1999 (B42).

<sup>54</sup> Reply to the Replacement PD, 25 November 20024 (B58).

- (a) When she purchased my property, the Developer did not advise the Appellant of the existence of the foul sewer in her rear garden.
- (b) NIW did not engage with the Appellant in good faith. No meaningful approaches ever made to me in the form of a letter, a card or an email. On the 29 November 2023, the Developers Agent emailed NIW to suggest that he write to Number ■ and ■ to set up a meeting. No such letter was received nor did anyone try to contact the Appellant to set up a meeting.
- (c) If anyone had taken time to explain the process and reassured the Appellant and her husband that their rear garden would have remained intact, *'none of these issues would have arisen in the first place'*.

6. **SECTION SIX – VIEWS OF NIW**

6.1 The views of NIW are set out in –

- (a) the Response **(B7)**,
- (b) the NIW Clarifications **(B15)**,
- (c) the Additional Information **(B41-B46)**,
- (d) the NIW Response to the PD **(B54, B55 and B57)**, and
- (e) NIW Response to the Appellant.

6.2 On 11 October 2024, NIW provided comments in response to the Appellant's Reply to the Initial Provisional Determination. As noted in Section Four, NIW's Response to the Appellant's Reply was out of time, and no reasonable request for an extension was provided. As such, I have had no regard to NIW's Response to the Appellant's Reply and do not provide a summary of it in this provisional determination.

6.3 NIW made no response to the Replacement Provisional Determination except to correct an error in relation to its submissions on the Provisional Determination **(B57)**.

6.4 With the exception of NIW's Response to the Appellant, I have read the above documents in full and have had full regard to all of these submissions. In doing so, I have borne in mind that my role is to determine the issues set out in Section Seven of this document.

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

***The Response***

- 6.6 NIW sets out the sequence of events relating to the development of the initial Article 161 Agreement, the meetings that took place on 5 December 2023 and the decision to proceed with the Adoption Proposal (as outlined in Section Four).<sup>55</sup>
- 6.7 NIW explains that the Developer approached NIW indicating that it intends to carry out a Development and that the Development requires a storm sewer to cross through the Property.<sup>56</sup>
- 6.8 NIW notes that, under Article 154 of the Water Order, NIW is under a "*duty to comply with sewer and lateral drain requisition*" if a Developer serves on it a requisition requiring it to provide such infrastructure (an **Article 154 Requisition**).<sup>57</sup>
- 6.9 The Developer has not yet made any Article 154 Requisition in relation to a storm sewer to serve the development.<sup>58</sup> However, for context, NIW makes the following points<sup>59</sup> –
- (a) The usual procedure for NIW to comply with an Article 154 Requisition is to serve a lands notice under Article 220 of the Water Order (an **Article 220 Notice**) on the landowner stating that it intends to construct a sewer.
  - (b) There is no right of appeal by the landowner in respect of an Article 220 Notice (unlike a notice of adoption under Article 159).
  - (c) On expiry of the notice period under the Article 220 Notice, NIW is entitled to enter the landowner's property and construct the sewer.
  - (d) Once the sewer has been laid, the landowner is entitled to claim compensation under Article 242 of the Water Order.

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<sup>55</sup> The Response (**B7**), p. 1.

<sup>56</sup> The Response (**B7**), p. 1.

<sup>57</sup> The Response (**B7**), p. 1.

<sup>58</sup> The Response (**B7**), p. 2.

<sup>59</sup> The Response (**B7**), p. 2.

- 6.10 NIW anticipates that an Article 154 Requisition may be imposed if it is not otherwise possible for NIW to adopt and use the Storm Pipe.<sup>60</sup>
- 6.11 NIW explains that, following discussions with the Developer, it investigated which option available would cause the least disruption to the Appellant.<sup>61</sup>
- 6.12 Following such investigations, NIW ascertained that there was already an unadopted, fully constructed storm pipe running through the land which, if adopted by NIW, could be used to provide the required sewerage infrastructure without having to construct a new sewer.<sup>62</sup>
- 6.13 It is NIW's view that adopting the existing Storm Pipe would cause less disruption and be less detrimental to the Appellant than if it were required to serve an Article 220 Notice to construct a new storm sewer. In particular, NIW notes that in the event of an Article 154 Requisition<sup>63</sup> –
- (a) the construction process required to provide a new storm sewer would involve excavating the Appellant's garden,
  - (b) a new storm sewer may impact upon the value of the Property (although NIW notes that the Appellant would be entitled to claim compensation),
  - (c) a new storm sewer may impact upon the use and enjoyment of the rear garden of the Property as any new storm sewer laid pursuant to an Article 220 Notice creates an area within which no building work may take place (under Article 236(9) of the Water Order) and it may be necessary for the new storm sewer to be laid beneath the flower beds and mature trees to which the Appellant refers, and
  - (d) a new storm sewer would create access rights onto the Property in favour of NIW without benefitting the Property.

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<sup>60</sup> The Response (**B7**), p. 2.

<sup>61</sup> The Response (**B7**), p. 2.

<sup>62</sup> The Response (**B7**), p. 2.

<sup>63</sup> The Response (**B7**), pp. 2 – 3.

- 6.14 NIW further points out that, in addition to the unadopted storm sewer, there is already an adopted foul sewer that crosses through the garden of the Property in close proximity to the unadopted sewer and some trees.<sup>64</sup> In support of this, NIW has provided a selection of maps which illustrate the positioning of each of the pipes.<sup>65</sup> NIW has also provided an entry from the Statutory Charges Register which states that the Property is affected by an agreement under Article 17 of the Water and Sewerage Services (Northern Ireland) Order 1973 (the agreement pursuant to which NIW states the foul sewer was laid).<sup>66</sup>
- 6.15 NIW assumes that the Appellant would have been made aware of the existence of the adopted foul sewer, and the legal implications of its existence, on purchasing the Property.<sup>67</sup>
- 6.16 In terms of access rights, NIW notes that the implication of there already being an adopted foul sewer is that NIW already has access rights to the garden in connection with the foul sewer.<sup>68</sup>
- 6.17 For the reasons above, NIW decided to further adopt the Storm Pipe via Article 159 of the Water Order.
- 6.18 NIW points to Article 159(5) which requires the sewerage undertaker to have regard to certain considerations in deciding whether a declaration of adoption should be made. With regard to these considerations, it states that<sup>69</sup> –
- (a) the Storm Pipe is required for a general system of sewerage or sewage disposal which NIW proposes to provide to serve a Development in the area following correspondence with the Developer,

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<sup>64</sup> The Response (**B7**), p. 2.

<sup>65</sup> Please see the various maps provided at **B9**, **B11**, **B12** and **B19**.

<sup>66</sup> Excerpt from the Statutory Charges Register (**B10**).

<sup>67</sup> The Response (**B7**), p. 3.

<sup>68</sup> The Response (**B7**), p. 2.

<sup>69</sup> The Response (**B7**), p. 3.

- (b) the Storm Pipe is not constructed under a road or under land reserved by a planning scheme for a street,
- (c) it is understood that the Storm Pipe would serve 10 properties,
- (d) the method of construction and state of repair of the Storm Pipe meet NIW's standards for adoption, and
- (e) in this case (where the owner objects) the making of the proposed declaration would be less detrimental to the owner than if the proposed declaration were not made and NIW instead served an Article 220 Notice pursuant to an Article 154 Requisition and built a new storm sewer.

6.19 NIW notes that the Appeal has been brought under Article 162(1) of the Water Order. In respect of this, it makes the following observations<sup>70</sup> –

- (a) Under Article 162(4), the Utility Regulator may, on considering such an appeal, allow or disallow the Adoption Proposal or make any declaration which NIW might otherwise have made.
- (b) Under Article 162(5), where the Utility Regulator makes a declaration under Article 162(4), the Utility Regulator may, if it thinks fit, specify conditions – including conditions as to the payment of compensation by NIW to the Appellant.

6.20 NIW further notes that the implication of these provisions is that the Utility Regulator may, if it sees fit, make a declaration that the Storm Pipe shall be adopted by NIW with conditions to the effect that<sup>71</sup> –

- (a) NIW is required to pay compensation to the Appellant calculated on the same basis as if the pipe had been laid by it pursuant to an Article 220 Notice,

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<sup>70</sup> The Response (B7), p. 3.

<sup>71</sup> The Response (B7), p. 4.

- (b) The assessment of such compensation shall take into account of the fact that the Storm Pipe is already in situ, that the Property will not need to be excavated in order to lay it, and that there is already an adopted foul sewer in place,
- (c) the assessment of such compensation shall be carried out by Land & Property Services, being the body which assesses compensation in respect of the laying of sewers pursuant to Article 220 Notices,
- (d) Article 242(3) of the Water Order, which provides for questions regarding compensation to be referred to and determined by the Lands Tribunal, shall have effect in relation to the assessment of such compensation, and
- (e) the declaration shall not take effect until the stated conditions are accepted by NIW.

***The Additional Information***

6.21 On 20 August 2024, NIW submitted the Additional Information to the Utility Regulator stating that it had just been made available to NIW by the Developer in the few days prior to its submission.<sup>72</sup>

6.22 The Additional Information consists of –

- (a) a lease between the Developer and the Appellant dated 26 August 1999 (the **Lease**),<sup>73</sup>
- (b) a folio in relation to AR19234 County Armagh (**Folio AR19234**),<sup>74</sup>
- (c) a folio in relation to [REDACTED] County Armagh (**Folio [REDACTED]**),<sup>75</sup>
- (d) a map in relation to folio AR19234 County Armagh,<sup>76</sup> and

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<sup>72</sup> Email from NIW to the Utility Regulator, 20 August 2024 (**B41**).

<sup>73</sup> Lease between the Developer and the Appellant, 26 August 1999 (**B42**).

<sup>74</sup> Folio AR19234, 5 August 2024 (**B43**).

<sup>75</sup> Folio [REDACTED], 5 August 2024 (**B44**).

<sup>76</sup> Map in relation to Folio AR19234, 12 August 2024 (**B45**).



(e) a map in relation to folio [REDACTED] County Armagh.<sup>77</sup>

6.23 NIW states the following in relation to the Additional Information –

(a) Folio AR19234 confirms that the Developer is the registered owners of the freehold land on the corresponding registry map comprising land situated on the north side of Silverwood Road, Craigavon.<sup>78</sup>

(b) Folio AR19234 includes the following entry<sup>79</sup> –

*"Part of the land herein is subject to a lease made on 26<sup>th</sup> August 1999 from [REDACTED] and another to [REDACTED] [REDACTED] [REDACTED] and another for 999 years."*

(c) The Lease contains the following clause<sup>80</sup> –

*"1. The Lessor in consideration of the yearly rent hereinafter reserved and of the covenants on the part of the Lessee and conditions hereinafter contained hereby demises unto the Lessee the premises...**EXCEPTING AND RESERVING** unto the Lessor and the Tenants of the Lessor occupying premises adjoining the free and uninterrupted passage and running of water soil gas electricity and other services from other buildings and lands of the Lessor its Lessees and Tenants in and through the sewers drains watercourses pipes wires ducts and conduits made or to be made in or under the premises and also liberty to enter upon the premises for the purpose of making laying or repairing sewers drains watercourses pipes wires ducts conduits or other services in or upon or under the premises for the purpose of draining improving or servicing any adjoining contiguous land of the Lessor..."*

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<sup>77</sup> Map in relation to Folio [REDACTED], 9 August 2024 (B46).

<sup>78</sup> Email from NIW to the Utility Regulator, 20 August 2024 (B41).

<sup>79</sup> Email from NIW to the Utility Regulator, 20 August 2024 (B41) and Folio AR19234, 5 August 2024 (B43), p. 9.

<sup>80</sup> Email from NIW to the Utility Regulator, 20 August 2024 (B41) and Lease between the Developer and the Appellant, 26 August 1999 (B42), p. 2.

- (d) One of the signatories of the Lease is "[REDACTED] [REDACTED]".<sup>81</sup>
- (e) NIW assumes that this "[REDACTED] [REDACTED] [REDACTED]" is the Appellant.<sup>82</sup>
- (f) Folio [REDACTED] contains the following entry<sup>83</sup> –
- "Short particulars of lease under which the land is held:*
- a. Date of lease: 26<sup>th</sup> August 1999*
- b. Document No. [REDACTED]*
- c. Term: 999 years from 1<sup>st</sup> February 1999*
- d. Note: The title of the lessor is registered in folio AR19234"*

6.24 NIW states that the Additional Information shows that when the Property was acquired, the Appellant signed a lease stating that the Developer reserved the right to lay sewers through the Property.<sup>84</sup>

#### **The NIW Response to the PD**

- 6.25 In its response to the Provisional Determination, NIW stated that it treated the Appellant's long lease as being equivalent to ownership rather than equivalent to a situation where a house is occupied by a tenant paying a market rent.<sup>85</sup>
- 6.26 It also stated that the papers in the Appeal contain the email from NIW to the Appellant of 7 December 2023 at 14:37, inviting her to discuss the matter. A representative from NIW called at the Property on several occasions when no-one was at home. On one of those occasions,

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<sup>81</sup> Email from NIW to the Utility Regulator, 20 August 2024 (B41) and Lease between the Developer and the Appellant, 26 August 1999 (B42), p. 9.

<sup>82</sup> Email from NIW to the Utility Regulator, 20 August 2024 (B41).

<sup>83</sup> Email from NIW to the Utility Regulator, 20 August 2024 (B41) and Folio [REDACTED], 5 August 2024 (B44), p. 3.

<sup>84</sup> Email from NIW to the Utility Regulator, 20 August 2024 (B41).

<sup>85</sup> NIW Response to the PD, 3 October 2024 (B54).

he left a note asking her to get in touch with him to discuss the matter. No response was received.<sup>86</sup>

6.27 NIW will consider the point made in the Provisional Determination regarding its letter to the Appellant on 22 March 2024. However, NIW's preference is always to meet customers face to face rather than to send written correspondence which may worry them.<sup>87</sup>

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<sup>86</sup> NIW Response to the PD, 3 October 2024 (B54).

<sup>87</sup> NIW Response to the PD, 3 October 2024 (B54).

**7. SECTION SEVEN – THE ISSUES TO BE DETERMINED**

- 7.1 The Statement set out the issues for determination. I agree with the issues as set out in the Statement.
- 7.2 The issues to be determined in the Appeal are as follows, taking into account all of the circumstances in the case –
- (a) Whether the Utility Regulator should allow or disallow the Adoption Proposal, or make any declaration that NIW might have made.
  - (b) Where a declaration is made, whether any conditions should be attached to that declaration.
- 7.3 However, as set out in Section Eight, there was an additional question of whether the Appellant has the right to bring the Appeal.

## 8. SECTION EIGHT – DETERMINATION

### *The Utility Regulator's jurisdiction to determine the Appeal*

8.1 Under Article 162(1) of the Water Order, an appeal against a decision by NIW to adopt a pipe under Article 159 may only be brought by the 'owner' of that pipe.

8.2 An owner is defined in Article 2 of the Water Order as follows –

*“owner”, in relation to any premises, means the person who—*

*(a) is for the time being receiving the rack-rent of the premises, whether on his own account or as agent or trustee for another person; or*

*(b) would receive the rack-rent if the premises were let at a rack-rent;*

8.3 In the Additional Information,<sup>88</sup> NIW provided evidence that the Appellant holds the Property on a long lease. The Appellant, in the Reply to the Additional Information, did not dispute that she was a leaseholder.<sup>89</sup>

8.4 In the Provisional Determination, I concluded that, in light of the Additional Information and Reply to the Additional Information, the Appellant was not (by definition) the owner of the Storm Pipe and did not have the right to bring the Appeal under Article 162(1). I therefore considered that there was no valid appeal that the Utility Regulator had the jurisdiction to determine.

8.5 However, in the Appellant's Reply to the PD, the Appellant asserted that they are the owner of the Storm Pipe and that the Utility Regulator does have jurisdiction to determine the Appeal.<sup>90</sup>

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<sup>88</sup> Email from NIW to the Utility Regulator, 20 August 2024 (B41).

<sup>89</sup> Email from the Appellant to the Utility Regulator, 29 August 2024 (B43).

<sup>90</sup> Reply to the PD, 8 October 2024 (B52).

- 8.6 Specifically, the Appellant contended that an owner is defined under Article 2 of the Water Order as the person receiving the rack rent of the premises. As the Appellant is paying a nominal rent of 5p, and 5p is not rack rent, the Developer is not the 'owner' of the Storm Pipe.
- 8.7 On the basis that the question of ownership determines the Utility Regulator's jurisdiction to determine the Appeal, I sought legal advice in order to clarify the legal owner of the Storm Pipe.
- 8.8 That advice confirms that the Appellant is the owner of the Storm Pipe for the purposes of Article 2 of the Water Order.
- 8.9 I have accepted that position and am therefore content that the Appeal was validly brought and that the Utility Regulator does have jurisdiction to determine it.

***The issues raised***

- 8.10 In consideration of the issues raised, I have found against the Appellant.
- 8.11 I accept that NIW has the power to adopt the Storm Pipe under Article 159 and that it has followed the appropriate process in doing so. I note that NIW and the Developer had difficulties in engaging the Appellant in relation to the adoption. But it does seem that they tried to do so in good faith. I understand that the Appellant disagrees with that assessment, but I consider that the evidence shows that both NIW and the Developer did try and engage with her.
- 8.12 I also accept NIW's submission that, if it does not adopt the Storm Pipe, it is almost certain that the Developer will ask it to lay a new one under Article 154 of the Water Order. Where the Developer does so, NIW will have a duty to construct the pipe and the power under Article 220 to enter the Property to undertake the necessary works.
- 8.13 Such works would involve partially excavating the Appellant's garden, as well as undertaking similar works at numbers ■■■, ■■■ and possibly ■■■ Knockramer Meadows. In circumstances where NIW adopts the existing Storm Pipe, such works (and the disruption and damage caused by them) will be avoided.

- 8.14 The Adoption Proposal will therefore prevent the damage to the Appellant's garden – and those of her neighbours – that laying a new pipe would entail. It will also result in substantially less cost to NIW, which is a publicly funded body.
- 8.15 I also note that the Appellant's lease includes Clause 2(vii), which allows the Developer's agents to enter the Property to carry out any repairs necessary to sewers or drains. Those powers are not restricted to the foul sewer which runs along the front of the Property, but also to the foul sewer which runs through the back garden.
- 8.16 The Developer retains a wayleave to undertake any repairs. The adoption of the Storm Pipe would simply mean that any such repairs would be carried out by NIW should they ever become necessary. The wayleave accorded to NIW to perform those repairs would be in addition to the powers that it already has under the Water Order to enter the Property to perform repairs to the foul sewer which runs under the same area of the Property.
- 8.17 In the Application, the Appellant set out three reasons why she does not wish the Storm Pipe to be adopted<sup>91</sup> –
- (a) The adoption of the Storm Pipe will impact upon the value of the Property.
  - (b) The adoption of the Storm Pipe will impact upon the Appellant's use and enjoyment of the rear garden to the Property. The Appellant notes that the Storm Pipe is situated beneath a number of flower beds and runs under mature trees.
  - (c) The granting of the Wayleave will impact upon the use and enjoyment of the Property without benefiting it in any way while being "*seriously detrimental*" to the Appellant. The Appellant states that there are currently no access rights onto the Property and that the Storm Pipe does not currently benefit from any wayleave.
- 8.18 On the basis of the points made above, I do not consider that the adoption of the Storm Pipe would adversely affect the value of the Property in any material respect. Nor do I consider that

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<sup>91</sup> The Application (**B1**), p. 1.

it would affect the Appellant's enjoyment of her rear garden or be seriously detrimental to her as NIW already has rights of entry in relation to the foul sewer and the Developer has rights of entry in relation to the Storm Pipe.

- 8.19 In the Reply to the PD, the Appellant states that NIW does not have access to her rear garden as the foul sewer runs along the front of her property. This is incorrect. There is a foul sewer which runs along the front of the Appellant's property and I accept the Appellant's submission that the area shaded green on the map attached to the lease relates to this foul sewer.
- 8.20 However, there is a separate existing foul sewer which runs through the back garden of the Property close to the position of the Storm Pipe as shown on the map at **B19**. I accept that NIW has a right of access to the Appellant's back garden under the Water Order in relation to that second foul sewer.
- 8.21 Although I have accepted the Appellant's points in relation to the area shaded green at the front of the Property, I cannot accept her argument that NIW does not already have access to her rear garden.
- 8.22 For these reasons, I find that NIW has the power to adopt the Storm Pipe and that the Adoption Proposal is much to be preferred to the alternative (the laying of a new pipe). In view of the particular concerns outlined by the Appellant, I also find that the powers that NIW will have to enter the Property following the adoption are neither much greater than it has at present, given the existing foul sewer, nor disproportionate when considered with all the other circumstances in the case.
- 8.23 Although I have found against the Appellant, I do understand why her concerns have arisen. NIW's letter to the Appellant of 22 March seems to be a standard template letter.<sup>92</sup> The letter is vague and does not contain any individual information that explains to her the points made above. In circumstances where NIW had not been able to have any discussion with the Appellant about the proposed adoption, it should have outlined to her the existing position in

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<sup>92</sup> The Adoption Proposal (**B2**).



relation to its rights to enter the Property and the fact that the adoption proposal would prevent damage to her rear garden in circumstances where the alternative would be to lay a new pipe.

- 8.24 It would have been useful for NIW to explain to the Appellant that she would have been liable to repair it where necessary, at her own expense, rather than NIW taking on that responsibility following adoption.
- 8.25 In her submissions, the Appellant has referred to her frustration around the communication and engagement she received from NIW and the Developer. Although I have not found those points persuasive in relation to the determination of the Appeal, when weighed against the analysis set out above, I do consider that had the Appellant understood the full picture, she may not have felt it necessary to launch the Appeal. I note that she seems to suggest as much in her Reply to the Replacement PD.
- 8.26 As such, I suggest that NIW review how it can undertake more effective and appropriate engagement with customers in relation to proposed adoptions, including providing better and more individually tailored written communications explaining what adoption might mean for a person as opposed to any alternatives. It is hoped that such action may limit the number of unnecessary appeals in the future.

### ***Conclusion***

- 8.27 For the reasons given above, I have determined that the Adoption Proposal should be allowed.

